

**Submission
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ADMINISTRATION OF THE 2019 NSW STATE ELECTION

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Inquiry into The Administration of the 2019
NSW State Election and Related Matters

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Thank you for the opportunity to make a submission to this Inquiry.

I am public policy professional who has worked in close connection with Australian parliaments and governments – predominantly in relation to the ACT, Victorian and federal governments – since 1994. I was a casual election-time employee of the Commonwealth Electoral Commission in the 1990s and was on one occasion an Officer-in-Charge of a polling place. I was an officer of the Victorian Public Service from 2005 to 2015, but now reside in NSW, while working in Canberra. In addition, I write for a blog focussed on the science and performance of electoral systems in Australia and worldwide (www.onelections.net).

This submission focuses on aspects of the voting systems by which the NSW Legislative Assembly was elected.

While Australia has by world standards exemplary systems and institutions for conducting elections, and a rich history of electoral process innovation, our system is not without faults. There is much to praise about our elections. Our electoral administration is high quality and politically independent, a public benefit which should not be underestimated. But in the interests of space, this submission gets to the point about some specific faults as I see them.

The long-term trend in electoral mood

The comments I make here relate to the election of the Legislative Assembly. Due to its electoral system the NSW Legislative Council is a far more ‘democratic’ chamber – arguably the most democratic in the world – but this submission is focussing on electoral outcomes in the Assembly chamber, which is responsible for confidence in the governing Executive.

The 2019 state election was historic in terms of the continuing direction of voter support shifting away from the two major Australian political parties. A record nine cross bench members were elected to the Assembly.

The political significance of this has been obscured by the Coalition parties retaining an overall majority in the Assembly, which diminishes the current crossbench in terms of political influence and media attention. But the significance of this development should not be overlooked. It will require only a minor re-balancing of the relative Coalition-Labor voter support in the future (or a few lost by-elections) to create minority government conditions.

The adjacent table shows that 2019 has set the record for the non-major party vote since modern political parties formed in NSW in the early 20th century, with 25.1% of the electorate giving first preference support on Assembly ballots to candidates not from Labor or the Coalition parties.

Moreover unlike previous surges in non-major party support – such as for the DLP in the 1960s-70s and the Australian Democrats 1970s-90s, One Nation in Queensland in 1998, the Xenophon-SA Best movement in South Australia, and the various recent Clive Palmer groups (none of which won significant numbers of lower house seats) – the 2019-23 Assembly crossbench consists of three distinct political movements: the Greens, independents, and the Shooters, Fishers and Farmers (SFF) party.

Table 1: Key non-major-party candidate voter support statistics 1991-2019

<i>Election</i>	<i>Total non-major-party formal 1st preference vote</i>	<i># of non-major party candidates placing in final 2</i>	<i># non-major party candidates winning seats</i>
1991	16.3%	11	4
1995	14.8%	4	3
1999	24.1%	10	5
2003	22.9%	14	6
2007	24.0%	21	6
2011	23.3%	21	4
2015	20.3%	14	5
2019	25.1%	19	9

The drivers of voter support for none of these three movements have a temporary feel about them. The Green and independent support in particular is baked into the state political culture. The SFF party’s lower house electoral success may be relatively recent, but SFF does not resemble the one-off ‘Palmer’-style electoral results; the SFF party has been around in some form for over two decades, is active in multiple states, and the party’s parliamentary experience and voter base are more settled, and slowly but steadily growing.

Returning to the table, in 2019 the rate of non-major-party candidates making it to the final two candidates in the preferential counts was also very high, although the results at the 2007 and 2011 elections were slightly higher still.

Behind these statistics is a long tail of other well-performing candidates (exceeding, say, 10% of the vote) which impacted district preference counts to varying degrees.

(Note that the size of the 'NMP' vote is not necessarily determinative of whether the final count amounted to a close race, because some strong NMP results happen in very safe Coalition or Labor seats.)

This strong historical trend should colour all analysis of the efficacy of the present electoral system, which is the theme of the next section.

In time, if the total NMP vote keeps increasing, election results will increasingly become seriously anomalous in terms of basic electoral goals including equality of voter influence, freedom of voter choice, the how many voters achieve adequate representation in the Assembly.

A performance assessment of the 2019 election of the NSW Legislative Assembly

In common with several other Australian parliamentary chambers, and many worldwide, the Assembly is elected in a system of single-member districts.

Such systems significantly damage the representative credentials of the chambers so elected. Through the use of the single-member-district approach, the choice of candidates available to voters is sharply constrained, the effective value of votes is rendered seriously unequal (some becoming highly influential, and some left to be of very low influence), and large numbers of voters are left unrepresented.

The party rooms of the major parties resulting from such elections are also strikingly distorted, with many party supporters across the state left unrepresented in both the Labor and Coalition membership of the Assembly. This is a most important point. Most complaints against single-member-district electoral systems focus on the perceived unfair impact on voters who choose to support minor political parties. But the distorting effect on the major party rooms may be an even greater ongoing issue. Their distorted nature may be a direct input into the tendency of governments to be too focused on only part of the electorate at a time, to the perceived neglect of other parts of the community, which in turn generates an ongoing driver of voter dissatisfaction. In short, improving the representative breadth of the major caucus/partyrooms could be of vital future importance to our system of government.

Participation and representation

Driven by compulsory voting and long-established culture, Australia has impressive electoral turnouts, consistently at or near 90% of enrolled voters. The turnout results appear to have been drifting down slightly in recent years, but that is most likely due to much improved methods of capturing all legal electors on the rolls, including young voters.

At the NSW Assembly elections of March 2019, the enrollee turnout stood at **86.3%**. Put another way, **13.7%** of the electorate did not participate in the election of the Assembly.

However, the proportion of enrolled voters who, following the election, have a representative whom they specifically sought in the Assembly is far lower, standing at only around **43.5%**. These are the voters whose 1st preference vote supported the successful elected MP.

The large gap between those two results – the remaining **42.8%** of the electorate – sought specific representation in the Assembly, *but did not get it*. These are the voters whose preference was for a candidate in their Assembly electoral district who was not selected.

The standard rejoinder to this fact is that all those voters are in theory ‘represented’ in the Assembly by their local MP, even if did not support that MP’s election. The claim is false on its face. Choose any partisan political issue, and ask if those whose views do not align with the local MP for their district are ‘represented’ in the day-to-day determination of political decisions. To say that a conservative voter living in Paddington, a Labor voter from Wagga, or a Green voter residing in Pymble is ‘represented’ in key political votes in the Assembly is a plain misuse of the term ‘to represent’.

This sorry outcome is alternatively justified by the claim that ‘there must be losers’ in any election. It is unavoidably true that some voters, by reason of them preferring candidates with very low followings, do not in practice achieve representation by candidates of their strongest preference, and that is so under any world electoral system. But the number of voters in this condition can easily be *minimised*.

For example, the proportion of the electorate represented by a preferred choice in the 2019-elected cycle of the Legislative Council is sharply better, at around **74.8%** in total, with **15.6%** not participating, and only the remaining **9.6%** left unrepresented purely by the working of the Legislative Council electoral system. These are very good results for an electoral system; in fact, due to its ‘division magnitude’ of 21 seats, excellent voter enrolment rates, and Australia’s very high voter participation rates, the NSW Legislative Council is arguably the most representative democratically elected assembly *in the world*.

There is a further problem: the poor rates of representation in the Legislative Assembly also differ significantly according to voters’ preferred political parties. Around **67%** of those of the state’s electors who supported Coalition candidates are represented in the new Legislative Assembly (the rates are 76% for National voters, and 64% for Liberal voters), while the equivalent figure for Labor voters is noticeably lower at around **57%**. The equivalent figure for supporters of the SFF party is **37%**. For Green-supporting voters the figure is much lower still, at just **13%**. Around **33%** of electors who were supporters of independents are represented, but this is true in only in three of the State’s 93 electoral districts, while for all other voters (collectively) the representation figure is of course **nil**.

(Note that the difference between Coalition and Labor outcomes is not inherently partisan, but largely reflects the circumstance that the Coalition had a strong relative vote plurality over the Labor party at the 2019 election; in past elections which returned large Labor majorities the relative major-party result would have been reversed.)

It is true that Australia’s culture of preferential voting allows the supporters of less popular candidates to *influence* the final result for the individual MP in each district (or at least, it does so if the contest happens to be close at least, but not otherwise). This is certainly a superior approach to that of the first-past-the-post single-member-district systems used overseas. But this comparison does *not* mean that these voters are achieving the same form of representation as is achieved by voters who both support larger parties (or rather, those who also live in districts where their preferred candidate prevails). The resulting representation is fundamentally unequal in nature. And this is, quite simply, a serious flaw in the system.

Constraint of choice

Another difficulty is the constraint of choice. In the Legislative Assembly district elections voters were offered typically fewer than ten candidates from which to make their choice of representative, when many more might easily be accessible.

The claimed logic of the present system, as with any system based on single-member divisions, is that choices should be limited on the basis of *residence*. But why should that be so? Residence is a factor which bears little connection to the way modern politics is actually framed, revolving as it does around the policies, programs and manifestos of political parties, and the legislative and political issues which run day-to-day in modern parliaments.

Moreover, in this year's Assembly elections, as is usual under the present system, for each political party only one candidate was offered, where voters might well desire a choice among more than one. There is no sound reason why voters need to be denied such choices in order for the electoral system, or the parliamentary system, to operate successfully. It is a constraint without any valid constitutional purpose from the voter's perspective, and indeed the practice is adverse to their scope of choice, and ultimately adverse to the functioning of accountability in the parliament so elected.

Inequality

The single-member division system also seriously fragments the effective influence on election results of the state's electorate. Electors living in safe districts wield little impact on overall electoral outcomes. Those residing in marginal districts have very high influence. The set of 93 margins of victory showed a coefficient of variation (a basic statistical measure) of 55% (**0.551**), whilst a result of zero would be the case if every vote was absolutely equal.

This difference influence is not merely a mathematical hypothesis, but is proven vividly by the patterns of campaign attention and investment which the state-wide parties undertake.

How to fix these problems

The problems outlined above are not conceptually difficult to identify, and nor are they difficult to repair. The electoral systems are easily fixed by appropriate legislation (or, less easily, constitutional amendment). The solutions can be seen in the electoral systems in use in Tasmania and the ACT, which feature:

- a wider range of choice of candidates, including within parties
- far better results in terms of the proportion of the electorate represented in the elected chamber (noting that voters supporting low-popularity candidates still do not make it into this overall statistic, but may receive the lesser consolation prize of influencing final results through lesser preferences)
- equality for all voters (or nearer approximations to it) of effective influence on the election results

That is the direction in which the electoral law of NSW should therefore be turned. The NSW Parliament should legislate for an electoral system which serves the voters well and creates a highly representative Assembly appropriate for maintaining the necessary constitutional relationship with a responsible government. The present legal regime is not achieving that outcome, and the results will become progressively worse if the electors of NSW continue to turn to alternatives other than the traditional major parties.

A growing potential for district result anomalies

As Australian elections display increasingly high rates of voter support for non-major-party candidates, in many of the vote counts in individual single-member electoral districts the distributions of preferences to determine the single elected MP are displaying an increasing complexity. This is another manifestation of the trend identified above that voters are supporting non-major party candidates in steadily increasing numbers, and also with an increasing diversity of minor party and independent profiles.

One of the technical problems of determining winners by means of sequential elimination (which is of course the universal practice) is that in rare cases, the candidate who prevails in the final count between just two candidates may in fact not be the 'majority winner' or '[Condorcet winner](#)' among all the candidates. In short, there may be a different candidate – one of those who were eliminated during the count – who was actually preferred by most voters to the candidate who was in fact declared the seat winner.

'Hidden Condorcet winners' can occur during especially close three-cornered contests (or, in rare cases, 4- or 5-cornered contests), and also in cases where an electorate is highly polarised, but where a well-supported 'compromise candidate' exists, either in the 'political centre' of that polarisation, or else sitting outside that polarisation entirely, who would have been acceptable to a majority of voters over either of the stronger, but more polarised candidates.

In simple terms, a hidden Condorcet winner will usually end up placed 3rd as the sequential elimination count unfolds, but would be chosen by the voters over either of the candidates placed higher at that point, were that candidate not eliminated by the sequential process.

Have such incidents occurred in Australian elections? In fact, it is fairly easy to rule out this possibility for around 98% of all Australian state and federal single-member-division election contests simply by examining the election results; most elections have a clear winner.

Hidden Condorcet winners will almost certainly NOT occur in regard to candidates to the 'left of Labor' or to the 'right of the Coalition' (often rather loosely described as politically 'extreme' candidates), or who are otherwise in some way controversial so that they have a ceiling above their potential voter support.

It is plausible, however, that during the period of the 1970s-1990s when the 'centrist' Australian Democrats had strong voter support, there were in fact incidents of a Condorcet winner being eliminated by sequential elimination in federal or state elections. As the voter support for independents has risen in the past two decades, it is also plausible that such incidents have also occurred more recently, as community attitudes to leading independents tend generally to sit outside the Labor-Coalition divide, making them more plausible Condorcet winners. Note that NSW has long been the strongest state in general in terms of voter support for independents.

All these speculations are made more intriguing by one very useful tool which has appeared on the NSW Electoral Commissions' website for election results. This relatively new feature, described as the "Two Candidate Preferred (TCP) Analytical Tool" – example [here](#) – allows users to quickly select any two-candidate comparison and reveal which of the two won the strongest preferential voter support. This tool now allows us to identify hidden Condorcet winners who are different from the declared election winner in any given Assembly district.

In the great majority of specific district elections it is clear that the current rule of sequential elimination – or simple the fact of a candidate winning 50% support outright on primary votes – means that no alternative hidden Condorcet winner existed. And to the best of my knowledge no case of a ‘wrong result’ has yet been identified in the 2019 state elections.

Another intriguing case arose in the recent federal election in the Division of Mallee, where no less than five candidates had substantial voter support. This was a remarkably divided election result. The race included candidates of the National Party and the Liberal Party (it being an ‘open seat’ under Coalition nomination practices), Labor, and two well-supported independents. (Note that this broad range of well-supported candidates is not an unusual scenario in many parts of the NSW electorate, mainly outside of the Sydney area.) On the election results the five leading candidates had first preference support of 27%, 18%, 15%, 9% and 9%, and thereafter an extraordinary 19% of the vote still remained for candidates placed 6th and lower on first preferences.

Only on the last count of preferences did the National Party candidate Anne Webster finally reach a 2PP majority (55%) over the Labor candidate. But all this truly proves is that the Labor candidate could not have been the Condorcet winner. It leaves open the possibility that the Liberal candidate or either of the two independents being a concealed Condorcet winner. (Indeed, *more than one* of those may candidates have in fact been preferred to Webster in a two-candidate comparison).

The point of this analysis is not to cast doubt on the legitimacy of Ms Webster sitting as the present federal MP; of course she was correctly elected under the current electoral law. However, what does deserve thought is whether, in a time of increasing voter volatility, such scenarios will become more common, and whether the electoral law needs to anticipate the problem of a correct Condorcet winner not being selected in such a scenario. If that were to occur, it would result in an MP sitting in the Assembly even though the community was fully aware that another candidate was preferred by a majority of voters.

Addressing this issue would require the law to recognise that the Condorcet winner of an electorate’s votes (if one exists – there is also a possibility that no such candidate exists, but leave that aside for the moment) should be the selected MP, rather than the candidate who prevails only in a sequential elimination count.

As mentioned above, this is a rare prospect; it is likely that ~98-99% of electoral races will demonstrably *not* involve any possibility of such a ‘wrong winner’. But in the rare cases where doubt exists, a fairly simple test could be established under the law which would trigger the count of votes to be converted into a full ‘pairwise’ comparison of all combinations of candidates. The existence of the current NSWEC web tool shows that this data in fact already is collected by the Commission.

As argued above, all single-member-district electoral systems yield poor representative outcomes. But so long as the single-member-system endures in Assembly elections, the state’s electoral law should anticipate this scenario and prepare for it. The counting task required has already been addressed in the online data counted for the 2019 election. The necessary legislative provisions should not in fact prove to be particularly complicated.

Funding and disclosure schemes

The debate in Australia about public-interest regulation of flows of political finance has unfolded in a slow and tortured manner for decades. Parliaments – heavily influenced by party fiscal interests and by the desire of party officials to operate away from public scrutiny – have been too sluggish in making obvious, simple reforms. Failure in this area of policy has probably contributed significantly to the long-term collapse of public trust in ‘politics’.

Happily, several years ago NSW developed what was then clearly the best of the state-level regimes for public-interest control of political donations, disclosure of those donations, and public-interest controls on electoral expenditure. Developments in recent years in Queensland and Victoria have complimented and in some ways outpaced the NSW regime. Overall, at state level regulation is getting steadily better.

Therefore, there is no immediate need to criticise the NSW regime, which appears now to be fairly adequate. Outbursts of donations scandal and illegal activity have emerged every few years, entangling both the Coalition and Labor in different ways, and while these affairs do nothing to add to the good reputation of Parliament, they at least indicate that the investigatory and prosecutorial systems are working effectively to apply the NSW laws. The role of the NSW ICAC has also been very important in maintaining adherence to the law.

However the Commonwealth level of regulation of the same matters remains in a very sorry condition. Commentators have been calling for reform for at least a decade. The Commonwealth Parliament’s JSCEM deliberations have either led to recommendations for modest reforms which have been ignored, or have failed to even make meaningful recommendations.

Commonwealth-level developments are not the NSW JSCEM’s responsibility, but I would draw the Committee’s attention to the reality that ultimately a well-integrated national regime covering political finance will be needed. This is true not least because of the continuing possibility of evasion of the law by movement of money between the different regimes, which is facilitated by ambiguities about whether some donations or transactions are of a ‘state’ or ‘national’ legal character. Opportunities for evasion of the laws of all jurisdictions should be closed off.

I would urge the Committee to give thought to ways in which the state regimes and a future reformed Commonwealth regime could be integrated into an effective multi-jurisdictional federal regime. The respective electoral commissions should be encouraged to work cooperatively, and perhaps to jointly develop advice to all governments about integration.

Again, the issue here is not so much NSW law or practice at the moment, but rather that NSW authorities have an opportunity to play a leading role in moving towards a healthy federal regime overall.

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Thank you for reading this submission, and I hope it is of use to the Committee.