



Malcolm Mackerras AO  
35 Creswell Street  
Campbell ACT 2612  
Tel: (02) 6248 8396  
10 June 2011

Mrs Vicki Dunne MLA

Chair

Standing Committee on Justice and Community Safety

Legislative Assembly for the Australian Capital Territory

Civic Square

London Circuit

Canberra ACT 2601

|                                                                                                                                        |                 |
|----------------------------------------------------------------------------------------------------------------------------------------|-----------------|
|  A.C.T. LEGISLATIVE<br>ASSEMBLY<br>COMMITTEE OFFICE |                 |
| SUBMISSION<br>NUMBER                                                                                                                   | 1               |
| DATE AUTH'D<br>PUBLICATION                                                                                                             | 27.06.11<br>Bt. |

Dear Vicki

Thank you for your letter of 20 May in which you seek my opinion on a range of issues relating to elections for the Legislative Assembly for the Australian Capital Territory.

I have studied the material you cite and find that I do not have a strong opinion on either the Electoral Legislation Amendment Bill 2011 or the Electoral (Casual Vacancies) Amendment Bill 2011. However, I have decided that, on balance, the former should be passed while the latter should be rejected. What follows is a description of my reasons as to why the Electoral (Casual Vacancies) Amendment Bill 2011 should be rejected.

I begin by saying that the Hare-Clark system operates under that name only in Tasmania and the ACT. For that reason I have engaged in a compare/contrast of the two systems which are not quite identical. However, this same system operates in four other jurisdictions. At the national lower house level it operates at elections for the House of Representatives of Malta and Ireland (where the body is called Dail). However, it also operates at elections in Northern Ireland for its assembly as well as operating for European Union elections for the whole of Ireland.

In these jurisdictions overseas the system is not called "Hare-Clark". It is called "Proportional Representation by means of the Single Transferable Vote", or PR-STV for short.

PR-STV is sometimes called "the British form of proportional representation". The reason for that has been its operation only in countries of the Anglosphere. Prior to New Zealand adopting the German system for elections to its House of Representatives it was the case that in every jurisdiction of the Anglosphere every member of every lower house was directly elected by the people. (In case you do not recognize the term "Anglosphere", countries meeting that description are the United Kingdom, Ireland, Canada, the United States, Australia and New Zealand, six countries in all. While Malta is not, strictly speaking, a country of the Anglosphere the British influence there is strong.)

So PR-STV combines two elements of democratic principle. One element is direct election, the other is proportional representation. The question in my mind is this: if one of these principles must give way, which should it be? Ireland, Malta and Tasmania give an unequivocal answer: direct election must prevail over proportional representation.

For a brief period under the modified d'Hondt system the ACT did not give that answer. Consequently, when Labor's Paul Whalan resigned from the Assembly on 30 April 1990 his party appointed Terry Connolly to replace him. Again when Lou Westende of the Liberal Party resigned from the Assembly on 25 July 1994 his party appointed Bill Stefaniak to replace him. However, in subsequent terms of the Assembly the Hare-Clark system has ensured that every member has been directly elected by the people of the ACT.

Tasmania has faced up to a problem which has not yet arisen in the ACT. It is possible to imagine a party running out of candidates to fill casual vacancies. Therefore it is possible to imagine a countback of votes robbing a party of a seat purely by virtue of that party running out of candidates able and willing to fill a vacancy. In that case, in Tasmania the party of the departed member may request (and be granted) a by-election.

Suppose this had applied in the ACT from the very beginning of Hare-Clark here. Suppose that in Brindabella (where the result in October 2001 was three Labor and two Liberal) Labor had run out of candidates to fill vacancies. In Tasmania Labor could ask for (and obtain) a by-election in Brindabella. Alternatively it could allow itself to lose a seat to avoid the cost of the campaign to keep the seat. I should mention that this has never actually happened in Tasmania, though it did come close to occurring in the Division of Franklin during the last term when a Labor member failed in her attempt to commit suicide.

In recognizing that a clash may occur between the democratic values of direct election and proportional representation I should mention that PR-STV is, strictly speaking, semi-proportional rather than a system of proportional representation.

The degree to which PR-STV is proportional varies from jurisdiction to jurisdiction. It is lowest in the Republic of Ireland where some members are elected from three-seat constituencies, some from four-seat constituencies and some from five-seat constituencies. The "average" member represents a four-seat constituency. The situation is set out in the table enclosed titled "District Magnitudes under the Hare-Clark System".

Actually the ACT produces the most proportional results. That is because one of the electorates returns seven members. However, even here the results are not especially proportional. I enclose a table showing the degree of proportionality in the ACT.

In some ways Ireland is the most interesting case. In addition to the low level of proportionality produced by low district magnitude there is also the fact of by-elections. There were three by-elections during the 2007-2011 term of the Dail. One of these produced a change of party distribution in a constituency. A Fianna Fail member in Dublin Central died in 2009. At the 2010 by-election he was replaced by a Fine Gail member.

I enclose a typical ballot paper to help members of the committee to understand the Irish system. It can be seen that this is very

much a candidate-based system. Although it is often loosely said that the Irish lower house system is "like the Australian Senate system" the two are, in fact, very, very, different.

It can be seen from the foregoing that my reasoning to reject the Electoral (Casual Vacancies) Amendment Bill 2011 is largely theoretical. Essentially I do not believe there should ever be party machine appointments in Australian lower houses. However, I now wish to add a practical consideration to my argument.

It is clear that the ACT has three big parties, Labor, Liberal and The Greens. Yet the Labor and Liberal parties play by one set of rules while The Greens play by different rules. Essentially I argue that The Greens rort the system. They do that by concentrating all their publicity on to one candidate in each electorate. In other words they avoid the competition between candidates of the same party which is deliberately encouraged by the system.

I enclose ballot papers (one rotation each) from the two most recent elections. It can be seen that the Greens do not nominate a number of candidates being the number to be elected. The other two parties do – seven candidates each in Molonglo and five each in Brindabella and Ginninderra.

A supporter of this bill has made to me the point that if, for example, both Elena Kirschbaum and Caroline Le Couteur were driving together to a meeting of The Greens and both were killed in a car crash, then The Greens would lose a seat because the party had run out of candidates to fill the vacancy caused by Le Couteur's death. That would be unfair to The Greens, so the argument was put.

My retort is to say that such an event would serve The Greens right. Why, O why, did The Greens field only three candidates when the Labor and Liberal parties fielded seven each? They did it, I suggest, to give themselves an advantage.

So, one of my objections to this bill is that it will encourage The Greens to go on doing that when they should, instead, be

encouraged to field the same number of candidates as each of the other two parties.

My ideal solution is that the ACT should adopt the Tasmanian provision, described above. However, I do not actually expect that. Consequently I think the bill should be rejected.

Yours sincerely

A handwritten signature in black ink that reads "Malcolm Mackerras". The script is cursive and fluid, with the first letters of each word being capitalized and prominent.

Malcolm Mackerras

## DISTRICT MAGNITUDES UNDER THE HARE-CLARK SYSTEM\*

| <u>Jurisdiction</u> | <u>Seven-seat<br/>Constituencies</u> |                | <u>Six-seat<br/>Constituencies</u> |                | <u>Five-seat<br/>Constituencies</u> |                | <u>Four-seat<br/>Constituencies</u> |                | <u>Three-seat<br/>Constituencies</u> |                | <u>Totals</u> |                |
|---------------------|--------------------------------------|----------------|------------------------------------|----------------|-------------------------------------|----------------|-------------------------------------|----------------|--------------------------------------|----------------|---------------|----------------|
|                     | <u>Number</u>                        | <u>Members</u> | <u>Number</u>                      | <u>Members</u> | <u>Number</u>                       | <u>Members</u> | <u>Number</u>                       | <u>Members</u> | <u>Number</u>                        | <u>Members</u> | <u>Number</u> | <u>Members</u> |
| Ireland             | —                                    | —              | —                                  | —              | 12                                  | 60             | 13                                  | 52             | 18                                   | 54             | 43            | 166            |
| Northern Ireland    | —                                    | —              | 18                                 | 108            | —                                   | —              | —                                   | —              | —                                    | —              | 18            | 108            |
| Malta               | —                                    | —              | —                                  | —              | 13                                  | 65             | —                                   | —              | —                                    | —              | 13            | 65             |
| Tasmania            | —                                    | —              | —                                  | —              | 5                                   | 25             | —                                   | —              | —                                    | —              | 5             | 25             |
| ACT                 | 1                                    | 7              | —                                  | —              | 2                                   | 10             | —                                   | —              | —                                    | —              | 3             | 17             |
| Total               | 1                                    | 7              | 18                                 | 108            | 32                                  | 160            | 13                                  | 52             | 18                                   | 54             | 82            | 381            |

\*Notes: (1) The term 'district magnitude' was coined by D.W. Rae (1971) *The Political Consequences of Electoral Laws*, Yale University Press, p.19, and simply means the number being elected from each district.

(2) The term "Hare-Clark" is used only in Australia. In Ireland and Malta the system is known as "Proportional Representation by means of the Single Transferable Vote" or PR-STV for short.

Malcolm Mackerras  
March 2009

## Elections for ACT Legislative Assembly

**Table 1: March 4, 1989<sup>a</sup>**

| Party   | % vote | Seats | % seats | Over-representation |
|---------|--------|-------|---------|---------------------|
| Labor   | 22.8   | 5     | 29.4    | +6.6                |
| Liberal | 14.9   | 4     | 23.5    | +8.6                |
| Others  | 62.3   | 8     | 47.1    | -15.2               |

**Table 2: February 15, 1992<sup>a</sup>**

| Party   | % vote | Seats | % seats | Over-representation |
|---------|--------|-------|---------|---------------------|
| Labor   | 39.9   | 8     | 47.1    | +7.2                |
| Liberal | 29.0   | 6     | 35.3    | +6.3                |
| Others  | 31.1   | 3     | 17.6    | -13.5               |

**Table 3: February 18, 1995<sup>b</sup>**

| Party     | % vote | Seats | % seats | Over-representation |
|-----------|--------|-------|---------|---------------------|
| Labor     | 31.6   | 6     | 35.3    | +3.7                |
| Liberal   | 40.5   | 7     | 41.2    | +0.7                |
| Greens    | 9.1    | 2     | 11.8    | +2.7                |
| Democrats | 3.9    | —     | —       | -3.9                |
| Others    | 14.9   | 2     | 11.8    | -3.1                |

**Table 4: February 21, 1998<sup>b</sup>**

| Party                | % vote | Seats | % seats | Over-representation |
|----------------------|--------|-------|---------|---------------------|
| Labor                | 27.6   | 6     | 35.3    | +7.7                |
| Liberal              | 37.8   | 7     | 41.2    | +3.4                |
| Osborne Independents | 9.1    | 2     | 11.8    | +2.7                |
| Greens               | 9.1    | 1     | 5.9     | -3.2                |
| Democrats            | 6.0    | —     | —       | -6.0                |
| Others               | 10.4   | 1     | 5.9     | -4.5                |

**Table 5: October 20, 2001<sup>b</sup>**

| Party     | % vote | Seats | % seats | Over-representation |
|-----------|--------|-------|---------|---------------------|
| Labor     | 41.7   | 8     | 47.1    | +5.4                |
| Liberal   | 31.6   | 7     | 41.2    | +9.6                |
| Greens    | 9.1    | 1     | 5.9     | -3.2                |
| Democrats | 8.0    | 1     | 5.9     | -2.1                |
| Others    | 9.6    | —     | —       | -9.6                |

Electoral System:      a Modified d'Hondt  
                                  b Hare-Clark STV

**Table 6: October 16, 2004<sup>b</sup>**

| <b>Party</b> | <b>% vote</b> | <b>Seats</b> | <b>% seats</b> | <b>Over-representation</b> |
|--------------|---------------|--------------|----------------|----------------------------|
| Labor        | 46.8          | 9            | 52.9           | +6.1                       |
| Liberal      | 34.8          | 7            | 41.2           | +6.4                       |
| Greens       | 9.3           | 1            | 5.9            | -3.4                       |
| Democrats    | 2.3           | —            | —              | -2.3                       |
| Others       | 6.8           | —            | —              | -6.8                       |

**Table 7: October 18, 2008<sup>b</sup>**

| <b>Party</b> | <b>% vote</b> | <b>Seats</b> | <b>% seats</b> | <b>Over-representation</b> |
|--------------|---------------|--------------|----------------|----------------------------|
| Labor        | 37.4          | 7            | 41.2           | +3.8                       |
| Liberal      | 31.6          | 6            | 35.3           | +3.7                       |
| Greens       | 15.6          | 4            | 23.5           | +7.9                       |
| Others       | 15.4          | —            | —              | -15.4                      |

Electoral System:      a Modified d'Hondt  
                                  b Hare-Clark STV