

Before the High Court

Day v Australian Electoral Officer (SA): Senate Voting Reforms under Challenge

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Abstract

In March 2016, the method of choosing Australian Senators was changed to abolish group voting tickets and allow optional preferential voting. The effect is to give voters greater control over their voting preferences, but it will also allow many votes to exhaust, rather than elect a candidate. Does this produce a Senate that is not ‘directly chosen by the people’ in breach of s 7 of the *Commonwealth Constitution*? On the one hand, the ‘choice’ of the people is enhanced, but on the other hand public participation in the outcome of Senate elections is likely to be diminished. Senator Day has challenged the validity of the 2016 changes on constitutional grounds. This column addresses each of those arguments and their prospects for success.

I Introduction

*Day v Australian Electoral Officer (SA)*¹ involves a challenge to the constitutional validity of reforms made in 2016 to Australian Senate voting laws by the *Commonwealth Electoral Amendment Act 2016* (Cth) (*‘2016 Act’*). The reforms provide for optional preferential voting above the line instead of group voting tickets. Their purpose is to prevent the ‘gaming of preferences’ in Senate elections and the election of candidates with negligible primary support.

The reforms give voters greater control over the allocation of their preferences, but also allow their votes to ‘exhaust’ where they do not include full preferences.² Section 7 of the *Commonwealth Constitution* provides for the Senate to be ‘directly chosen by the people’.³ On the one hand, these reforms enhance the

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¹ High Court of Australia, Case No S77/2016.

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² A vote exhausts once each of the candidates listed in its preferences is excluded from the count because of their low votes and it therefore cannot be transferred on to any candidates continuing in the count.

³ Note that this phrase was inserted to distinguish a Senate chosen indirectly, by electoral colleges or by State Parliaments: John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, 1901) 418–9.

‘choice’ of the people. On the other hand, they may result in the number of votes of ‘the people’ that determine the last places in Senate elections being diminished, due to the exhaustion of votes. Does this make the laws unconstitutional?

II Background

Prior to 1948, the Australian Senate voting system swung to extremes with one or other of the main parties winning the vast majority of seats. In 1948, the system of proportional representation was introduced for Senate elections, ensuring that the Senate more accurately reflected the will of voters. In 1984, to reduce the number of inadvertent informal votes, reforms were enacted to allow ‘above the line’ or ‘below the line’ voting. A voter could choose whether to mark preferences for all candidates listed below the line or to mark one square above the line indicating acceptance of the ticket of preferences lodged by that group or party. While the change was effective in reducing the number of informal votes and making voting quicker and easier for voters, it shifted enormous power to parties over the allocation of preferences. This magnified the significance of preference deals between parties and eventually led to opportunistic gaming of the system.

Similar electoral changes were adopted in most Australian States. The gaming of Upper House elections by micro-parties began in earnest, however, in New South Wales (‘NSW’) in 1999. There was a proliferation of registered parties⁴ with catchy names⁵ and often overlapping membership, many of which were established for the purpose of harvesting votes and directing them by way of preference flows to elect particular candidates. The prize for such activity was an eight-year term in the Legislative Council and a parliamentary pension. So many micro-parties participated in the election that a ‘table-cloth ballot paper’ had to be produced. At the 1999 NSW State election, Malcolm Jones of the Outdoor Recreation Party was elected with a primary vote of 0.2% (or 0.045 of a quota).⁶ Two other candidates were elected from parties that received 1% or less of the primary vote.⁷

Reforms were then enacted in NSW, including requiring a party to have 750 members before it could be registered, with no overlap of members. The most significant change, however, was to end the use of group voting tickets that had facilitated the gaming of the system, while retaining the above the line and below the line structure of the ballot paper. Marking ‘1’ in a box above the line would give consecutive preferences to that party’s candidates, followed by the candidates

⁴ Eighty-one parties, comprising 264 candidates contested the NSW Legislative Council election in 1999, compared with 27 parties and 99 candidates on the 1995 ballot paper.

⁵ They included the Three Day Weekend Party, the Jobs for Everyone Party, the Stop Banks Exploiting Australians Party, the People Against Paedophiles Party, the Give Criminals Longer Sentences Party and the Make Billionaires Pay More Tax Party.

⁶ NSW Electoral Commission, *1999 LC Group Totals: NSW Legislative Council 1999 State Election Group Totals* (11 October 2013) <http://www.elections.nsw.gov.au/results/state_elections_-_legislative_council/1999/1999_lc_group_totals>.

⁷ Unity Party (0.98%) and Reform the Legal System Party (1.00%): *ibid.*

of any party marked ‘2’ above the line, and so on.⁸ That system has been in place in NSW since the 2003 State election. It has not eradicated minor parties,⁹ but it has stopped the election of candidates from parties for whom only a minority of their vote at the point of election was received as first preferences. Election results now largely reflect the proportion of first preference results cast for candidates of parties.¹⁰ Proportionality based on first preferences is no longer distorted by calculated preference tickets lodged by parties.

The Commonwealth adopted similar changes to party registration in 2000,¹¹ but this did not stop the preference gaming in Senate elections. Between 2001 and 2013, the number of Senate candidates almost doubled from 285 to 529. In the 2013 half-Senate election, Ricky Muir of the Australian Motoring Enthusiast Party was elected with a primary vote for his party of 0.5% in Victoria, reliant on the preferences of 22 other parties, nine of which polled more first preference votes.¹² Wayne Dropulich of the Australian Sports Party was initially elected despite his party receiving only 0.2% of the vote in Western Australia, having received preferences from 20 other parties, including 15 that polled more first preference votes.¹³ He was later defeated in the re-run of the Senate election.

Following the 2013 election, the Joint Standing Committee on Electoral Matters inquired into the Senate election and recommended implementing optional preferential above the line voting.¹⁴ The Committee recognised that if full above the line preferences were compulsory, it would lead to a high informal vote, but if they were optional, it would most likely lead to a high rate of vote exhaustion. It noted a compromise model of requiring voters to mark at least a certain number of boxes above the line, so that both informal votes and exhausted votes are kept as low as possible.¹⁵ Ultimately, however, it recommended fully optional above the line voting.

⁸ *Parliamentary Electorates and Elections Amendment Act 1999* (NSW). Note that in NSW, for constitutional reasons, it is necessary to vote for at least 15 candidates for a vote to be formal, which is why all groups above the line must have at least 15 candidates. No such constitutional constraint applies at the Commonwealth level.

⁹ In 2016, the Australian Greens hold five seats in the NSW Legislative Council, the Shooters and Fishers Party and the Christian Democratic Party hold two seats each, and the Animal Justice Party holds one. Note, however, that the NSW Legislative Council has a lower quota than applies in Senate elections.

¹⁰ For the outcomes of the 2003, 2007, 2011 and 2015 NSW Legislative Council elections, see NSW Electoral Commission, *Past Results: State Elections* (4 April 2016) <http://www.elections.nsw.gov.au/past_results/state_elections>. For example, in 2015 the first preferences for the Liberal/National Parties amounted to 9.38 quotas, resulting in nine seats; Labor won 6.84 quotas and seven seats; the Greens won 2.18 quotas and 2 seats; the Shooters and Fisher Party won 0.86 of a quota and one seat; the Christian Democrats won 0.64 of a quota and one seat; and the Animal Justice Party was the only one to jump ahead of another party (the No Land Tax Party) on preferences, having won only 0.39 of a quota, but still winning one seat.

¹¹ See *Commonwealth Electoral Act 1918* (Cth) pt XI. The provisions regarding party membership and overlap were challenged and upheld in *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 (*‘Mulholland’*).

¹² Australian Electoral Commission, *Official Election Results* (2016) <<http://results.aec.gov.au/>>.

¹³ *Ibid.*

¹⁴ Joint Standing Committee on Electoral Matters, Parliament of Australia, *Interim Report on the Inquiry into the Conduct of the 2013 Federal Election: Senate Voting Practices* (2014) 53–4.

¹⁵ *Ibid.* 48–9.

In 2016, the Commonwealth Parliament passed legislation to give effect to the compromise model of optional preferential voting for Senate elections.¹⁶ It eliminated group ticket voting but instructed voters to place at least six numbers in boxes above the line, while including savings provisions to ensure that marking ‘1’ only above the line would still be a formal vote. A preference marked above the line indicates that the voter’s preferences are to flow through the candidates of the first preferred group, with preferences then flowing through the candidates of the next preferred group and so on, as indicated by the voter’s ordering of groups. Optional preferential voting was also instituted below the line, with voters being instructed to vote for at least 12 candidates.¹⁷

One concern raised about this new system is that it will be harder for micro-parties to be elected, so that those voting for micro-parties may not find their vote fully represented in the make-up of the Senate. Another concern is that there will be high rates of vote exhaustion, diminishing public participation in the count for the last Senate vacancies in each State.

In *Day v Australian Electoral Officer (SA)*, Senator Day¹⁸ seeks to challenge the constitutional validity of these amendments. The High Court of Australia has expedited the hearing of the matter in light of the anticipation that a double dissolution election could be held on 2 July 2016 and given the importance of resolving any doubt about the validity of the electoral laws. The analysis below follows the arguments as set out in Senator Day’s submissions to the High Court and concludes by discussing a further argument, not fully developed in those submissions, which would appear to have better prospects of success, although it is still likely to fail.

III More than One Method of Voting

Section 9 of the *Commonwealth Constitution* provides that the Commonwealth Parliament ‘may make laws prescribing the method of choosing senators, but so that the method shall be uniform for all the States’. Senator Day’s first argument is that although there is a uniform law, applying to all States, prescribing how senators are to be chosen, s 239 of the *Commonwealth Electoral Act* prescribes two methods, being one above the line and one below the line, and that the *Constitution* requires that there be a single uniform method.¹⁹

If one accepts that the *Constitution* requires a single ‘method of choosing senators’, that requirement appears to go to the method of determining who is actually chosen to be a senator (that is, the method by which the votes are counted and senators are determined to be elected), rather than the way in which the voter expresses his or her choice on the ballot paper. While voters may have two or more

¹⁶ *Commonwealth Electoral Amendment Act 2016* (Cth).

¹⁷ *Commonwealth Electoral Act 1918* (Cth) s 239 (‘*Commonwealth Electoral Act*’).

¹⁸ Note that additional proceedings have since been commenced by persons in other States raising the same arguments. See, eg, *Madden v Australian Electoral Officer (Tas)* (High Court of Australia, Case No S109/2016).

¹⁹ Day, ‘Written Submissions of Plaintiff’, Submission in *Day v Australian Electoral Officer (SA)*, Case No S77/2016, 5 April 2016, 2–4 (Argument A1–Argument A6).

options of how to *express* their choice on the ballot paper,²⁰ there remains a single uniform method for choosing the senators. This is the method set out in s 273 of the *Commonwealth Electoral Act* under which a quota is set, candidates whose votes reach the quota are elected, the surplus votes of those elected and the preferences of excluded candidates are redistributed, and after a number of counts determination of who is chosen to be a senator is complete with all vacancies filled. There is no different treatment of votes expressed above or below the line. All first preferences are treated in the same way, as are the transfer values of surplus votes once a quota is reached and the transfer of the votes of excluded candidates. The mere fact that a voter might choose to simplify how he or she expresses his or her preferences by voting above the line for candidates in the order nominated by their group, does not result in senators being ‘chosen’ by a different method.

The second problem with Senator Day’s argument is that, if it were to be accepted, it is also likely to invalidate the very system under which he was elected,²¹ including all Senate elections for over 30 years. Voters have had the option to express their vote above the line or below the line since this system was instituted at the 1984 election. The difficulty for Senator Day is to explain why that system was valid in 2013 when he was elected and why the recent Senate voting reforms have changed it so that it is now constitutionally invalid.

Senator Day’s argument largely relies upon the definition of ‘dividing line’ in s 4(1) of the *Commonwealth Electoral Act*. The term is defined as the line on the Senate voting paper ‘that separates the voting method described in subsection 239(1) from the voting method described in subsection 239(2)’. Senator Day’s submissions identify this as a new definition introduced by the *2016 Act*,²² implying that it identifies two distinct voting methods in 2016, in contrast to the pre-2016 voting system. In fact, this is not so. The same definition of the ‘dividing line’ was inserted into s 273A(10) of the *Commonwealth Electoral Act* in 1998.²³ All the *2016 Act* did was to repeal the definition in s 273A(10) and reinsert it in the general definition provision in s 4(1). The same definition was applied to the electoral system under which Senator Day was chosen.

In any case, all the definition does is identify that a voter has two different means by which he or she can express his or her preferences on the ballot paper. This is different from the ‘method of choosing senators’, which is the way in which the votes expressed on those ballot papers are counted to choose the senators, which is a uniform method set out in s 273.

²⁰ See the discussion of whether savings provisions amount to alternative methods of voting in *Langer v Commonwealth* (1996) 186 CLR 302, 318 (Brennan CJ); 322 (Dawson J); 337–8 (McHugh J); 351 (Gummow J) (*‘Langer’*). Note that no Justice in *Langer* suggested that this amounted to a separate ‘method of choosing senators’ in breach of s 9 of the *Constitution*.

²¹ Senator Day notes in his submissions that his election has not been challenged within 40 days of the return of the writs and that ‘any such challenge is a legal impossibility’: Day, ‘Written Submissions of Plaintiff’, Submission in *Day v Australian Electoral Officer (SA)*, Case No S77/2016, 5 April 2016, 8 (Argument B10). The issue here would be not his personal election, but the validity of the law pursuant to which he was elected. No limitation clause in that law could undo its constitutional invalidity.

²² *Ibid* 3 (Argument A5), 4 (Argument A7). See also *Day v Australian Electoral Officer (SA)* [2016] HCATrans 73 (24 March 2016) 10.

²³ *Electoral and Referendum Amendment Act 1998* (Cth) sch 1 cl 133.

IV Directly Chosen by the People – Choice of Parties not Individuals

Senator Day's second argument is that s 7 of the *Commonwealth Constitution* is breached because electors vote above the line for a party, not individuals. His submissions state that a 'vote above the line is not for individuals except derivatively through the operation of the Act and dependent upon the contents of the nomination form not available to the public ... i.e. not "directly"'.²⁴

The *Commonwealth Electoral Act* does not treat above the line votes as being votes for parties, rather than individuals. On the contrary, the provisions concerning the counting of votes and the choosing of senators apply to preferences given to individuals. Section 273(8) provides for the start of this process by requiring that the 'number of first preference votes given for each candidate' shall be ascertained, following which the quota is calculated and 'any candidate who has received a number of first preference votes equal to or greater than the quota shall be elected'. The 'method of choosing senators' relies upon voting preferences given to individual senators.

When an elector votes above the line, the order of preferences given to individual candidates is, as specified in s 272, the order in which the candidates for that group are listed below the line. Hence, where a first preference has been given to a group above the line, this is shorthand for giving preferences to the candidates of that group in the order in which they are listed below the line, with preferences then flowing through the candidates of the second preferred group, as listed, and so on. Unlike the pre-2016 position, the order of preference of candidates is clear on the face of the ballot.

The High Court, in original jurisdiction or as the Court of Disputed Returns, has twice dealt with the argument that above the line voting is indirect because it involves votes for parties, similar to an electoral college. On both occasions, the argument was summarily rejected. In *McKenzie v Commonwealth*, Gibbs CJ observed:

[I]t is right to say that the electors voting at a Senate election must vote for the individual candidates whom they wish to choose as senators but it is not right to say that the Constitution forbids the use of a system which enables the elector to vote for the individual candidates by reference to a group or ticket. Members of Parliament were organized in political parties long before the Constitution was adopted and there is no reason to imply an inhibition on the use of a method of voting which recognizes political realities provided that the Constitution itself does not contain any indication that such a method is forbidden. No such indication, relevant to the present case, appears in the Constitution.²⁵

²⁴ Day, 'Written Submissions of Plaintiff', Submission in *Day v Australian Electoral Officer (SA)*, Case No S77/2016, 5 April 2016, 7 (Argument B7).

²⁵ *McKenzie v Commonwealth* (1984) 57 ALR 747, 749 (Gibbs CJ) ('*McKenzie*').

Justice Hayne also dealt with the issue in *Ditchburn v Australian Electoral Officer (Qld)*.²⁶ His Honour accepted the authority of the decision of Gibbs CJ in *McKenzie* and added:

I do not accept that the provisions for above the line and below the line voting in Senate elections are contrary to s 7 of the Constitution. In particular, I do not accept the contention that those provisions ‘prescribe a method of electing Senators which resembles an electoral college, and where Senators are *indirectly* chosen by the people of the State’.²⁷

The 2016 changes enhance the ability of above the line voters to choose between different groups of candidates, rather than having the one group dictate preferences for every candidate. Further, those choices are apparent from the face of the ballot paper, rather than hidden from view. Accordingly, it is hard to see why the High Court would strike down the *2016 Act* while having upheld, consistently, the validity of the law as it stood from 1984 to 2015.

V A Principle of Directly Proportionate Representation

Senator Day argues that s 7 of the *Commonwealth Constitution* imposes a principle of ‘proportionate representation’. He discerns a principle that the ‘choice of senators is directly proportional as near as practicable to the vote they receive’²⁸ from the words of s 7 which require that senators be ‘directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate’. He also relies on the nexus between the two Houses in s 24 and the requirement in that section that the number of members chosen in the States shall be in proportion to the respective numbers of their people, as well as the requirement in s 128 of the *Constitution* that the approval of the voters in an affected State be required if the proportionate representation of the State in either House is to be altered. He draws from these provisions a ‘direct proportionality principle’.²⁹

Sections 24 and 128 of the *Constitution*, however, concern *how many* representatives a State has in either House, vis-à-vis other States — not whether the method for electing those representatives reflects the proportion of votes achieved by parties or candidates. Section 7, by ensuring that the number of senators for each original state is equal regardless of population ensures that ‘the “value” of votes is unequal’.³⁰ Further, while s 7 provides for each State to be an entire electorate, it expressly permits both the Commonwealth Parliament to legislate otherwise and the Queensland Parliament to separate the State into divisions. None of these provisions is directed to any requirement of proportionality in relation to the voting system.

²⁶ (1999) 165 ALR 147.

²⁷ *Ibid* 150 (emphasis in original). See also *Abbotto v Australian Electoral Commission* (1997) 144 ALR 352; *McClure v Australian Electoral Commission* (1999) 163 ALR 734; *Mulholland* (2004) 220 CLR 181, 215–17 [83]–[87] (McHugh J); 237 [155] (Gummow and Hayne JJ); 302 [350] (Heydon J).

²⁸ Day, ‘Written Submissions of Plaintiff’, Submission in *Day v Australian Electoral Officer (SA)*, Case No S77/2016, 5 April 2016, 8 (Argument C1).

²⁹ *Ibid* 8 (Argument C2).

³⁰ *Mulholland* (2004) 220 CLR 181, 190 [11] (Gleeson CJ).

The Senate electoral system for the first 18 years from Federation was first-past-the-post, which is a long way from proportional representation. The preferential block voting system used for the Senate from 1919 to 1948 also produced landslide victories that were far from proportionately representative of party votes. According to Senator Day, the proportional representation system introduced for the Senate in 1948, which uses the Droop system to establish the quota, is also constitutionally invalid because some votes do not end up electing a candidate.³¹ This has *always* been the case in the Senate since 1901 and it is unsurprising that, in an election, not every vote elects a winner. In first-past-the-post systems, it is often the case that a majority of votes fail to elect a candidate. The High Court has long accepted that the Parliament has ‘substantial room’ for choice in voting systems across a permissible spectrum,³² but Senator Day’s argument would place Parliament in a severe legislative straitjacket.

Senator Day claims that the electoral system results in a ‘discriminatory disenfranchisement of a significant proportion of the electorate’.³³ To be ‘disenfranchised’, is to have one’s right to vote removed. An example is to be found in *Roach v Electoral Commissioner*,³⁴ where certain prisoners were denied the right to vote, and in *Rowe v Electoral Commissioner*,³⁵ where the early closure of electoral rolls prevented certain people from voting. In contrast, no one has had his or her right to vote removed by the *2016 Act*. Senator Day’s complaint is, instead, that some voters will not achieve the election of their preferred candidates. That does not amount to being disenfranchised. It simply amounts to supporting losing candidates, which is a very common experience in relation to democratic elections.³⁶

VI A Free and Informed Vote

Senator Day is also arguing that the instructions on the ballot paper are misleading, as they instruct voters to vote for at least six groups above the line or at least 12 candidates below the line. This instruction is consistent with the requirements of s 239 of the *Commonwealth Electoral Act*. However, ss 268A and 269 also save

³¹ Day, ‘Written Submissions of Plaintiff’, Submission in *Day v Australian Electoral Officer (SA)*, Case No S77/2016, 5 April 2016, 9 (Argument C5). The plaintiff argues that the *Constitution* requires a Hare quota (number of votes divided by number of seats) which is higher than the currently used Droop quota (number of votes divided by one more than the number of seats, plus one) which is the minimum number of votes needed to fill each seat. For a discussion of the operation of the Droop and Hare quotas, see Nicolaus Tideman, ‘The Single Transferable Vote’ (1995) 9(1) *Journal of Economic Perspectives* 27.

³² *Attorney-General (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 56–7 (Stephen J); *Mulholland* (2004) 220 CLR 181, 190–91 [14] (Gleeson CJ); 206–7 [63]–[64] (McHugh J); 236–7 [154] (Gummow and Hayne JJ); 254–5 [213] (Kirby J).

³³ Day, ‘Written Submissions of Plaintiff’, Submission in *Day v Australian Electoral Officer (SA)*, Case No S77/2016, 5 April 2016, 10 (Argument C8).

³⁴ (2007) 233 CLR 162 (‘*Roach*’).

³⁵ *Rowe v Electoral Commissioner* (2010) 243 CLR 1 (‘*Rowe*’).

³⁶ Contrast Lampedusa’s depiction of the announcement of the results in Donnafugato of the 1860 plebiscite on the formation of Italy: ‘Voters, 515; Voting, 512; Yes, 512; No, zero’. All dissent had been annulled, killed with the newborn babe of good faith: Giuseppe Tomasi di Lampedusa, *The Leopard*, (Collins Harvill, 1988) 96–8.

from informality certain types of votes that do not comply with those requirements, such as votes with fewer preferences given than required, or votes where a preference number has been repeated or left out. Similar savings provisions, to reduce the number of unintentional informal votes, have been in place for decades.³⁷

Senator Day contends that the instructions on the ballot paper breach the implied freedom of political communication by interfering with the ‘right of electors to be informed of ways of voting in the election’.³⁸ There is in this case, however, no law that prevents or impedes voters from being informed about how they may vote. Unlike the laws in question in the *Langer* and *Muldowney* cases,³⁹ the validity of which was in any case upheld, there is no provision that prevents anyone advocating voting in a manner that is formal. While the form of the ballot paper, including the instructions on it, are mandated by Form E in sch 1 of the *Commonwealth Electoral Act*, they do not impose any burden upon the freedom of political communication, as they do not forbid or limit in any way communications about voting methods. Nor are they misleading. They set out valid means of voting, but could not be expected to include a description of every savings provision.

Senator Day argues that the instructions on the ballot paper constitute a communication that ‘interferes with the right of electors to be informed of ways of voting in the election’.⁴⁰ However, the High Court has long made clear that the implied freedom is not a personal right — it is simply a limitation on the Commonwealth’s legislative and executive power.⁴¹ Further, as McHugh J observed, the ‘free choice of electors is not assisted by persons registering a single group of members multiple times with eye-catching “single issue” party names for the purpose of channelling preferences to other candidates’.⁴²

VII A Stronger Argument

Most of the arguments in the plaintiff’s submissions involve complaints about the Senate voting system, which equally apply to the pre-existing Senate voting system, and in some cases to all the different Senate voting systems since 1901. The substantive difference, however, between the 2016 voting system and the previous one is the use of optional preferential voting, which will allow a

³⁷ See discussion of such provisions in *Langer* (1996) 186 CLR 302.

³⁸ Day, ‘Written Submissions of Plaintiff’, Submission in *Day v Australian Electoral Officer (SA)*, Case No S77/2016, 5 April 2016, 12 (Argument D3).

³⁹ *Langer* (1996) 186 CLR 302; *Muldowney v South Australia* (1996) 186 CLR 352 (‘*Muldowney*’). Note that Senator Day sought to amend the 2016 law to make it a criminal offence to publicly advocate marking a Senate ballot paper in a way that is contrary to the ways set out in s 239. The proposed amendment was defeated: Commonwealth, *Parliamentary Debates*, Senate, 17 March 2016, 2646–9.

⁴⁰ Day, ‘Written Submissions of Plaintiff’, Submission in *Day v Australian Electoral Officer (SA)*, Case No S77/2016, 5 April 2016, 12 (Argument D3).

⁴¹ See, eg, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560 (the Court); *Monis v The Queen* (2013) 249 CLR 92, 189 [266] (Crennan, Kiefel and Bell JJ); *Unions NSW v New South Wales* (2013) 252 CLR 530, 554 [36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *McCloy v New South Wales* (2015) 89 ALJR 857, 867 [29] (French CJ, Kiefel, Bell and Keane JJ).

⁴² *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 214 [80] (McHugh J).

significant number of votes to exhaust. The plaintiff's submissions make some reference to this distinction,⁴³ including some dubious assertions about its consequences,⁴⁴ but only start to develop the relationship between the exhaustion of votes and the High Court's jurisprudence in a cursory manner in their penultimate paragraph.⁴⁵

Senator Day's case would be more powerful if it drew on the High Court's jurisprudence in the *Roach* and *Rowe* cases, that representative government is evolutionary in nature⁴⁶ and may develop only in the direction of maximising public participation in elections and making elections as expressive of the will of the majority as practical.⁴⁷ The next step would be to establish compulsory full preferential voting as a '[d]urable legislative development'⁴⁸ that forms the baseline for public participation and contend that the exhaustion of votes permitted by the *2016 Act* reduces public participation in the outcome of elections, at least in relation to the determination of the final Senate seats in each State. Support could also be claimed from the Court's acceptance in *Langer* of the public interest in the expression of full preferences for candidates. In that case, Toohey and Gaudron JJ observed that a 'voter does not participate either fully or equally with those who indicate an order of preference for all candidates if his or her ballot paper is filled in in such a way that it is exhausted'.⁴⁹

The argument would proceed that, while in the past, public participation in elections may have been more limited,⁵⁰ or may today still be limited,⁵¹ the evolutionary nature of representative government, as required by s 7 of the *Constitution*, is irreversible, preventing the enactment of any law that would reduce public participation in the outcome of elections or diminish the expression of the will of the majority by increasing the likelihood of the exhaustion of votes.

This argument is stronger than the arguments set out in the plaintiff's submissions, because it clearly distinguishes the current law from past laws and does not involve an attempt to tie invalidity to Droop quotas or other features of electoral law that have been in operation for decades. The Commonwealth also

⁴³ For example, it is noted in the plaintiff's submissions that the 'practical operation of the law is to remove the former requirement that each person is required to vote so as to cast a full preference choice amongst the candidates': Day, 'Written Submissions of Plaintiff', Submission in *Day v Australian Electoral Officer (SA)*, Case No S77/2016, 5 April 2016, 13 (Argument D8).

⁴⁴ See, eg, the assertions in the plaintiff's submissions that votes will exhaust from candidate six and that the effect is that 'electors record no vote at all, as their vote is denied all real value': *ibid* 14 (Argument D9).

⁴⁵ *Ibid* 15 (Argument E5).

⁴⁶ *Roach* (2007) 233 CLR 162, 174 [7] (Gleeson CJ); 186–7 [45] (Gummow, Kirby and Crennan JJ).

⁴⁷ *Rowe* (2010) 243 CLR 1, 18–19 [18]–[22] (French CJ); 48–9 [123], 51–2 [132] (Gummow and Bell JJ); 115 [356], 116–17 [366] (Crennan J).

⁴⁸ *Rowe* (2010) 243 CLR 1, 18 [19] (French CJ).

⁴⁹ *Langer v Commonwealth* (1996) 186 CLR 302, 334 (Toohey and Gaudron JJ). See also McHugh J's statement that the 'system is as effectively undermined by filling in a ballot paper in a way that does not indicate the voter's complete order of preferences as it is by a vote that is wholly informal': at 339.

⁵⁰ See, for example, the exclusion from the franchise of certain racial groups.

⁵¹ For example, as at 31 December 2015, the Australian Electoral Commission estimated that 1 066 779 eligible Australians were 'missing' from the electoral roll: Australian Electoral Commission, *Enrolment Statistics* (2016) <http://www.aec.gov.au/Enrolling_to_vote/Enrolment_stats/>.

seems concerned to avoid having to deal with this argument. As second defendant, it has attacked the argument at its factual source (rather than on the basis of legal argument) stating that there is ‘no basis for the Court to make findings of the extent to which the practical effect of the new system would be the exhaustion of votes’.⁵²

While the above argument is stronger and better secured in current constitutional jurisprudence than the ones raised in the plaintiff’s submissions, this does not mean that it should succeed. First, there are strong counterarguments that could be employed by the Commonwealth against the notion of the irreversible evolutionary development of representative government.⁵³

Second, even if the evolutionary development of representative government continues to be accepted by a majority of the High Court, the critical distinction in this case is that the *2016 Act* does not *require* that votes exhaust. In *Roach and Rowe*, the impugned laws prevented voters who wished to vote from voting. The opposite is the case in relation to the *2016 Act*. Voters continue to have the right and power to give full preferences when they vote. What is different is that they also now have a choice to limit their preferences to those persons they would be prepared to elect to Parliament.

Section 7 of the *Constitution* requires a Senate that is ‘directly *chosen* by the people’ and some emphasis must be placed upon a free choice. If a voter chooses to vote in a way that prevents his or her vote from being used to elect a person of whose policies the voter does not approve and if the voter would rather that his or her vote exhausts than be used to elect such a person, then that appears to be a genuine choice that is consistent with the principle of representative government.

VIII Conclusion

The grounds for this challenge are not strong. For the most part, the arguments being made would apply with equal or greater force to the pre-2016 law, the validity of which has consistently been upheld, albeit by single judge decisions. The *2016 Act* is substantively different because it permits optional preferential voting, allowing votes to exhaust. While there is a possibility that this might be regarded as contrary to the irreversible evolution of representative government, the *2016 Act* does not mandate that votes become exhausted — they merely give voters a choice as to how their vote can best reflect their preferences. It would therefore be difficult to argue that a Senate elected pursuant to the *2016 Act* was not ‘directly chosen by the people’.

⁵² Commonwealth, ‘Submissions of the Second Defendant’, Submission in *Day v Australian Electoral Office (SA)*, Case No S77 of 2016, 12 April 2016, 14 [61].

⁵³ These arguments are set out in detail in Anne Twomey, ‘*Rowe v Electoral Commissioner* — Evolution or Creationism?’ (2012) 31(2) *University of Queensland Law Journal* 181.

