

AV OR NOT AV? Lessons from Australia

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I. Introduction

The United Kingdom (UK), long a bastion of first-past-the-post elections, is considering a move to the alternative (AV) or preferential vote used in Australia. A referendum is planned for 5 May 2011 to consider adopting AV for elections to the Westminster Parliament.¹ The referendum is the outcome of coalition negotiations between the Conservative and Liberal Democrat parties. Ironically, the AV system is not the first ‘preference’ of either party. Conservative policy has been to maintain first-past-the-post electoral laws; Liberal Democrat policy has until now been to push for proportional representation. Interest in the AV system in the UK has, historically, been more associated with elements of the Labour Party. For instance Labour proposed a reform bill including AV as long ago as 1930,² and pledged in its 2010 manifesto to hold a referendum on the topic. The AV system has attracted interest in other parts of the world, including the United States where it is known as ‘instant run-off voting’.

In this paper we consider: (i) the nature of the alternative vote (what is it?); and (ii) its implications for voters, parties and candidates, and regulators (how will AV operate in practice?). The practical implications - not of AV but of the run-off or second ballot for which AV is a substitute – were once excoriated by Ramsay MacDonald for giving rise to ‘degrading bargaining, bribing, and other ways of cadging for majorities which would follow the announcement of the figures of the first election’.³ We can consider whether concerns of this nature are legitimate or justified, in view of Australia’s rich experience with AV. Australia has long used AV not only for its triennial national elections, but also for

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¹ Parliamentary Voting System and Constituency Bill 2010 (UK). See further, House of Commons, Political and Constitutional Reform Committee, 3rd Report of Session 2010-11.

² Representation of the People (No 2) Bill 1930 (UK).

³ J Ramsay MacDonald, *Socialism and Government*, vol 1 (1909), p 140.

state elections, all but one of which involve AV.⁴ Over 73 percent of Australia's parliamentarians are elected by AV; the rest, mostly in upper houses, are also elected by preferential voting, but proportionally through the single-transferable vote or STV.⁵

Whilst preferential voting may liberate electoral choice, it comes at a cost, in particular of disenfranchising electors who make mistakes. The Australian experience also teaches that the competition for preferences motivates party apparatchiks to barter over and campaign for preferences—which have become a new kind of currency—in ways that bear out some of Ramsay McDonald's concerns. This paper discusses these costs and effects and the regulatory measures laws implementing AV may require to address unintended consequences and attempts to game the system.

II. The Alternative Vote

The 'alternative vote', or AV for short, is a political science term for a form of voting in which electors rank candidates in order of preference. AV goes by various names, notably 'instant runoff voting' in the US and 'preferential voting' in Australia. Each elector has a single vote, but that vote can be transferred between candidates, during the count, according to the elector's ranking of preferences. The invention of preferential voting from the 1850s, in the form of multi-member electorates using proportional representation under STV, is most associated with Thomas Hare. It was particularly promoted by John Stuart Mill. Then, in the 1870s, an MIT Professor of Architecture William Robert Ware devised AV as a majoritarian, single-member simplification of STV.⁶ Thus British and American ingenuity combined to give birth to the concept of AV. Australia is often credited with originating electoral ideas when it is better described as an early adopter and refiner: Australia 'does indeed deserve her reputation as a seed-bed of experiment' but the seeds

⁴ The small state of Tasmania does not use AV for its lower house.

⁵ M Mackerras, 'Single Transferable Vote Systems in Australia' (1996) 34 *Representation* 62 at 62. Papua New Guinea, a former Australian territory, is the only other country with significant experience with AV: B Reilly, 'Preferential Voting and Political Engineering: a Comparative Study' (1997) 35 *Journal of Commonwealth and Comparative Politics* 1. Outside Australia, STV is used most notably in Ireland and Malta: M Mackerras and W Maley, 'Preferential Voting in Australia, Malta and Ireland' (1998) 7 *Griffith Law Review* 225.

⁶ See B Reilly, 'Preferential Voting and its Political Consequences' in M Sawyer (ed) *Elections: Full, Free and Fair* (1997), p 78 at 83.

often ‘have come from outside’.⁷ Curiously then, whilst AV is today pitched as a borrowing from Australia, far from being a purely Australian discovery, ‘British debates over preferential electoral systems had the most influence on events in Australia’.⁸ AV is most obviously contrasted with first-past-the-post voting or FPP for short. FPP is the simple, traditional form of voting for Westminster elections. It derived from the simple method of early polling where electors merely had to publicly declare the name of their favoured candidate: it matured in the ballot era into a method where electors just have to place a cross in the box beside their favoured candidate’s name. (To illustrate the additional complexity of choice under AV, a sample Australian House of Representatives ballot paper is **appendix 1**.)

How does AV work once the ballot boxes are opened? Initially, invalid or informal ballots are put aside. Then the ‘primary’ (or first preference) votes are counted. If no candidate has 50 percent of the primary votes, the count proceeds by eliminating the least popular candidates, in turn, and transferring each of their ballots to the next preferred candidate remaining in the count, in accordance with each elector’s intention. This continues until one candidate has a majority.⁹ In contrast, FPP often fails to produce a winner with a majority of the vote, particularly in three-way contests or where there are numerous minor parties on the ballot. (Candidates who top FPP polling with under 50 percent of the vote are known in the jargon as ‘plurality’ winners.) The chief institutional attractiveness of AV is the extra legitimacy it may give successful MPs and in the formation of government. It has a second, democratic attraction of giving electors more choices. (Indeed it may encourage parties to run candidates in electorates they cannot win). Similarly, under AV electors do not need to vote strategically or vote-barter,¹⁰ and parties

⁷ W ‘Keith’ Hancock, *Politics in Pitcairn: And Other Essays* (1947) 81, quoted in D Farrell and I McAlister, ‘1902 and the Origins of Preferential Electoral Systems in Australia’ (2005) 51 *Australian Journal of Politics and History* 155 at 158. Compare D Butler, ‘Australia’s Contribution to Political Institutions’ (2001) 7 *The New Federalist* 47 at 47: ‘Australia has been the most fertile source of constitutional experimentation, both at the federal and the State level.’

⁸ Farrell and McAlister, *ibid* at 158.

⁹ The official count continues, for indicative purposes, to produce a final ‘two-party preferred’ or ‘two-candidate preferred’ result. This helps estimate swings needed to win elections. In a largely two-party system like Australia this can be done nationwide as well as constituency-by-constituency: a nationwide figure is less sensible in genuinely multi-party systems.

¹⁰ As to which see B Watt, *UK Election Law: a Critical Examination* (2006), pp. 76-82.

need not withdraw candidates strategically. Supporters of parties that run third or worse do not feel their vote is wasted. It achieves these benefits by avoiding vote-splitting. That is the effect, familiar in both the UK and US, where candidates with similar ideological or policy attractions divide the vote, permitting a rival whose positions do not command majority support to win. For example, Ralph Nader's progressive Presidential candidacy in 2000 perhaps deprived Democrat Al Gore of victory over Republican George W Bush. Similarly, during some periods of Conservative rule in the UK, there has effectively been a Lib-Lab opposition with majority electoral support, hindered by FPP yet unwilling to form an electoral coalition to minimise vote-splitting.

The purpose of AV is to ensure a majoritarian outcome in each *electorate*. However, AV does *not* guarantee that a governing party will have earned a majority even of the two-party preferred vote (that is, of votes finally tallied as if all races had resolved into a battle between the two dominant parties). This is not a flaw unique to AV: it can be seen even more starkly in FPP results, and is a result of the 'winner-takes-all' nature of single member electorates. Such distortions of proportionality tend to be exacerbated by quirks in electoral boundaries and in a party's support being concentrated in a few safe seats or, conversely, spread too thinly across the country. In short, whilst the family of STV systems employed in multi-member electorates achieves proportional representation, its AV child, when employed in single member electorates, is majoritarian rather than proportional. Unless minor party support is concentrated, they will likely be under-represented. Nonetheless outcomes tend to mirror the 'two-party preferred' vote. For example in Australia in 2010, the Labor Party secured 50.1% of that vote to 49.9% for the Conservative opposition: each of these major parties won 72 seats.

That said, AV comes with several potentially significant costs. One is that voting is rendered more complex. For the first few elections it is employed, the number of unintentional informal votes will inevitably rise. Such wasted votes will then remain higher than they would be under FPP. Second and more profoundly, whilst removing some of the discouragement to supporters of third and minor parties, AV reconfigures choices for both electors and campaigners. Under AV, electors are asked not just to vote for the party or candidate they most like, but also to rank parties for whom they may have little

enthusiasm. For some, this may transform elections into a choice of the least disliked, rather than the most liked. Parties in turn are encouraged to fight for preferences as much as primary votes, especially in key marginal electorates.

III. Implications of AV for Voters

Variations of AV

If we think of AV from the viewpoint of democratic considerations, it is right to focus first on its effects on electors although, as we shall see, the effects on political parties may be just as great. At this point, it is necessary to understand that there are variations of AV, and that much will depend on the variation adopted. The law can mandate that electors express a full set of preferences. Or it can permit electors to rank as many preferences as they wish: that is the optional preferential vote or OPV.¹¹ Full preferences are mandated in most Australian jurisdictions, and have been since 1918 for national elections, but in recent years two States have employed OPV.¹² Full preferences make life easier for the parties by limiting the fear of vote-splitting. But mandating full preferences puts a heavier onus on electors. If electors wish to vote formally, they must rank *all* candidates on offer. (This is subject only to ‘savings’ provisions: an elector who mistakenly repeats a number on their ballot might be treated as having voted validly up to that point).¹³ Mandating full preferences also may appear to guarantee legitimacy, by forcing electors to choose between the likely governing parties, say Conservative and Labour, or at least between the two most competitive parties in any particular constituency. But it does so even of electors who might see that ultimate choice as one between Tweedledum and Tweedledee.

The Australian High Court has rejected challenges to laws mandating full preferences on several occasions, both before and after the discovery of an implied freedom of political

¹¹ Or indeed as further variations it may mandate electors to make two preferences; or permit electors to make two preferences, as in the case of the Representation of the People (No 2) Bill 1930 (UK).

¹² In New South Wales, OPV is constitutionally entrenched so that a referendum is required to alter it: Constitution Act 1902 (NSW) s 7B and Sch 7. See also Electoral Act 1992 (Qld) s 113. An intermediate option is to require a minimum number of preferences other than one: but this makes little sense in single-member, as opposed to multi-member electorates.

¹³ Compare Commonwealth Electoral Act 1918 (Cth) s 270 (saving certain Senate ballots).

communication in the Australian Constitution.¹⁴ At first glance, the case for full strength AV may seem illogical. How can an elector be *forced* to have a sincere or real preference amongst candidates about which he or she is equally ignorant or uninterested? The Court's response has been that the question is ultimately for parliamentary sovereignty: the design of voting systems is for the legislature not the courts.¹⁵ AV (in its different forms) has long been accepted by political scientists as one reasonable option in a smorgasbord of voting systems. While it may be hard on electors to compel them to rank all the options to vote formally, the High Court has effectively said that it is not irrational to do so. Like it or not, electors must have politicians to represent and govern them, so why not require electors to choose, ultimately, between the parties of government? Parliament is entitled to hope that, over time, even the most apathetic electors may, having been required to express preferences, come to think of party politics not as a set of binary oppositions or to plump for the party they have always plumped for, but to see the parties on a policy continuum and to develop genuine preferences between them.

In democratic theory, OPV is preferable than mandating full preferences. It obviates the problem of forcing electors to find some point of differentiation between all the candidates. As former Australian Prime Minister Whitlam observed, OPV is 'perhaps the only electoral procedure in the world that permits electors to express their *indifference* to candidates'.¹⁶ An elector can even number all squares, but leave the last one blank, in a symbolic snub of an unloved party such as the BNP (on which more below). Yet although OPV may be better from the point of view of personal freedom, it is not without its problems. One institutional concern with OPV is that, in a worst case, it can collapse back into FPP, because it permits electors to just plump for a single party. Whether because they lack confidence in the electoral system (see below) or do not care to embrace multiple parties or candidates, some electors may see the extra choice offered by AV as nugatory. A dominant party with plurality support may encourage electors to plump by running a 'Just Vote 1' advertising campaign. The Labor Party in Queensland employed just

¹⁴ *Judd v McKeon* (1926) 38 CLR 380, *Faderson v Bridger* (1971) 126 CLR 271 and *Langer v Commonwealth* (1996) 186 CLR 302.

¹⁵ Except in extreme circumstances of a blatantly undemocratic or partisan system.

¹⁶ EG Whitlam, *The Whitlam Government 1972-1975* (1985), p 679 (emphasis added).

this strategy when its conservative rivals were divided in the 1990s-early 2000s. It was pitched at encouraging conservative supporters to just vote for the party of their primary choice, splitting the vote by limiting the flow of conservative preferences.

The latter kind of mischief-making can be dealt with two ways. One is by ensuring that electors understand how the OPV system works, and that the choices are always up to them. In a country with multiple voting methods such as the UK, such official education will always be a challenge. The other would be to mandate full preferential voting. The model to be considered at the 2011 UK referendum involves OPV. It is not merely that the notion of electors being led by law to be good citizens sounds illiberal to British ears, a concern hardly assuaged by the fact that (unlike in Australia) electors are free not to vote, and that if full preferences were mandated electors might prefer to spoil their ballot rather than express preferences between Tweedledum and Tweedledee.¹⁷ Under a system mandating full preferences an elector would *have* to choose not to vote to avoid having to express a preference between, say, the BNP and some other extremist party. In the end, mandating full preferences involves requiring voters to express a preference between parties which may be obnoxious to them. Yet without a measure of compulsion, AV is likely to be diminished if a few voters submit a fully completed list of candidates, more submit a partially completed list, and most vote only for a single candidate.

Complexity and Wasted Votes

Under FPP the problem of ‘wasted’ ballots is the problem of votes cast for a party that has no chance of affecting the outcome. AV obviates that problem, but creates a different type of wasted vote. These are informal votes: ballots rejected during the count for not embodying a valid vote. These are typically cast by electors who either do not fully understand the system or who make mistakes in completing their ballot. FPP is the simplest of systems because it elicits the least information. It asks electors to plump for their favourite party or candidate. AV elicits more information. If full preferences are

¹⁷ *Faderson v Bridger* (1971) 126 CLR 271 at 272. As it is, fewer than two percent of Australians deliberately spoil their ballots. Indeed, if too many people voted informally, electoral legitimacy could be undermined more than if electors did not turnout, as deliberate informality is a clearer protest than failure to turnout which can represent contentment, uninterest or protest.

required, it may, subject to any savings provisions, require an elector to rank order a dozen or more candidates. The complexity problem with AV may be particularly acute at by-elections, which often attract such large fields of candidates that they are compared to the fields facing punters in the biggest horse races.¹⁸ Some of these candidates are attention seekers, especially if the by-election attracts national interest. The problem of excessively long ballot papers could be addressed by increasing the level of deposit required to nominate, or raising the bar to registration of political parties.¹⁹ But such ‘solutions’ are themselves problematic for democratic participation, and may run counter to one purpose of AV, which is to enhance choice. More generally, the very shift to a new electoral system - particularly a more complex one - will cause disenfranchisement by confusing electors, especially in the initial, transition period.

Education is vital, but can only go so far. Under compulsory, preferential voting, Australia has high rates of informal voting by Western standards: although it ran as low as three percent in the 1990s, it exceeded five percent in 2004. An official survey ranked Australia 46th out of 146 nations for informality, with an average of 3.7 percent. The UK, under FPP, ranked the best of all: 146th with an average informal rate of just 0.2 percent.²⁰ Concern over inadvertent informal voting is such that the Australian Electoral Commission regularly publishes studies of all informal ballot papers. These suggest higher rates of informality amongst electors from non-English speaking backgrounds, in the form of a strong correlation between electorates with above average foreign language density and informal voting.²¹ Low formal education is a secondary but ‘valuable predictor’ of informal voting,²² and there is anecdotal evidence of electors with shaky handwriting misnumbering

¹⁸ Hence the phrase ‘a Melbourne Cup field’, applied to long ballots in Australia: ‘an Epsom Derby field’ might be the UK equivalent.

¹⁹ In Australian national elections, the deposit for a lower house nomination is approximately £250; half the amount for Commons’ elections. It is somewhat easier to register a new party in the UK: a fee of £150 and an intent to stand candidates. In Australia the fee is about £250 plus 500 members.

²⁰ Australian Electoral Commission, *Informal Vote Survey: House of Representatives 2001 Election* (AEC, Research Report No 1, 2003) at 6-7 and Table 1.

<http://www.aec.gov.au/pdf/research/papers/paper1/res_rep_01.pdf>

²¹ *Ibid*, pp 14-15.

²² *Ibid*, pp 15-16.

ballots.²³ Only a little over one percent of the votes appear to be deliberately spoilt. On average, then, upwards of three percent of turnout in Australia is wasted on accidental informality, and the causes can be summarised as a mixed interaction between compulsory voting, a high immigrant population and the complexity of the electoral system.²⁴ One argument in favour of OPV is that by not mandating full preferences, fewer electors make errors in numbering a long ballot.

Any wasted vote is a shame, not least as the very point of electoral democracy is to equally value each electoral voice. (Inadvertent informality is particularly ironic in Australia, where every vote is so sacred that electors are fined for not bothering to vote). More significant from a systemic viewpoint is whether increased informality – which will surely occur in the UK - will have partisan effects capable of affecting very close races. The Australian experience points to a mild effect on the Australian Labor Party, which enjoys electoral advantage in both immigrant communities and poorer communities with less formal education. If that concern mapped onto the UK system, it would be a particular problem for the British Labour Party, since absent compulsory voting, such communities *already* have relatively lower turnout than less marginalised communities. The effect might parallel a problem which attracted international attention in the botched 2000 US Presidential election, where poorer (and blacker) communities often had the oldest or least efficient voting technology, and hence the highest rates of wasted votes.²⁵ In a worst case scenario, especially under AV mandating full preferences, activists might even load ballot papers in targeted seats with dummy candidates, to create mischief. (This occurred in a 1975 Australian Senate race).²⁶ Having OPV rather than full preferences would make

²³ Ibid, p 16. Some older electors thus inadvertently vote informally, despite having long experience with AV. (The Australian Electoral Commission has not found a significant correlation between electorates with above average populations of octogenarians and informality, but admits the elderly are ‘vulnerable’ to informality.)

²⁴ I McAllister and T Makai, ‘Institutions or Protest? Explaining Invalid Votes in Australian Elections’ (1993) 12 *Electoral Studies* 23 at 23 and following. This thesis is supported by L Hill and S Young, ‘Protest or Error? Informal Voting and Compulsory Voting’ (2007) 42 *Australian Journal of Political Science* 515.

²⁵ S Ansolabehere, ‘Voting Machines, Race, and Equal Protection’ (2002) 1 *Election Law Journal* 61 at 62-63: finding a ‘statistically significant association between race and residual votes’, that is ‘unmarked, uncounted, and spoiled ballots’.

²⁶ When conservative activists allegedly flooded the Senate ballot in the state of New South Wales. More recently, nine Christian Democratic Party candidates were nominated for the Bradfield by-election of 2009: with 22 candidates, the informal vote spiked to nine percent.

such a strategy less attractive. Computerised voting could also radically eliminate accidentally informal votes, but at the risk of erecting other barriers to voting in poorer and older communities.

For all these fears, however, AV is not inherently confusing. Albeit as consumers, electors make choices everyday by ranking often similar products. A cola drinker might like Dr Pepper best of all, but finding it not available at their local grocer have to give a 'second preference' to Coca-Cola or Pepsi. Such choices are not unknown under FPP elections, when an elector finds that their favourite party does not run a candidate in their constituency. But while AV on its own may not be terribly complex, it remains the case that the risk of informality can only increase when electors are asked to use two or more different systems on election day (as the 2008 Scottish Parliamentary elections demonstrated). In Australia, electors are at a heightened risk of informality because Senate voting permits a 'tick-a-box' for a party list, whereas the House of Representatives requires full preferences under AV. As a result, Senate informality is low; but at a cost to formality in the House of Representatives:²⁷ a double dilemma since governments are formed in the latter chamber. A similar effect could be expected if the UK adopts AV for the Commons but a different voting system is adopted for its upper house. Given the complexity of the existing British electoral system these considerations tend to reinforce the case for OPV, so that if some electors mistakenly think they can only vote '1' for an AV election, their primary vote at least will still be counted. (Whether such deemed formality is consistent with the integrity of the process is another matter altogether.)

IV. Impact of AV on Political Parties

Reinforcing Party Cartels?

What then of the impact of AV the political parties? Every voting system has different partisan effects, although these will vary depending on the shape of the party system. The

²⁷ McAllister and Makkai, above n 25 at 34. The position is even worse for New South Wales and Queensland voters, who switch, sometimes in the same year, between the simpler OPV system for State elections to the more exacting full preferential requirement for national elections.

introduction of AV in Australia was driven by partisan concerns to limit vote-splitting when one 'side' of politics was less united than its rivals. In the UK, AV is also driven by partisan concerns (Liberal Democrat interests) and is likely to have partisan consequences (probably Liberal Democrat interests). In many seats where Liberal Democrats run a respectable second place, they may be elected on the preferences of supporters of the third-placed party. Their parliamentary representation will be more proportionate to their actual vote share and they will no longer be also-rans in terms of parliamentary power. Their seat share may ensure them the balance of power, requiring Labour or the Conservatives to negotiate coalition government or a memorandum of understanding to support a minority government. The introduction of AV may thus make coalition or minority government a typical rather than an atypical feature of Westminster politics, moving the Liberal Democrats from a party of perpetual opposition to a party of perpetual government.

However AV is far from an invitation to Italianate chaos. In the Australian experience, AV has exhibited the tendencies to stability and majority government that are a hallmark of FPP.²⁸ Compared to proportional voting systems, AV does not present any positive incentive to the fracturing of the party system (subject to opportunistic exceptions discussed below). A splinter party or small party is unlikely to win any seats under AV, at least until it builds strong primary support, though there may be circumstances where strong preference flows or deals could help small parties such as the Greens to make a bigger breakthrough than under FPP, especially if the two parties in a coalition government were deeply unpopular. For the most part, the Australian experience is that AV has tended to reinforce the large party cartel which operates in many systems with FPP. Indeed the Australian system has been the most durable and rigid two party system of any parliamentary democracy in the world. Races for the House of Representatives typically reduce to a contest between the two major forces, Australian Labor and the Liberal-National conservative coalition. In the British context, AV is likely to reinforce the cartel operating between the main parties. It is unlikely to break open that cartel, though it may

²⁸ C Bean, 'Australia's Experience with the Alternative Vote' (1996) 34 *Representation* 103 at 104. This is why it is the second-choice, behind proportional representation, for many Liberal Democrats.

facilitate a process under way in which the two party cartel is replaced by a three party cartel.

To reinforce this point, it is salutary to look at the experience of Australian national elections since AV was adopted in 1918. Aside from the effects of two temporary splits in the Labor party, only one minor party candidate has won a seat at a general election to the Australian House of Representatives since 1919.²⁹ The exception is where a popular local independent emerges: in that situation, preferences can be crucial in electing that independent or having his or her supporters decide the race.³⁰ (Analogues of this of course have occurred in UK even under FPP: for instance Wyre Forest's election of an independent on local hospital issues in 2001 and 2005.) This is not to say that small parties are shut out completely from representation in Australia. Rather, the parliamentary role of minor parties such as the Australian Democrats, Greens and One Nation in recent decades has arisen because of the proportional, STV system for Australia's Senate, not AV. There is a parallel here in the UK, where the list system employed for European Parliamentary elections has permitted parties such as the UKIP, Greens and BNP to gain a foothold. If rainbow representativeness were the goal, proportional representation (say for a second chamber) is a better avenue: it will not be achieved through AV. Indeed, where parties can garner significant regional support, FPP does not prevent parliamentary representation, as the records of the various nationalist or unionist parties in Scotland, Wales and Northern Island demonstrates.³¹

An Expanded Role for Minor Parties?

If AV is likely to strengthen the electoral voice of the large parties, how will it affect their behaviour during elections? Australian experience suggests that the main parties will seek to do 'deals' with other parties, a practice that may be even more intense in the UK's three

²⁹ A Greens MP in 2010. See D Jaensch and D Mathieson, *A Plague on Both Your Houses: Minor Parties in Australia* (1998), pp 210-212. (Labor splits occurred during the Depression and the Cold War). The record at by-elections is almost as paltry, although The Greens briefly took a Labor seat in 2002, with a primary vote of just 23 percent. On the institutional factors involved see Jaensch and Mathieson, pp 173-182.

³⁰ In recent decades independents have had success in Australian regional electorates, as rural politics has become more localised and fragmented in the face of drought and population decline.

³¹ Although a federation, there are no equivalent sub-national parties in Australia.

party system than in Australia's two party system. 'Preference deals' are arrangements created by horse-trading over preference recommendations. Preference recommendations are where one party advocates or guides its members and supporters to allocate their preferences in particular ways. Obviously no party can guarantee that members and supporters will behave as requested.³² But where there is both loyalty to a party and uncertainty about the other candidates (or the electoral system itself), this guidance can be very influential. In Australia it is provided through the ubiquitous 'how-to-vote' card. This is a flyer, usually distributed on the doorstep of the polling booth, but sometimes also advertised in newspapers. In it, a party will replicate an image of the official ballot paper and seek to instruct their supporters on how to allocate their second and later preferences. Such guidance has most effect on the staunch supporters of the major parties: people who habitually vote Labor or Liberal for example, and may not think much about how to rank the minor parties. But it can also be very influential on supporters of minor parties, who may otherwise be exercising a 'protest' vote. (Sample cards are at **appendix 2**).

The UK context is particularly complicated and fluid. In many safe seats, one of the three parties romps home with at least 50 percent of the vote: that party should continue to win 50 percent of the primary vote under AV. In others, one party is dominant and the other parties are so weak that preferences are unlikely to affect the result. But in many seats, the vote is split three ways such that the preferences of the weakest of the large parties will decide the outcome. Further, AV may encourage more candidates to run in many UK constituencies, by lessening concerns about vote-splitting and 'wasted' votes. In the 2007 Australian election, for example, the average number of candidates per constituency was just over seven. AV can deal parties currently on the margins into the political process: such as the Greens on the left and the BNP and the UKIP on the right. (Conversely, the three main British parties could tacitly agree to not do any deals with the BNP and to symbolically place it last on their how-to-vote recommendations).³³ AV will

³² Unless electors are given an option of just voting '1' for a party, and the party channelling those preferences according to a pre-determined flow, as occurs for Australia's Senate elections.

³³ The mainstream parties in Australia adopted this approach to 'starve' the racist, nationalist One Nation Party in the early 2000s; the One Nation Party saw this as evidence of a cartel at work.

likely increase the collective vote share of minor parties, which is suppressed by FPP. At the 2005 Commons election, for instance, the minor party share of the vote was just 5.6 percent. In the 2010 Australian House of Representatives, in contrast, it was over 18 percent³⁴ Whilst AV would put an end to tactical voting in the UK,³⁵ in its stead it may erect a market in preferences, which in Australia have become a form of 'political currency'.³⁶ Even if preferences are irrelevant to the outcome in a majority of safe and semi-safe seats, the fates of governments are rarely decided in such electorates. Under AV, 'second preference' strategies are crucial to the campaign strategies of every party that has a realistic chance of winning seats.

Preference deals take several forms. They can be across the board and cover all seats; or they may only cover particular key seats, with a party making no recommendations to its supporters in other seats. Parties can do deals for quid pro quo preferences: a party like the Greens might preference centre left parties in the lower house in return for preference support in any upper house election. Aside from such preference 'swaps', preference deals offer two benefits for smaller parties. The first is policy influence, with preference deals providing an opportunity to exert some policy leverage over the major party suitor. For example, the UKIP could seek a more euro-sceptic manifesto from the Conservatives.³⁷ In that scenario, a party otherwise marginalised under FPP is dealt into the sphere of influence.³⁸ It may become a kind of pre-electoral partner of the major party, to the extent that it has an interest in the major party it preferences winning seats and government. It will wish to demonstrate that its preference recommendations make a difference in the outcome in key seats. Although such deals are not binding contracts,³⁹ a major party in government will only renege on such policy

³⁴ D Kavanagh and D Butler, *The British General Election of 2005* (2006), p 204. Compare Australian Electoral Commission <<http://results.aec.gov.au/13745/Website/HouseStateFirstPrefsByParty-13745-NAT.htm>>

³⁵ On which, see J Curtice et al in Kavanagh and Butler, *ibid*, pp 238-245.

³⁶ G Orr, 'The Australian Experience of Electoral Bribery: Dealing in Electoral Support' (2010) 56 *Australian Journal of Politics and History* 230.

³⁷ Or the Greens could seek an environmentally focused manifesto from centre-left parties.

³⁸ This is not to say a minor party has no influence under FPP. It can threaten to run and split the vote.

³⁹ G Orr, 'A Politician's Word: the Legal (Un)enforceability of Political Deals' (2002) 5 *Constitutional Law and Policy Review* 1.

commitments at a cost to its credibility. For smaller parties, preferences under AV thus offer a form of influence without representation.

The other benefit a minor party may gain from a preference deal is tangible support. If the major party to the deal has spare resources (financial or otherwise), it might agree to assist the minor party in its campaign. A typical way this occurs in Australia is through lending volunteers to distribute the minor party's literature, especially on polling day. At first glance it seems perverse that one party, in competition with another, would assist the other with scarce campaign resources. But it is in the major party's interest that the minor party's preference recommendations are publicised. As we shall soon discuss, such tangible support raises the almost forgotten problem of electoral bribery, invoking the spectre of Ramsay McDonald's fears cited at the start of this paper. Of course elements of such calculations and influence are not unknown to FPP politics. The threat of minor parties running candidates and bleeding or splitting the major party vote may already prompt the major parties to make policy appeals to electors who might otherwise support those minor parties. But preferential voting under AV adds a new dimension to FPP politics, as preferences become a currency and minor parties are directly dealt into the system.

V. Impact of AV on Regulation

Bribery

Finally, what about the implications of AV for the regulation of elections? British elections are governed by the Representation of the People Act 1983 (RPA), the contents of which generations of British public lawyers have been blissfully ignorant. (British public law is more concerned with restraining the powers of representative institutions than understanding their composition, purpose, or operation. Part II of the RPA deals with the election campaign, and addresses a wide range of practices. Much of this was put in place by the Corrupt and Illegal Practices Act 1883 (UK) in response to the then endemic custom

of crude vote-buying.⁴⁰ Since then the concerns addressed by the Act have grown, as new technology and new inventions (such as the motor car) contrived to change the landscape on which elections were fought. The Australian experience suggests that the adoption of AV and the likely trade in preferences will mean that some of the provisions of the 1983 Act may need to be adapted and expanded (remembering it is possible that Australian practices will not be reproduced, but that different problems giving rise to different needs may emerge).⁴¹ The first issue, however, is that preference deals under AV create the spectre of electoral bribery, an offence largely forgotten in most liberal democracies.

The current definition of electoral bribery in the UK is narrow and dated. It is only directed at bribes to influence anyone to 'vote or refrain from voting'.⁴² If AV were adopted this would need to be extended in two ways. First, to clarify that bribing a voter to influence any of his or her preferences is an offence; and second to clarify that bribing another party to influence its preference recommendations is an offence. Both types of bribery are covered in the Australian legislation.⁴³ However such clarification does not settle the question of what influences will be deemed to be corrupt. If preferences are necessarily a form of political currency under AV, then certain deals in them must be acceptable. Thus, log-rolling on policy, to secure a minor party's preferences is unexceptionable: indeed it is part of the point of AV that it recognises the electoral worth of minor parties and the votes they attract. Similarly, it seems unobjectionable for two simpatico parties to simply agree to swap preferences. But what of a major party promising resources -and especially money- to encourage a minor party to make a favourable preference recommendation? Any hint of money or money's worth influencing preference recommendations should be unlawful for the same reasons that electoral bribery was originally outlawed: to allow wealth to purchase electoral support offends democratic egalitarianism and ramps up the cost of participating in elections.

⁴⁰ G Orr, 'Suppressing Vote-Buying: the 'War' on Electoral Bribery' (2006) 27 *Journal of Legal History* 289.

⁴¹ The regime for regulatory adaptation is recognised in Representation of the People (No 2) Bill, cl 1(2).

⁴² Representation of the People Act 1983 (UK), ss 113-114.

⁴³ Commonwealth Electoral Act 1918 (Cth), s 326(2)(a) ('any vote') and 326(2)(d) (preference recommendations).

The use of bribery law to deal with the latter type of case is not, however, without difficulty. A payment or provision of resources may have multiple purposes. One purpose, which most would consider corrupt, would be to reward the minor party for buying its support. Another purpose, which would not be corrupt, is to help a less well resourced party in a joint endeavour, by promoting its profile and preference recommendations. These difficulties were highlighted in Australia in two high profile cases, one involving Liberal Party Minister Vic Garland in 1976, and the other a prominent Labor front-bencher, and now Minister for the Treasury, Wayne Swan, in 1993. Both men were forced to stand aside during investigations after they admitted giving modest sums of money to help a minor party campaign, during preference negotiations. In the earlier case, a Magistrate dismissed the charge; in the later case the Federal Police did not recommend prosecution.⁴⁴ It helped in Swan's case that the ultimate decision as to preference recommendations was made in the minor party's national office, whereas his payment was at constituency level.

Unethical political deals or arrangements are rarely made public, and even when they are, they are difficult to prove on any criminal standard of proof. The Australian experience has been that although prosecutions are rare, the law of corrupt practices (especially bribery, treating and undue influence) at least provide a backdrop against which the ethics of campaign practices can be discussed and excesses inhibited. Aside from ensuring that the existing UK law covering electoral bribery potentially applies to preference voting and recommendations, it is not immediately clear what institutional or legislative measures could be taken to guard against corrupt deals without stifling political practice. For instance, centralising decision-making about preferences in the hands of national-office, party cadre may help professionalise politics in the hands of those more likely to be risk averse and take legal advice. But such centralisation creates its own deficits for participatory democracy. A simple legislative provision could be drafted to ban payments or transfers of resources between otherwise rival parties or candidates, but this would breach the freedom of association of parties that are simpatico or in informal coalition.

⁴⁴ See Orr, above n 37 at 230-233.

How-to-Vote Material

The emergence of horse trading in preferences under AV thus raises questions about the adequacy of the existing law, particularly relating to bribery. Preferential voting will affect campaigning more broadly, in ways that may also require regulatory attention. If Australian experience is any guide, an inevitable development will be the emergence of how-to-vote material, through which parties seek to influence how electors complete their ballot. The ubiquitous how-to-vote cards, distributed outside polling stations, form the most visible sign of the crucial nature of preferences under AV. To some, this is a perfectly legitimate practice, and a cherished election-day activity through which activists can support their party. To other observers, however, these cards are a menace: they may lull some electors into thinking that to vote Labour, for instance, one must follow the Labour how-to-vote card. Such a perception dulls one of the democratic purposes of AV, namely to ask electors to decide for themselves which of the major parties they wish to win in their electorate. In between, others see how-to-vote cards as mostly wasted paper. Provided each candidate has a party name or ‘independent’ alongside their name, any informed elector should be capable of casting their ballot without the assistance of such a card.⁴⁵

In response to some of these concerns, two Australian jurisdictions have legislated a one hundred metre *cordon sanitaire* around polling booths, within which no electoral material can be distributed.⁴⁶ But although this prevents the distribution of the material where it will have the greatest impact, it does not prevent the distribution of how-to-vote material by other means, such as via letter-boxing or newspaper advertisements. Electors are of course free to bring such material with them to the polling station, even in these jurisdictions. A less restrictive alternative would be to ban the distribution of how-to-vote cards in the vicinity of polling stations and instead require the electoral officials to post samples of each party’s card near each polling compartment for those electors who wish

⁴⁵ In Australia, the preferences of Greens supporters tend to be invariant to their party’s recommendations, probably because such electors tend to have strong ideological commitments.

⁴⁶ Electoral Act 2004 (Tas) s 177; Electoral Act 1995 (ACT) s 303. These rules only apply to sub-national elections.

to consult them. This solution cuts down on the environmental cost and treats every party, however big or small, as equals. It has not, however, been trialled as an option in Australia, presumably because it deprives the major parties of their natural advantage of being able to mobilise activists around every polling station.

A more serious concern with how-to-vote cards is not so much the fact of their distribution but the manner and content. Problems routinely arise in Australia when major parties circulate ‘second preference’ how-to-vote cards. These are not distributed to guide the major party’s supporters, but to appeal to the supporters of a particular minor party. The temptation has been to disguise the true source of the card: the aim is to harvest preferences by luring minor party supporters into assuming the cards represent the recommendation of that minor party. Subterfuges include authorising the card under the name of an obscure major party official without clear mention of that party and adopting a different get-up to the major party’s established brand. To translate a common Australian example into the UK context, the Conservatives might publish a card titled ‘Think of Voting 1 for the Greens? Give your 2nd Preference to the Conservatives’. Whilst that text may seem innocent, it would be less so if it were published on green, recycled paper. In two egregious Australian cases, Australian Labor activists tried to mislead electors orally and in the manner of their dress. In one case, they handed out visually neutral cards whilst saying to electors ‘Voting One Nation?’ (implying that the card had come from the One Nation Party). In another case, Labor activists donned light blue t-shirts with the slogan ‘Put Your Family First’, whilst handing out cards designed to appeal to supporters of the religious, Family First Party.

Such mischievous material and practices in Australia have given rise to ex tempore injunction actions on polling day,⁴⁷ and even to an election petition.⁴⁸ In Australia it is an illegal electoral practice to mislead an elector in the casting of their vote.⁴⁹ Judicial intervention however is an expensive stitch out of time. Election day applications are

⁴⁷ *Goss v Swan* [1994] 1 Qd R 40 (adopting test of ‘gullible’ elector).

⁴⁸ *Carroll v ECQ (No 1)* [2001] 1 Qd R 117.

⁴⁹ Commonwealth Electoral Act 1918 (Cth) s 329. The Australian High Court in *Evans v Crichton-Browne* (1981) 147 CLR 169 held that this offence applies only to misleading voters as to how to translate their intentions into a valid vote: this includes misleading an elector who wishes to follow a particular party’s preference recommendations.

hurriedly argued and polling may be almost over before an injunction can be served. Worse, an election petition is not only post-facto, but a waste of money unless the winning margin is extremely narrow. As a result, some Australian jurisdictions have adopted a regulatory salve, and require all how-to-vote material to be *registered* well before polling day. This gives electoral authorities and rival parties time to object to potentially misleading material.⁵⁰ For Australian national elections, new laws are mandating that parties publishing ‘second preference’ cards display their name in legible font.⁵¹ Such micro-regulation is unlikely to stop all mischief and malpractice, but if AV were adopted elsewhere, it would be wise to legislate such measures. This is particularly so as the UK has no culture of using the courts on election day, and post-election petitions, which provided the traditional way of policing electoral cheats, have fallen into disuse.

⁵⁰ Eg Electoral Act 1992 (Qld) Pt 9 Div 2.

⁵¹ Electoral and Referendum Amendment (How-to-Vote Cards and Other Measures) Act 2010 (Cth).

Appendix 1: Illustration of AV (Full Preferential) Ballot Paper

(© Australian Electoral Commission)



The image shows a sample ballot paper for the House of Representatives. At the top, it features the Australian coat of arms and the text: "BALLOT PAPER HOUSE OF REPRESENTATIVES YOUR STATE ELECTORAL DIVISION OF YOUR ELECTORATE". Below this, a large instruction reads: "Number the boxes from 1 to 8 in the order of your choice." The ballot lists eight candidates, each with a numbered box to its left. The candidates are: CANDIDATE A (POLITICAL PARTY), CANDIDATE B (INDEPENDENT), CANDIDATE C (POLITICAL PARTY), CANDIDATE D (POLITICAL PARTY), CANDIDATE E (POLITICAL PARTY), CANDIDATE F (POLITICAL PARTY), CANDIDATE G, and CANDIDATE H (POLITICAL PARTY). A large, diagonal "SAMPLE" stamp is overlaid on the ballot. At the bottom, it says "Remember...number every box to make your vote count." and includes the AEC logo (Australian Electoral Commission).

BALLOT PAPER
HOUSE OF REPRESENTATIVES
YOUR STATE
ELECTORAL DIVISION OF
YOUR ELECTORATE

*Number the boxes
from 1 to 8 in the
order of your choice.*

4 CANDIDATE A
POLITICAL PARTY

6 CANDIDATE B
INDEPENDENT

3 CANDIDATE C
POLITICAL PARTY

1 CANDIDATE D
POLITICAL PARTY


5 CANDIDATE E
POLITICAL PARTY

8 CANDIDATE F
POLITICAL PARTY

2 CANDIDATE G

7 CANDIDATE H
POLITICAL PARTY

**Remember...number every box
to make your vote count.**

 **AEC**
Australian Electoral Commission

Appendix 2: Sample 'How-to-Vote Cards'

Full Preferential Voting

Vote 1 Adele Carles

ADELE CARLES
A NEW FACE FOR FREMANTLE

How to vote for Adele Carles
Make your vote count, remember to number all the boxes.

Legislative Assembly Ballot Paper

7	VARGA, Nik Independent
9	TOTTEN, Rob CITIZENS ELECTORAL COUNCIL
3	TER HORST, Jan Independent
4	ZAGAMI, Carmelo Independent
6	BONI, Steve Independent
8	DU PLESSIS, Andriette WAFAMILYFIRST.COM
5	TAGLIAFERRI, Peter Australian Labor Party
11	HOLLETT, Julie Christian Democratic Party WA
10	LORRIMAR, Rosemary Anne Independent
1	CARLES, Adele Greens (WA)
2	WAINWRIGHT, Sam

Remember that this is just a suggestion
— you are always free to number the
candidates in the order of YOUR choice

THE GREENS

CHANGE BEGINS HERE

Vote 1 Adele Carles

Authorised S. Rees, The Greens WA, 442 Hay St, Perth
Printed PK Print, 25 Employment Crescent,
Hamilton Hill

Card under OPV

(Labor Party opting for a 'vote 1' only strategy)

Peter Beattie & LABOR
Putting Queensland First

Steve Bredhauer
Labor for Cook

BALLOT PAPER

WEBB, A

HOLLINGSWORTH, L

Vote **1 BREDHAUER, STEVE (ALP)**

IMPORTANT: If you spoil your ballot paper, ask for another one.
Printed on 100% recycled Australian-made paper. PLEASE DISPOSE OF THOUGHTFULLY.

Vote 1 LABOR in your electorate
If you wish to distribute preferences, make sure that One Nation, CCAQ and like candidates are placed last.

Authorised C. Milner ALP 16 Peel St South Brisbane

'Second Preference' Card

(Issued by Labor Party, appealing to Family First Party supporters, although Family First Party policy recommended *not* preferencing Labor)

