PROPORTIONAL REPRESENTATION SOCIETY OF AUSTRALIA
(AUSTRALIAN CAPITAL TERRITORY BRANCH)

OPPORTUNITIES TO IMPROVE VOTER INFLUENCE

Submission by the Proportional Representation Society of Australia (Australian Capital Territory Branch) to the Select Committee on Amendments to the Electoral Act 1992

May 2014

The Proportional Representation Society of Australia (Australian Capital Territory Branch) has been actively involved in the struggle to obtain and maintain effective voting for Canberrans since its formation. The ACT Branch was a founding member of the Hare-Clark Campaign Committee that energetically helped attract two-thirds public support for proportional representation at the electoral system plebiscite in February 1992, and played a prominent role in the preliminary and campaigning activity leading to the entrenchment, again by a two-thirds majority, of the key Hare-Clark principles in February 1995.

We have been unwavering in our promotion of the voter empowerment and fairness to all candidates and parties that the Hare-Clark system brings and have consistently supported efforts to achieve improved electoral administration including the setting of basic standards for party registration. Elections ACT has led the nation through pathbreaking initiatives such as the changes in undertaking scrutiny procedures using best-available methods that now lead to very accurate scanned electronic storage of full voting particulars in the week following an election, and upgraded efforts to take the mark-off of electors' names when they vote to the next step that technological changes and available resources safely permit.

In our view, our major electoral legislation that was passed by the Legislative Assembly in 1994 was at the forefront of Australian experience as voters' interests were consistently put first in the drafting of amendments to a very unsatisfactory starting point provided by the Follett Government following the decisive plebiscite outcome: in particular, Robson Rotation was properly implemented and it was unanimously agreed that ballot-papers would be accepted as formal as long as they had a single first preference - they would of course contain an instruction to mark at least as many preferences as there are vacancies to be filled, in accordance with the official description of the Hare-Clark system prepared by the Australian Electoral Commission; there was also a deliberate effort to keep exhausted votes to the minimum possible.

Bipartisan agreement was achieved on the key Hare-Clark principles that would take a two-thirds Assembly majority or approval by a majority of electors at referendum to adjust, circumvent or flout: after legislation governing the conduct of referenda was passed, only one MLA voted against the *Proportional Representation (Hare-Clark) Entrenchment Bill 1994* that included safeguards against sudden or tactical changes to the size of the Legislative Assembly, should the federal parliament cede power over such matters.

We have subsequently seen both positive and negative steps, the latter most notably in the abandonment in 2008, uniquely in Australian electoral practice, of separate columns for non-party groups. That step, at odds with one unambiguous feature of the 1992 official description of the Hare-Clark system, deprived groups whose hopes for legislative changes are dashed late in the term of an Assembly of the chance to generate a readily-recognisable ballot-paper presence unless they have assumed the worst and started party registration activity by the end of June in an election year.

In an extremely positive direction, following significant research by both the Canberra Branch of the Statistical Society of Australia and the Electoral Commissioner, Robson Rotation arrangements were refined to minimise any possible down-the-column advantage to particular continuing candidates when someone is excluded or a surplus is distributed following a candidate's election. The printing of additional rotations followed unanimous agreement by the Legislative Assembly to amending legislation that substituted a schedule of expanded rotations for the original specific entrenched schedule.

Arguing for large increases in Assembly size a recent phenomenon

Bearing in mind how much Assembly wariness and resistance there was to any possibility of change in its size before the turn of the century, the Proportional Representation Society of Australia (Australian Capital Territory Branch) is concerned that the rejection of a very large potential increase in Assembly numbers by a sizeable portion of electors could result in a lengthy period of public disquiet including subsequent protest votes or lower turnouts.

The foreshadowed enlargement of the Assembly from 17 to 25 members represents what would be the second-largest percentage increase in any Australian legislature since Federation, as can be seen from the table below of key particulars surrounding the chamber in which governments are formed in each jurisdiction: the House of Representatives and Senate which have a nexus as to size waited nigh on fifty years before making the biggest-ever move, and the current second-largest increase during this period was in the Northern Territory which went from 19 to 25 MLAs at the 1983 election; the Senate's size increased by two-thirds in 1949 while the increase for the House of Representatives was slightly less because of the way entitlements of individual states were calculated, based on population.

Table 1: Selected changes in legislature sizes since 1901

	current size	last change	previous size	previous change	at federation	change since federation	largest increase (year)
AUST	150	1984	121	1949	75	100%	63.5% (1949)
NSW	93	1999	99	1995	137	-32.1%	10.1% (1988)
VIC	88	1995	81	1976	86	2.3%	11.0% (1976)
QLD	89	1986	82	1972	72	23.6%	21.0% (1950)
WA	59	2008	57	1983	44	34.1%	13.6% (1965)
SA	47	1970	39	1939	54	-13.0%	20.5% (1970)
TAS	25	1998	35	1959	38	-34.2%	16.7% (1959)
NT	25	1983	19	1974			31.6% (1983)

Originally, if the Assembly were to receive power to determine its own size, any change thereafter would require either a two-thirds majority of the Assembly in favour, or alternatively need to be approved at referendum by a majority of all enrolled electors (in practice, somewhere near 60% of those voting formally). This followed amendments to the *Proportional Representation (Hare-Clark) Entrenchment Bill 1994* moved by former Chief Minister Rosemary Follett who was a fierce opponent of increasing the size of the Assembly and was adamant that it should not happen without the direct approval of electors.

Among her comments for the government when debating in principle the entrenchment legislation introduced by Gary Humphries were:

> It is the Government's strongly held view that the current size of the Assembly, at 17 members, has clearly proved to be adequate for the Territory's needs. While the ACT does have fewer elected representatives than any other State or Territory, I believe that six years of self-government has shown that this relatively modest number of members can be made to work effectively. Rather than our Assembly growing, I believe that probably every other parliament in the country should shrink considerably…
>
> The Government considers that any proposal to change the size of the Assembly not only should be justified on its own merits but also should be approved at referendum by a majority of voters…
>
> I do not support any move to increase the size of the Assembly without a specific referendum and a specific decision by the electors of the ACT.

When moving her specific amendment:

> This Act applies to any law made pursuant to a power at any time vested in the Legislative Assembly to make a law with respect to the number of members of the Legislative Assembly.

in relation to future changes in size of the Assembly should the power to do so be handed over by the federal parliament, Ms Follett remarked:

> It is my view that 17 is an ample number for the good government of the Territory. It has worked very well within this Assembly. I know that having 17 members has placed strains upon the Assembly from time to time, because we have all of the powers of, and more powers than, any other parliament in Australia. I believe that, stretched as we are, we have done a good job. The committees have worked well; the Assembly has worked well; we have not had a problem in getting quorums; and we

> have conducted government business, private members business and so on very capably. For that reason, I believe that we should stick to the number. I would heartily commend to every other parliament in Australia that they consider halving their numbers, because it is quite clear to me that a small parliament is a good parliament.

Such attitudes remained influential in the Assembly though not expressed as forcefully after Ms Follett departed. Even as late as 1999, a majority of an Assembly Select Committee on the Report of the Review of Governance, including Opposition Leader Jon Stanhope, indicated that the community was not yet ready for any increase:

> 3.27 The Committee accepts that strong arguments can be made for an increase in the number of members. Mr. Cornwell considers that these arguments are compelling and supports an increase in the number of Members to twenty-one. On balance however, Mr Osborne and Mr. Stanhope believe that the arguments against an increase in members outweigh the arguments in support. While self-government is now more generally accepted by the people of Canberra, it is still unpopular with some. To increase the number of local politicians at this stage of self-government will only increase the cynicism and opposition.

On becoming Chief Minister in December 2001, Mr Stanhope remarked:

> Labor understands the arguments for and against any increase. But the fundamental fact remains that we have a population of 312,000 governed by a parliament of 17 members. The size of the Assembly puts strains on the operations of the Assembly and on government. Labor wants the debate to continue. There will come a time - perhaps it has already come - when the size of Canberra warrants an increase in the number of electorates and members.

Those comments raising the possibility of bipartisan agreement on a future increase were made roughly at the current half-way mark for our period of self-government. If possibly no increases were justifiable then in the eyes of a significant portion of the Assembly and community, that puts a fairly stringent cap on any increases justifiable now, certainly one well below what is suggested by any comparison of elector numbers in 1989 and currently.

The federal handover-of-power amendment that passed in the Senate on 21 March last year requires a two-thirds Assembly majority to alter its size: it either over-rode the entrenchment provision deliberately by leaving out the ordinary possibility of electors being involved when there wasn’t overwhelming Assembly agreement, or inadvertently most likely rendered otiose the standard referendum alternative for by-passing entrenched Hare-Clark principles as the circumstances in which the final say might be left with electors were overlooked.

As can be gauged from periodic elector comments in the media, there may still be extensive annoyance when they reflect on not being consulted about such an important matter in the manner Ms Follett regarded as essential. Assembly members are consequently likely to be accused of opportunism in availing themselves so quickly of a newly-available power.

The case for twenty-five MLAs rather than twenty-one or some other intermediate number has not been comprehensively made out to the electorate because last year’s narrow terms of reference prevented consideration by the Expert Reference Group of other possibilities for dealing with having insufficient Ministers: for instance, both former Deputy Chief Minister Ted Quinlan and former Clerk of the Senate Harry Evans raised in their submissions the possibility of some Ministers being appointed, and there were also proposals about better or different resourcing that were not taken up by the Expert Reference Group:

> The terms of reference for this inquiry do not extend to considering proposals to alter the fundamental nature of the ACT's electoral arrangements…
>
> An issue raised with the ERG related to the resources provided to non government members, particularly staff numbers, research capabilities, parliamentary library resources and allowances for communicating with constituents. This issue is beyond the terms of reference of this inquiry.

Unweighted totals of representatives at federal, state/territory and local government levels as set out in the Expert Reference Group's discussion paper of 2013 will cut no ice with those wanting tangible signs that the Assembly is making the most of its potential. Critics are instead likely to point to the ACT's usual failure to achieve high levels of Commonwealth Grants Commission recognition that its service delivery difficulties require some form of special national recognition.

The Assembly has also not taken action to demonstrate that it is operating within its full capacity in a manner that most befits a small parliament, say through a formal thorough examination of where Assembly practices could be improved or the good initiatives of other small legislatures adopted. The Proportional Representation Society of Australia (Australian Capital Territory Branch) thinks it prudent that any attempt to increase the number of MLAs include a public demonstration that available resources in the Assembly and community are being deployed or tapped into as efficiently and effectively as possible. Otherwise knee-jerk dismay at any proposed increase in MLAs will create a fertile field in which wild allegations can be expected and disaffection fomented.

The ACT Branch has repeatedly argued that the Assembly needs to establish and develop its own practices and traditions appropriate to a small legislature rather than mindlessly hanker for the emulation of actual or supposed Westminster traditions. In particular, in a small chamber, it is important that the Speaker always be actively involved in all aspects of committee work, and the presence of even very busy ministers on select committees should not automatically be ruled out.

We have also suggested that the Assembly involve the community more in its diverse work by:

- giving greater resources to committees and providing additional common support staff for MLAs;
- tapping into available community expertise through the formation of working parties to advance fact-finding and public debate (for instance, as Mr Humphries did in 1993 when the drafting of the extensive original electoral legislation began); and
- encouraging the placement of imminent proposed amendments to legislation on the Internet.

The successful institution of a Parliamentary Budget Office federally should certainly serve as food for thought in relation to Assembly reform. In addition, with all the expertise that is available among Australian Capital Territory residents, it should be a challenge to the Assembly to behave in such a manner that knowledgeable people routinely seek to pass on to the community the benefits of their experience and creative thinking.

A comprehensive package that included more avenues for effective public involvement in legislative and accountability processes might assuage mild initial suspicions that politicians were just bolstering their numbers as an attempted easy way out rather than tackling their own contribution to the perceived problem by closely examining the fundamentals.

Past performance should influence numbers of MLAs to be returned from each electorate

If an increase from 17 to 25 MLAs is to be made now, there are two major reasons why there should be just three electorates, returning nine, nine and seven members respectively: first, facing the prospect that a 2-3% change in voter assessments could alter a previous electoral outcome in any electorate would place maximum pressure on incumbents to perform in an environment in which there is a degree of local representation; second, as evidenced by the remarkable degree of stability over the past twenty years, there would be a lessened likelihood of a need for regular major boundary changes even as particular areas grew very rapidly and others remained static.

The reason why odd numbers are entrenched for the size of ACT electorates is that they guarantee that a majority of votes translates into a majority of seats. Parties aspiring to govern know that their prospects of ultimate success improve the closer they can come to achieving 50% support in any electorate, rather than having some lower percentage as their real target in pursuit of obtaining half the available seats.

One-third of the vote will guarantee two of five seats, whereas 37.5% is the target for definitely securing three of seven seats, and 40% translates into certainly obtaining at least four of nine seats. The maximum proportion of votes that might be ineffective falls from 16.7% to 12.5% and 10% as the number of vacancies in a seat increases from five to seven and then nine.

In practice, close matches between votes obtained and seats won has been the ACT's Hare-Clark experience over six elections, as set out separately for five-member and seven-member electorates in Table 2. Figures in bold pick out discrepancies of at least five percentage points between votes and seats where at least one person was elected.

Seven-member electorates have provided a closer reflection of the people's will in a number of ways, starting with fewer divergences to that degree (7 of 20 instances, compared with 10 of 17) and becoming more noticeable when a divergence by at least ten percentage points is considered (2 instances compared with 5).

Where a party or group has stood and been successful in five-member electorates, its proportion of Assembly seats has always been higher than its proportion of first preferences. However, when Labor and Liberal have been at their lowest ebb in Molonglo, their proportion of seats was slightly less than their level of strong voter support.

Table 2: Comparison of ACT votes and seats in electorates of different size

	Votes in 5-member electorates	Seats in 5-member electorates	Votes in 7-member electorate	Seats in 7-member electorate
2012 election				
ALP	**37.8**	**50**	40.4	42.9
Liberal	**39.9**	**50**	**37.4**	**42.9**
ACT Greens	9.0	-	13.2	14.3
Australian Motorist	5.6	-	2.1	-
Other	7.6	-	6.9	-
2008 election				
ALP	38.3	40	**36.1**	**42.9**
Liberal	**31.6**	**40**	31.5	28.6
ACT Greens	**13.7**	**20**	**18.2**	**28.6**
Australian Motorist	6.6	-	2.8	-
Community Alliance	5.5	-	1.1	-
Other	4.3	-	10.2	-
2004 election				
ALP	**47.9**	**60**	45.3	42.9
Liberal	36.4	40	**32.6**	**42.9**
Australian Democrats	2.8	-	1.4	-
ACT Greens	7.7	-	11.5	14.3
Other	5.1	-	9.3	-
2001 election				
ALP	**43.4**	**50**	39.3	42.9
Liberal	**29.9**	**40**	**34.1**	**42.9**
Australian Democrats	8.3	10	7.6	-
ACT Greens	6.7	-	12.6	14.3
Paul Osborne	3.5	-	-	-
Other	8.2	-	3.4	-
1998 election				
ALP	**29.0**	**40**	25.6	28.6
Liberal	35.2	40	41.5	42.9
Australian Democrats	6.6	-	5.1	-
ACT Greens	8.4	-	10.1	14.3
Osborne Independent Group	**13.0**	**20**	3.7	-
Moore Independents	-	-	**7.0**	**14.3**
Other	7.7	-	7.1	-
1995 election				
ALP	**32.1**	**40**	30.9	28.6
Liberal	38.8	40	42.8	42.9
Australian Democrats	4.4	-	3.2	-
ACT Greens	8.3	10	10.1	14.3
Moore Independents	3.9	-	**8.8**	**14.3**
Other	12.4	10	4.2	-

ACT experience, similar to that in Tasmania, has shown that a candidate or party achieving half a quota has some prospect of being elected, but cannot automatically expect assistance in the form of transfers from excluded candidates of the largest parties. In five-member electorates, the ACT Greens failed to win a seat in 1998 despite getting just over half a quota on average, while the Australian Democrats started with 0.6 of a quota in Molonglo in 2001 but could not extend this to near a quota and were not even the last to be excluded, and the Greens were unsuccessful in Ginninderra in 2012 despite starting with slightly more than 0.6 of a quota.

On three occasions, the difference in first-preference support for larger parties was reflected in different numbers of MLAs being returned in the seven-member electorate, but not on three others when gaps of 3, 5 and 13% straddled the important 37.5% point for three quotas. Following significant exhaustion as the last candidates from several parties were excluded, two Greens and two Liberal MLAs were elected in Molonglo in 2008 despite a 13% difference in first-preference support for those parties.

Gaps of over 6% in support did not translate into any more five-member seats for the Liberals in 1995 and 1998, nor one of nearly 7% for Labor in 2008, and a gap of over 13% across the two five-member electorates resulted in a single-seat advantage for Labor in 2001.

The most noticeable persistent feature of ACT experience has in fact been the large seat bonus achieved by the second party in five-member electorates. This is because support remained just strong enough to achieve a second quota through the flow of preferences and thereby translate even slightly under 30% of first preferences into 40% of seats.

The vote-spreading properties of Robson Rotation have meant that one or more Liberal and Labor candidates generally remained in scrutinies towards the end, maximising the prospects of one of those parties picking up an additional seat ahead of a smaller party striving to build a quota. This was especially highlighted in the loss in 2012 by Greens incumbents in both Brindabella and Ginninderra.

Table 3 below illustrates the tendency for the largest parties to do particularly well from their actual level of support, obtaining all seats in five-member electorates in both 2004 and 2012, and always achieving a seat bonus of 9% or often much more in them. In contrast, the major parties have never won all the seats in Molonglo, the seat bonus reached double figures at 13% on one occasion but has usually been quite a deal less, and in 1995 the proportion of seats won fell below their combined first-preference support.

Proponents of “strong government” with little or no time for smaller parties or independents cannot reasonably claim that such candidates have been let into the Assembly too easily.

Table 3: Combined votes and seats for largest parties

Election	% ALP/Liberal 5-member vote	% ALP/Liberal 5-member seats	% ALP/Liberal 7-member vote	% ALP/Liberal 7-member seats
2012	78	100	78	86
2008	70	80	68	71
2004	84	100	78	86
2001	73	90	73	86
1998	64	80	67	71
1995	71	80	74	71

After the 1998 elections, there was considerable discussion of the fact that only two women were elected, both in Molonglo, some critics claiming that this showed an inherent flaw in Hare-Clark in that it was difficult to break the benefit of incumbency. Actually, two women, both incumbents who came into the Assembly when a casual vacancy was filled, were each defeated by little more than a handful of votes, two other incumbents were also defeated on that occasion and another did not stand for re-election.

An examination of the fate of female candidates as summarised in Table 4 also shows no grounds for anxiety, apart from in relation to the near-misses of 1998.

Table 4: Comparison of votes and seats for women

Election	% female 5-member vote	% female 5-member seats	% female 7-member vote	% female 7-member seats
2012	35	40	51	29
2008	35	50	34	29
2004	28	30	38	43
2001	24	30	41	43
1998	25	-	57	29
1995	33	20	68	43

Two or three women have been elected in Molonglo on each occasion, including party leaders with significant surpluses then available for other candidates in accordance with individual voters' wishes, while the numbers successful in both five-member electorates have varied between nil and five. The potential benefits of incumbency have been highlighted by ongoing success for two Ginninderra MLAs that led to majorities of females being elected there in 2008 and 2012, and higher percentages overall being elected than in Molonglo on both of those occasions.

Over the six Hare-Clark elections to date, women have taken 36% of the Molonglo vacancies and 28% of those in five-member electorates. They have nominated in large numbers at all elections, comprising between 30% and 43% of candidates, and were in a majority in Molonglo in 2001.

The greater difficulty women have had in five-member electorates, particularly in Brindabella, shows how much of a significant additional hurdle a quota of 16.7% rather than 12.5% constitutes. Had seven-member electorates applied universally throughout, at each election several more women would have been elected to the Assembly.

Overall, as could be anticipated from first principles, seven-member electorates have provided noticeably better matches of votes and representation than have the five-member ones, and have facilitated the entry of a higher proportion of women into the Assembly. An even-closer correspondence between votes and seats could be expected in nine-member electorates without undermining effective local representation or leading to unwieldy ballot-papers.

The Proportional Representation Society of Australia (Australian Capital Territory Branch) would therefore regard any arrangement consisting only of five-member electorates as inferior to the current set-up because of the likely lessening in numbers of candidates nominating in each electorate, the additional potential for votes being ineffective and the greater difficulty women would have in getting elected.

While even a small decline in the level of effective voting is to be regretted when an improvement is possible, it is important to note that at each election except 2012 there has been significant territory-wide difference in support for the two largest parties. Had single-member electorates applied, on five occasions there would have been at best just a token Opposition presence in the Assembly, and concentrated geographical lopsidedness the other time.

Breaking ties that occur during scrutinies

In its report on the 2012 election, the ACT Electoral Commission identified a flaw in the legislative provisions for attempting to break multiple ties in levels of surplus at a particular count during the scrutiny on the basis of whether:

> 1 of the contemporary candidates had more total votes than any other contemporary candidate at the last count at which all the contemporary candidates had unequal total votes.

The identified deficiency in the wording (the unfortunate presence of the word “all”) is not replicated when multiple ties for the lowest progress total at a particular count during the scrutiny are sought to be resolved on the basis of whether:

> 1 of those candidates had fewer total votes than any other of those candidates at the last count at which those candidates had unequal votes.

However, the Commission’s proposed amendment (just deleting the word “all”) does not always constitute the best-available improvement in either situation when more than two candidates are involved.

What should happen if some of the candidates to be separated are tied with most votes at the most recent count where not all of them had the same progress total is that the search continues among previous counts but is now confined to the smaller group of still-tied candidates. By repeating this process as often as is necessary, either one candidate is eventually legitimately established as the first whose surplus should be distributed, or a draw by lots is shown to be necessary among a group of candidates with the same progress totals at each previous count.

The difference is best illustrated through the use of a simple example, obviously capable of being scaled up to accurately reflect characteristics of actual ACT scrutinies, involving the breaking of a tied surplus of five among three candidates when the quota is 100.

Table 5: Breaking a multiple tie in surplus size

Candidate	progress total	progress total	progress total
Spanos	89	95	105
Muller	88	95	105
Allen	90	92	105

In this case, as Spanos and Muller had the equal-highest number of votes (95) at the previous count, tie-breaking activity is now ideally confined to just them. Therefore Spanos, with one extra vote two counts back (89 compared with 88), has her surplus dealt with first, even though Allen had the most votes (90) of these three candidates at that count: Allen necessarily dropped out of contention because he had fewer votes than either Spanos or Muller at the count before each of them passed the quota, and this just interim step should be clearly articulated in the scrutiny provisions.

This logical and appropriate outcome is unlikely under the amendment proposed by the Electoral Commission as no-one had the most votes in this group at the previous count.

Should that automatically lead to a draw by lots even though the tie could be broken by a more persistent search for differences at previous counts?

If the proposed wording wasn't accurately translated into a search algorithm, it is possible that Allen's surplus would be dealt with first because he has most votes when most recently there wasn't a tie for most votes: if that is so, on what logical or fairness grounds would his deficit one count before the quota was reached have been disregarded?

In terms of potential wording for comprehensive drafting instructions that deal appropriately with all situations no matter how complex, the candidate whose surplus is dealt with first is:

- the one with most votes at the previous count where not all progress totals were equal; or
- where, there is still a tie at the top when most recently not all progress totals were equal, the candidate from the still-tied leading group with highest progress total at the previous count where not all of them were on equal terms; or
- where a cascading search backwards to try to separate a diminishing cluster of still-tied candidates cannot at any previous count establish one candidate with a higher progress total than those of the other candidates not yet excluded from the tie, a draw by lots among those whose progress totals have been tied throughout.

Even though the current wording is not as defective should there be more than two candidates with fewest votes when a candidate must be excluded, there currently remains a conceptually-identical difficulty should two or more with lowest totals be tied at the previous count where not all progress totals were equal.

A similar narrowed-down search backwards should continue until either one candidate is established as alone having fewest votes or a subset (possibly no smaller than the original group) with the same number of votes at all previous counts is identified for the application of lots to determine who will be excluded first.

In the case of tied surpluses, the Tasmanian wording for their resolution is:

> If there are equal surpluses at a later count or at a transfer, the surplus of the candidate who was the highest on the poll at the count or transfer at which the tied candidates last had an unequal number of votes is the first to be transferred. If those candidates have had an equal number of votes at all preceding counts or transfers, the returning officer decides by lot which candidate's surplus is the first to be transferred.

The two possibilities set out here are also not exhaustive, as the simple example discussed above demonstrates. The introduction of a comprehensive approach based on consistent search-refinement principles in the Australian Capital Territory is therefore likely to be of use to electoral authorities in other jurisdictions on the rare occasions where such more complex situations arise.

A number of other minor defects or opportunities for improvement in the scrutiny rules and calculations were not picked up in 1994 because what was being proposed was identical to Tasmanian provisions or close enough for nothing worthwhile to be gained by attempting to tinker with such details when more violent attacks were being launched on key aspects of the Hare-Clark system that two-thirds of voters had endorsed at plebiscite in 1992. What was achieved systematically though, apart from ensuring that Robson Rotation was implemented properly, was keeping exhausted votes to a minimum while giving electors maximum freedom in how they exercised their franchise even though that might not always be entirely in accordance with the ballot-paper instructions foreshadowed by the Australian Electoral Commission.

Dealing with fractional remainders

One other minor opportunity for improvement surrounds the current “count votes” practice of dropping fractions whenever ballot-papers with value less than one are transferred.

For instance, if a candidate receives 36 ballot-papers with value one-tenth, three votes are added to her progress total and the six-tenths is at least temporarily lost by fractions; were that candidate to receive 14 ballot-papers of value one-tenth at a subsequent count, currently she would be credited with just one extra vote. In other words, just four votes in aggregate would be added to her progress total at those two counts even though a total of 50 ballot-papers with value one-tenth had been involved; should that candidate later be excluded, it is possible for there to be a gain by one on account of fractions because the 50 papers (and any others of the same value) would be considered for transfer as a job lot.

Instead of continually dropping fractional parts arising in transfers, it would be preferable to first test whether combining these with earlier ones should result in one extra vote being added at a particular count to the progress total of the candidate involved: more than one vote might be added in aggregate to individuals’ progress totals over all counts, but never at a single count.

What are practical ways of going about this, bearing in mind that transfer values in the ACT are not converted from fractions to decimals of a particular arbitrary length to avoid the possibility of further votes unnecessarily being lost in other circumstances?

One would be to convert all fractional transfers to say three decimal places and sum them, omitting the aggregate fractional part from the progress total in normal record-keeping circumstances regarding progress totals, but justifiably still allowing it to be considered first when there is either an apparent tie in surpluses or in progress totals when an exclusion must occur.

Although it uses a sampling procedure to distribute surpluses in both Legislative Council and local government elections, New South Wales makes comparisons of fractional parts at every count, raising as many of the highest to the next integer as is necessary to avoid any loss by fractions, and then of course disregarding the remainder.

Possible deferment of a surplus transfer

Another minor alteration, present in the scrutiny rules of a number of jurisdictions including federally, involves the possible deferment of a surplus transfer where that could not affect the next exclusion to take place.

In New South Wales this is expressed as:

> a transfer of votes under this subclause is not made unless the surplus of the elected candidate, together with any other surpluses not transferred, exceeds the difference in numbers between the votes of the 2 continuing candidates lowest on the poll

whereas a more comprehensive test procedure is set out in federal legislation.

Such a provision can result in quotas being reached more quickly because more votes, starting with some of full value, are transferred at the exclusion than in dealing with the surplus(es) involved: before computerised counting was introduced, implementing such a step could result in a significant saving of time and effort without introducing obviouslyanomalous elements. It is still a matter worth considering in current circumstances or new ones that might be contemplated.

Not confining transfers of surpluses to the last parcel of votes received

Now that there are computerised scrutinies after ballot-papers have been scanned, it is reasonable to ask whether ACT procedures for dealing with surpluses should not shift from following the Gregory transfer that has been used in Tasmania since the introduction of the Hare-Clark system to adopting the weighted inclusive Gregory transfer that was legislated in Western Australia for Legislative Council and local government elections after a thorough review of the academic literature following controversy over the application of the defective Senate (unweighted) inclusive Gregory transfer value approach at the Mining and Pastoral Region election of 2001.

Under the Gregory transfer, only the parcel of votes taking a candidate beyond the quota is eligible for further transfer: the ballot-papers received at earlier counts are regarded as fully used up in electing the candidate concerned (electors should be satisfied that their vote has been fully effective), though it can be reasonably argued that such a distinction is rather arbitrary and historically associated with making manual scrutinies much easier to complete.

In 1983 a previous Irish-inspired Gregory transfer method using sampling to transfer a partially-representative surplus all at value one was replaced in the Senate by a crude and distorting approach of defining the transfer value as the surplus divided by the total number of ballot-papers contributing to the candidate’s election. The failure to consider at what value ballot-papers were received introduces the possibility of significant distortion in the distribution of a surplus because it exaggerates the impact of very large parcels of relatively small transfer value, as the example below will show.

The non-transferability in 1974 of thousands of ballot-papers with first preferences for Neville Bonner, third on the Coalition list, followed immediately by numbers for Labor candidates, had drawn attention to the desirability of all ballot-papers helping elect a candidate to be eligible for further transfer, rather than just those received in the parcel taking the progress total beyond the quota. The previous approach, of making the surplus an accurate sample of ballot-papers in the parcel taking the candidate beyond the quota according to what was the next available preference indicated, was also known to leave open the possibility of unrepresentativeness of further preferences, and would not be exactly replicated in any recount.

The weighted inclusive Gregory transfer allows all ballot-papers contributing to a candidate’s election to be eligible for further transfer, after calculation of a surplus factor by which all previous transfer values are multiplied. This approach, capable of straightforward adaptation to the ACT’s circumstances of optional preferential voting to ensure that transfer values never increase, avoids anomalies by taking the same proportion of each ballot-paper’s remaining value to have been used in the election of the candidate and allowing the remaining proportion to be available to continuing candidates

These differences are best illustrated by a simple example in which the quota is 10,000 votes. Perez has 9,500 first preferences and is elected upon receiving 6,000 ballot-papers all of value one-half, with progress total 12,500 and hence a surplus of 2,500 to distribute.

Under the Gregory transfer that applies in the Australian Capital Territory and Tasmania, only the 6,000 ballot-papers last received would be eligible for transfer, at value 2,500/6,000 = 5/12 if all had a further preference for a continuing candidate.

The Senate approach would see all 15,500 ballot-papers helping to elect Perez being transferred at value 2,500/15,500 = 5/31: in this case, 84% of each first preference is deemed to be used up, but just 42% of the remaining value of the ballot-papers received at value one-half.

Under the weighted inclusive Gregory method, there is a surplus of 2,500 to be transferred, from ballot-papers with aggregate value 12,500, so the surplus factor is 2,500/12,500 = 1/5. The first preferences would all be transferred at value 0.2 while the remaining ballot-papers would be transferred at value 0.5x0.2 = 0.1: 80% of each ballot-paper's previous value would be used in electing Perez and the remaining 20% available for transfer to continuing candidates

This information is summarised in the table below that also provides a break-up of the contribution to the surplus of the two parcels of votes received: the first preferences contribute nothing under the Gregory transfer, determine 1,532 votes of the surplus transfer under the Senate unweighted inclusive Gregory approach and 1,900 votes of the surplus transfer under Western Australia's weighted inclusive Gregory method. If parcel-oriented differences usually arise in the marking of further preferences, outcomes can change markedly according to which method of transferring surpluses is used.

Table 6: Differences that transfer value definitions can make

	Transfer value	Proportion of previous value used	Division of surplus	Proportion of surplus
ACT Gregory transfer definition				
First preferences	0	100%	0	0%
Other votes at 0.5	5/12	16.7%	2,500	100%
current Senate definition				
First preferences	5/31	83.9%	1,532	61.3%
Other votes at 0.5	5/31	41.9%	967	38.7%
weighted inclusive Gregory method				
First preferences	0.2	80%	1,900	76%
Other votes at 0.5	0.1	80%	600	24%

Even more marked differences would arise if it were 6,000 papers at transfer value 1/6 that put Perez beyond the quota, with a progress total of 10,500 votes. Under the ACT's Gregory transfer, these papers alone would be transferred, at value 1/12 (assuming they all had a next available preference); under the flawed Senate approach all 15,500 papers would move on to the next available preference or become exhausted in each instance, at value 1/31 (with the percentage composition of the surplus being just 61% on the basis of the parcel of first preferences even though it contributed 90% of Perez's progress total when she reached the quota); the first preferences would be transferred at value 1/21 under the weighted inclusive Gregory method and the remainder at value 1/126 (whereupon the surplus would be distributed in the ratio 19:2, matching the votes each parcel contributed to the progress total of Perez).

Dividing the surplus by the total number of ballot-papers contributing to a candidate's election always gives undue influence to those ballot-papers within the quota with the lowest previous transfer values, and may result in some electors effectively getting more than one vote, should a particular transfer value rise during the course of a scrutiny.

While a change to the weighted inclusive Gregory method would represent a noteworthy advance upon what has been and continues to be a first-rate system, it would also be possible to apply the more sophisticated computer-oriented Meek approach that is in use in some New Zealand elections. Meek would mimic weighted inclusive Gregory in the example discussed above, but it also allows already-elected candidates to receive further votes as others are elected or excluded: in such cases, transfer values to continuing candidates are scaled up appropriately but no change is made to the order in which candidates have previously been elected or excluded.

A thorough review of the underlying principles and the research literature was undertaken in Western Australia by Dr Narelle Miragliotta following controversy over transfer values in the Mining and Pastoral Region (including one that increased as a surplus was being distributed) after the 2001 Legislative Council elections. Her comprehensive report *Determining The Result: Transferring Surplus Votes in the Western Australian Legislative Council* assessing the options commonly under consideration was released in 2002 and is available at *http://www.elections.wa.gov.au/sites/default/files/content/documents/Determining_the_result.pdf*.

Former Western Australian Attorney-General Jim McGinty recognised that the prospect of a transfer value increasing during the course of a scrutiny was completely unacceptable, and proceeded with amendments that introduced the weighted inclusive Gregory method for both Legislative Council and local government elections.

When voters are given some real latitude in the marking of preferences as in the ACT, it is vital that adequate resources be applied to make as many as possible aware that marking more preferences can only increase the chances of making their vote fully effective. There also needs to be a slight refinement of the Western Australian surplus fraction concept to successfully apply the weighted inclusive Gregory methodology and simultaneously keep exhausted votes to a minimum.

First, the total transferable vote weight for continuing candidates, the aggregate amount by which their progress totals would increase if all the ballot-papers were transferred at their current value, needs to be established: if, in the normal run of events, it exceeds the surplus, the surplus factor becomes the surplus divided by the total transferable vote weight and all previous transfer values are multiplied by it when the surplus is transferred to continuing candidates; otherwise, all of the previous transfer values remain unchanged and some exhaustion of votes is unavoidable as the transfer is made.

Reducing the quota whenever votes are exhausted

The Droop quota, usually calculated at the outset of a scrutiny as the first integer greater than the number of formal votes divided by one more than the number of vacancies to be filled, is the point at which candidates are mathematically assured of being elected.

A federal attempt to introduce a reducing quota in 1983 was abandoned when it was pointed out that a confusion in the drafting between non-transferable and exhausted ballot-papers meant that there was no guarantee of electing the right number of Senators. However that failure is no reason to abandon efforts to avoid elected candidates having to accumulate more votes than they actually need to be assured of election once ballot-papers start to exhaust, because it is possible to continually reduce the quota on the basis of sound principles in those circumstances.

There are three approaches possible for making adjustments free of potential anomalies: two only look forward, accepting that vacancies still to be filled will require fewer votes than were asked of the candidates already elected, whereas the third goes back and increases transfer values from all earlier surpluses, without interfering with the order of exclusions undertaken so far during the scrutiny.

The simplest approach reduces the quota by taking account of just the number of exhausted votes, dividing the number of votes for elected and continuing candidates by one more than the total number of vacancies to be filled, and increasing this quotient to the next integer. An impeccable refinement uses just the number of votes for continuing candidates and the number of unfilled vacancies to establish in a similar manner a new quota for the remaining vacancies that will be slightly smaller still. Both of these methods accept that candidates already elected have more votes in their quotas than will be required of those still to achieve success.

An alternative approach, first set out by English mathematician Dr Brian Meek in the late 1960s, adopts the second definition above but also retrospectively adjusts downwards the quotas of those already elected, which means increasing their surpluses and therefore the values at which the ballot-papers involved are now credited to current continuing candidates. It also at all times allows transfers to candidates already elected who under more traditional counting rules are normally by-passed once they have reached the quota.

Further detailed particulars of Meek's approach and helpful associated references are set out in Dr Miragliotta's research paper mentioned above. This sophisticated set of counting rules avoids some anomalies that can arise under simpler ones, and removes the possibility of electors achieving more of what they really want through their single transferable vote by strategically rearranging their preference order (although exactly how they might achieve such ends usually cannot be predicted in advance with any confidence): requiring computerised calculations, it was initially endorsed by the Electoral Reform Society of Great Britain and Ireland, and is in use as part of the single-transferable-vote methodology for electing local governments and district hospital boards in New Zealand.

Any attempt to have a variable quota would require a two-thirds Assembly majority because of the specific wording surrounding the principle of being declared elected when the Droop quota, rather than any other possibility that might be resorted to in pursuit of slanted outcomes, is reached:

> a candidate whose total votes equal or exceed a relevant quota as defined in schedule 4 of the *Electoral Act 1992*, being that schedule as in force on 1 December 1994, shall be declared elected

Adjustments to the quota when the number of votes is small

While it is not material for public elections with large numbers of votes, where the quota is going to be rather low as for the Aboriginal and Torres Strait Islander Elected Body, it is often better to give each ballot-paper value 100 or 1,000 (and therefore essentially work to two or three decimal places) to avoid increasing the quota to a degree where it becomes quite likely that the last elected candidate will not have to come very close to attaining it.

For instance, if there are 120 votes for seven vacancies, the customary value for the quota is 16, and hence after six vacancies are determined, there are just 24 votes left through which to fill the final vacancy. If each ballot-paper is instead given value 100, the quota becomes 1,501 (or 15.01 votes) and after 6 vacancies have been filled, there is unused value of 2,994 (or 29.94 votes) through which to fill the final vacancy, making it much more likely that the quota will again be achieved by the final candidate.

That approach of assigning value greater than one to each vote when relatively few are cast is one practical way of complying with the ideal that elected candidates not be required to accumulate more votes than are strictly necessary to guarantee their election.

Expanding the remedies available when something goes wrong during an election

WA's recent fresh Senate election has exposed deficiencies in most Australian provisions dealing with the Court of Disputed Returns as the remedies available (not upgraded for greater needed flexibility when the Senate moved first to proportional representation in 1948) are voiding an entire election, disqualifying candidates or otherwise finding them not duly elected, or finding candidates duly elected although not so declared: this is all set out federally in the winner-take-all language of the previous Senate electoral systems rather than based on the new fundamental criterion of whether the quota for election was achieved, and has been closely mimicked elsewhere and also not overhauled upon the introduction of proportional representation in individual jurisdictions.

After the loss of 120 ballot-papers previously set aside as informal and 1,250 accepted as above-the-line votes en route to the central recount centre in Western Australia, the Australian Electoral Commission petitioned the Court of Disputed Returns for the 2013 Senate election there to be voided: several candidates and electors also filed petitions within the statutory period available. The extensive 1983 amendment of the *Commonwealth Electoral Act 1918* had opened up the possibility of the AEC petitioning for specific types of declarations and required rulings within three months in those instances.

His Honour Justice Hayne summarised the issues to be settled as follows:

> Was the result of the election likely to be affected by the loss of the ballot papers? Can this Court now decide who should have been elected? Can it do so by looking at records of earlier counts of the lost ballot papers? And need it now examine ballot papers whose formality is disputed? Or must it instead declare the election absolutely void?

Having observed that the procedures for a recount are set out in prescriptive detail in the federal legislation, Justice Hayne ruled that there was no opportunity to draw evidence from earlier scrutiny activity in an attempt to fill in the information gaps created by the ballot-papers lost during the recount. His Honour found that the electors who had committed the lost ballot-papers into ballot boxes were prevented from voting and that their number was far greater than the smallest gap in progress totals determining an exclusion during the incomplete recount: consequently an illegal practice as defined in the *Commonwealth Electoral Act 1918* had occurred that could have prevented two different candidates from rightly being declared elected.

The candidates declared elected to the fifth and sixth vacancies were therefore not duly elected and it was in this instance not possible to say who was duly elected. As a result, the entire election was voided and electors were required to vote again on (or before) 5 April in a process beginning afresh with updated electoral rolls for Western Australia in place and another call made for nominations.

Would a similar outcome be possible or even expected in the ACT in such circumstances without a change in our legislation? This will require a systematic examination of what can go wrong or be in contention to ensure there is sufficient authority and available flexibility for either Elections ACT or the Court of Disputed Returns to quickly and fairly achieve as contemporaneous territory-wide electoral justice as is possible.

Appropriate remedies need to be available when material errors in electoral procedure have occurred and not been promptly rectified relying on authority set out in the legislation.

Otherwise, where there are very narrow margins at some points of exclusion in future, those particularly upset at the most likely outcome will be aware that the disappearance, defacement or destruction of only a small batch of votes or incontrovertible evidence associated with these could lead to an order for a fresh election.

The Australian Capital Territory's recount provisions are not as prescriptive as those in federal legislation, but a deal of uncertainty would remain without insertion of specific amendments that minimise the possibility of resort to remedies as unsatisfactory as that ultimately adopted in Western Australia. The decision-making powers of our Court of Disputed Returns are summarised as follows before more detail is provided about inquiry into certain matters (including what questions are resolved conclusively one way or another on receipt of particular evidence), and the overriding need for any intervention to be based on the outcome being in doubt as a result of what has transpired:

> **265 Declarations and orders**
> The Court of Disputed Elections shall hear and determine an application and may—
> (a) declare the election void; or
> (b) declare that a person who has been declared elected was not duly elected; or
> (c) declare that a person who has not been declared elected was duly elected; or
> (d) dismiss the application in whole or in part;
> and may make any orders in relation to the application that the court considers appropriate.

The powers of the Court of Disputed Returns in the Australian Capital Territory are closely based on those set out in Section 360 of the *Commonwealth Electoral Act 1918* that was significantly amended in both 1922 and 1983, and cosmetically in 2010: they are set out in black-and-white terms perhaps suitable only for adjudicating upon the filling of winner-take-all vacancies rather than taking proper account of the importance of achieving the quota in the simultaneous election of several MLAs using proportional representation.

Much more attention has been paid to electronic aspects of voting and scrutiny procedures in the Australian Capital Territory than is set out federally or in other jurisdictions. This reflects the leading role Elections ACT has played in developing new procedures based upon application of developing technology:

> 187 (3) In recounting ballot papers, the commissioner—
> (a) may reverse a decision made earlier in the scrutiny; but
> (b) must deal with the ballot papers in a way that is consistent with this part.

> **187C Recount of electronic scrutiny of ballot papers**
> (1) This section sets out the alternative ways in which a recount of the electronic scrutiny of ballot papers may be conducted.
> (2) The recount may be conducted by recounting data from electronic ballot papers kept on a backup copy of electronic data produced at a polling place or scrutiny centre.
> (3) If an approved computer program is used to find out the result of a scrutiny, the recount may be conducted—
> (a) by rerunning the program; or
> (b) by reloading the data into a different copy of the program and running the program.
> (4) If practicable, the recount may be conducted—
> (a) by re-examining the accuracy of any preference data entered into the computer program from paper ballot papers; or

(b) by conducting—

(i) a partial or full manual scrutiny of paper ballot papers from which preference data has been entered into the computer program; or

(ii) a combination of manual scrutiny of those paper ballot papers and a computerised scrutiny of electronic ballot papers.

Some strengthening of wording might be appropriate to maximise the prospects of scanned ballot-papers and rulings previously made in relation to them normally being accepted as a replica of the intention on the originals in case copies of some of those on paper cannot be physically produced for consideration by the Court of Disputed Returns. Alternatively, broader language might be inserted allowing other convincing evidence of high reliability to be presented and accepted.

It is also important to ensure that where it could make a difference to the overall outcome, all legitimate votes and all eligible candidates are included with minimal possible imposition upon the voters affected by errors. For instance, Tasmania had the spectacle in Denison in March 2014 of 2,338 attempted postal ballot-papers being damaged by an out-of-control automated letter-opening facility that wasn't operated properly: 163 of these ballot-papers could not be repaired and therefore had to be treated as informal. Fortunately in this case there would not have been any impact on the final outcome and the election declaration itself wasn't exposed to challenge, whereas it might have been if a margin for exclusion or election at the end of the scrutiny was fairly narrow.

In the light of the Western Australian and Tasmanian examples mentioned above, even though Elections ACT pays great attention to training of casual staff and supervision of all critical aspects of elections, it is desirable to examine all provisions to ensure that there is sufficient flexibility for the fair and appropriate handling of imaginable matters, generally relating to candidates or votes, that might be promptly corrected in accordance with well-set-out rules, or brought before the Court of Disputed Returns.

First, just as there is a provision as in other jurisdictions that the correctness of the roll is not a matter for inquiry, it would make sense to have a mechanism for settling nomination disputes (matters of rejection rather than more general ineligibility questions) before polling begins, even if that in extremis might mean postponing the election by one or more weeks. If there is any uncertainty about the non-acceptance of the nomination of one or more eligible candidates, another election will be forced if it is later found that an error has been made, because it will follow that voters have not had a proper opportunity to express their views.

Should one or more candidates be disqualified because of findings by the Court of Disputed Returns, a provision that their names be simply passed over on each ballot-paper, as is done should a candidate die before election day, will usually provide electoral justice in those circumstances. Nevertheless, it is true that the Tasmanian parliament hurriedly amended legislation to specifically cover multiple vacancies potentially arising simultaneously when three Labor candidates in Denison were challenged in 1979 on the grounds of alleged campaign expenditure in excess of statutory limits.

Another mechanism is required for ensuring that all votes are appropriately considered at minimum additional inconvenience to electors. There must be sufficient flexibility to allow problems or defects to be rectified quickly in the easiest and most appropriate manner, for instance by allowing just the affected polling places or electors to be polled again, as could easily have solved the WA problem of missing papers. In Tasmania's case, it should have been possible to identify the electors whose postal ballot-papers were irrevocably destroyed and afford them another opportunity to lodge their vote that way: having such a power in the provisions governing the conduct of the election would be better than requiring the mishaps to necessarily be resolved through findings and orders of the Court of Disputed Returns.

In addition, the risk of unjust non-election through changes of elector attitude over time must also be suitably confined. For instance, in the Western Australian case there was no doubt that three Liberal and one Labor Senator had originally been elected with quotas, and their positions should not have been in any jeopardy subsequently.

Western Australia's procedure for filling casual vacancies in the Legislative Council provides useful guidance for how such expressions of voter intent can be respected in circumstances where all electors are asked to return to polling places. There is a full recount, with the vacancy being taken by the first previously-unelected consenting candidate to achieve a quota or otherwise be declared elected: in some circumstances, those who have already contributed to the election of one or more incumbents will also have an influence in who gets to fill the casual vacancy.

It is specifically declared that the positions of those previously elected and continuing cannot be affected by such a procedure, in part because there is no guarantee that, with a different set of consenting candidates, those who were initially elected would necessarily be successful again if they previously relied on extensive transfers from others.

The same criterion of obtaining a quota when there are a particular overall number of vacancies to be filled should continue to apply, but the number of available places can be restricted to the degree necessary to ensure that those initially with a quota or otherwise certain of election also enter the Assembly.

In the Western Australian case, only the last two vacancies would have been in play and with ballot-papers with fixed column orders, a requirement that these remain unchanged would have prevented Labor and the Liberals from gaming the situation by altering their column order in hot pursuit of the available vacancies, rather than relying on demonstrating additional voter support. While Robson Rotation obviates the need for such anti-gaming measures in the ACT, having a provision that allows the Court of Disputed Returns to make whatever orders it deems necessary to achieve a just outcome in a particular situation would be sensible.

An ordinary quota-preferential scrutiny with such an unobjectionable set of constraints would produce the fairest outcome in these circumstances or any others where certain candidates could be appropriately declared elected by the Court of Disputed Returns and detailed orders brought down about how any remaining vacancies were to be filled. As the disqualification of any candidate would still leave intact the remainder of the preference order that each individual has indicated, it would only be in extreme circumstances that a fresh call for nominations could be entertained.

By allowing the replacement of a limited number of ballot-papers, the bypassing of names of disqualified candidates and the declaration that particular candidates achieved the quota and should not have their positions put into question in subsequent fresh voting and counting, it would usually be possible to achieve electoral justice that comes as close as is possible to being contemporaneous with voting that occurred elsewhere around the Territory.

The flexibility to undertake or order any other limited corrective action that facilitated a fair assessment of voters’ wishes as much as possible in line with those expressed in initial voting should be inserted into the powers of the Electoral Commissioner and the Court of Disputed Returns, along with appropriate broad guidance about how it might be arrived at in extreme situations in accordance with the principles that apply when Western Australian Legislative Council casual vacancies are filled.