

From Gerry-Built to Purpose-Built: Creating Fair and Equal Electoral Districts in South Australia[#]

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This paper examines the Constitutional requirement of the Electoral Districts Boundaries Commissioners in South Australia.

Elsewhere in Australia, and until 1991 in South Australia, the presumption has been that a redistribution of electoral districts would only be politically fair if the redistribution authority is blind to the political consequences of the boundaries it draws. The fairness clause reverses that presumption, and requires the Commission to take political values into account, in much the same way as the parties, commentators and political scientists have always done.

The paper covers the process the Commission has worked out to put the fairness clause into effect. I'll also look at why the fairness clause was introduced.

First, the fairness clause itself

Like every other jurisdiction around Australia, South Australia requires its boundaries commissioners to draw electoral boundaries in such a way that each seat will have roughly the same number of electors at the subsequent election. In addition, the Commissioners must try to make sure that, at that election the party which wins a majority of the votes will win a majority of the seats, and will therefore be in a position to form government.

Specifically, section 83(1) of the South Australian Constitution Act 1934 requires that:

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In making an electoral redistribution the Commission must ensure, as far as practicable, that the electoral redistribution is fair to prospective candidates and groups of candidates so that, if candidates of a particular group attract more than 50 per cent of the popular vote (determined by aggregating votes cast throughout the State and allocating preferences to the necessary extent), they will be elected in sufficient numbers to enable a government to be formed.

As in every other jurisdiction there are other criteria which the commissioners *may* take into account — geography, community of interest, ease of communication with the Member — but the equity and fairness criteria are so demanding that in practice they over-ride these criteria, and in particular a requirement that *existing boundaries* be taken into account has been removed altogether.

To put this into context, I need to summarise the electoral system in South Australia

It is bi-cameral. The Legislative *Council* is elected using proportional representation over one Statewide electorate. The Boundaries Commission has no reference at all in relation to that House.

The House of *Assembly* has 47 Members elected to represent single-member seats. It is these electorates that the Boundaries Commission is responsible for. Boundaries are examined and can be redrawn after every election.

Elections are held on a fixed date every four years.

In Assembly elections, there is a full preferential ballot. In the final result in a seat, if the contest involves a candidate other than the ALP or Liberal candidate (if it is an ALP: NAT result for example) the ballot papers are rethrown to find a theoretical ALP: LIB two party preferred result. This means that there is an official count of the two party preferred vote for the State as a whole, for each seat and indeed for each booth.

The *Electoral Districts Boundaries Commission* is an on-going entity of three Members — the most senior puisne judge of the Supreme Court, the State Electoral Commissioner and the Surveyor General. The redistribution process is essentially a legal one.

A quick overview of boundaries

Many of you will immediately think of Playford and malapportionment. What Playford did in 1936 was to entrench existing malapportionment as a formal *zonal* system, which kept the LCL in power for the next 30 years, even at elections when the 2PP estimates show that the majority of voters across the State would have preferred a Labor government.

In 1965 *the ALP* won government despite the enormous disadvantage that it faced at the polls, but electoral reform was blocked by the Legislative Council. Electoral reform was gradually achieved by the ALP under Dunstan and also by Steele Hall's 'small l liberal' government, and in 1976 an independent Electoral Districts Boundaries Commission was constituted and drew South Australia's *first ever* set of equitable boundaries.

The Commission's Order came into effect without Parliamentary involvement and it seemed to everyone that, just like the *franchise, boundaries* would no longer be an issue. Someone did suggest that political values might be taken into account but the Commission refused the idea point blank.

In recent history the *political contest in South Australia* has not been *dominated* by either Labor or the Liberal Party. No government has had the numbers in the *Upper House* since the introduction of proportional representation in 1973, and in the Lower House since the Dunstan decade both ALP and Liberal governments have often needed to rely on the support of Independents or members representing minor parties — for example for the 16 years from 1989 until the most recent election in 2006, ALP and Liberal governments relied on the support of minor party MPs and Independents for almost 10 of those 16 years.

South Australia's *political geography* is relatively rigid compared to other States because the degree of regionalisation is quite low. There is no large mining workforce that votes ALP as in Western Australia, and the steel industry based in Whyalla has lost most of its workforce since the mid-1970s. Aquaculture, fishing, forestry and agriculture are not big employers.

As a result there is a fairly limited ALP vote in the country to the extent that the ALP regularly wins just one of the seats outside Adelaide.

By contrast, in the city, it is fairly easy to categorise individual suburbs as either Labor or Liberal.

The result is that country voters support the Liberal Party at a much higher rate than city voters support the ALP. The concentration of Liberal support in country seats was a problem for the Liberal Party in the 1980s, because the Liberal Party could not convert its vote into seats as efficiently as the ALP could.

This was not a matter of *a single-member electoral system amplifying the vote of the winning party*: with a similar share of the vote across the State the ALP consistently won more seats than the Liberal Party did.

And it was not just a matter of *the ALP running a series of effective campaigns in marginal seats*. The political effect of geographically concentrated party support is a phenomenon which had been identified in Britain a hundred years before, and in 1958 *Soper and Rydon* had identified that in federal elections in Australia the ALP

was disadvantaged by concentration of its support in cities. Soper and Rydon developed *measures* for the two *drivers* of under-representation — *unequal electorate sizes* and what they called *the differential concentration of majorities*. If we use their measures we can see that in South Australia before the introduction of equal-sized electorates these two factors were working in opposite directions. In 1975 the fact that some electorates contained many more electors than others, reduced the ALP's effective 2 party preferred vote by 3 percentage points, and the differential concentration of party support reduced the effectiveness of the *Liberal* two party preferred vote by 2.3 percentage points. So when equal-sized electorates were introduced in 1976, the ALP disadvantage was removed but the differential concentration of majorities remained to disadvantage the Liberal Party.

The problem came to the fore at the State election of 1989 when the Liberal Party won 52% of the two party preferred vote across the State but didn't win enough seats to form government.

Meanwhile, there was strong population growth in outer suburban areas which threw several electorates well out of quota, but no redistribution was likely for several years. The ALP government began the process to change the frequency of redistributions but in Select Committee one of the Independent Labor Members whose support made it possible for the ALP to govern, supported the Liberal proposal for a fairness clause. For a win on more frequent redistributions the ALP accepted the fairness clause.

What does having the fairness clause involve?

Implementing the fairness requirement seemed difficult at first because the methodology was not obvious. The Commission and the parties do now seem to be agreed on the following points. Political support will be represented by the two party preferred vote at the most recent election. Political support in a given geographic area will be calculated at the census collectors district level, and it will be the weighted average of the two party preferred results at booths used by the residents of that CCD. The two party preferred vote will be used rather than a two group vote or a government: non-government construct. The pendulum will be used and uniform swings will be assumed to operate (but it won't be assumed that individual seats will each swing to the same degree). Country seats will be assumed to swing less than the average (on the basis of which the Commission will not make the median seat a country seat). The Commission will not take incumbency into account. The Commission will not make large numbers of marginal seats in order to over-insure the need to guarantee the winning party a majority of the seats. The date at which the new electorates will need to have equal numbers of electors will be the next election date.

Finally, the Commission will test its boundaries at two points in time. Firstly at the time of the redistribution the Commission will need to be satisfied that if the

Opposition wins a swing big enough to give it 50%+1 of the 2PP vote, it will win a majority of seats and be able to form government. Secondly, at the time of the subsequent election, the redistribution will be judged on the basis of whether the party or group that wins a majority of the two party preferred vote across the State actually does win a majority of the seats.

The fairness clause is not a proportionality requirement

The Commission does not attempt to fix seats around the pendulum in such a way that a party which wins 55% of the vote will necessarily win 55% of the seats. But it does explicitly set seats around the pendulum in such a way that if either the ALP or the Liberal Party wins just over 50% of the vote, it will win the median seat and be able to form government.

The fairness requirement is not a requirement that the electoral system be fair to all parties, or to individual Members of the Parliament

Minor parties have submitted that the new system entrenches the importance of the two major parties.

Individual Members have submitted that the combination of frequent distributions and the Commission's lack of concern for existing community of interest makes representing communities more difficult. Perhaps more importantly, Members have argued that it seems unfair to have a marginal seat made even more marginal simply because the Commission needs to have seats set at particular points of the pendulum. Naturally enough no-one has complained when a slender margin has been increased for the same reason.

Has the introduction of the fairness clause been worthwhile?

Of the four State elections since the introduction of the fairness clause, three have returned results which were clearly fair in that the party which won a majority of the 2PP vote across the State had also won a majority of the seats. The result in 2002 is not as clear, as the Liberal Party won a majority of the 2PP vote across the State but did not convince the various Independent members to support it to form government — you might recall that an Independent called Peter Lewis gave his support to the ALP to form government even though his was clearly a Liberal-oriented electorate. I agree with the Commission's conclusion that this was not a problem with the redistribution, but with the Liberal Party's ability to translate its support into government.

In general, *the parties and the individual Members support the new system* and there has been no attempt to change or nullify the fairness provisions.

It has taken some time for Members of both parties to recognise that community of interest is no longer a reason for deviation from the quota, but the Commission has been resolute. The paper notes the outcry in 1991 when the Commission attached Kangaroo Island to the Eyre Peninsula electorate rather than the Fleurieu Peninsula electorate, and the Commission's fairly blunt response.

My understanding is that *the Commissioners also support the use of the fairness clause*. When the first draft of the redistribution was finalised in 1991, the Commissioners were surprised to find that without any intention to advantage one party or the other, they had drawn boundaries which would not have given a fair result when judged by the previous election's results. I think that was a salutary lesson.

Has the fairness clause put an end to the disadvantage caused by differential concentrations of support?

Support is still concentrated and sometimes it seems to have made a difference, but it is not always the Liberal Party that has been disadvantaged, so it is hard to see it as a systemic bias. Applying Soper and Rydon's measures to the four State elections since the introduction of the fairness clause, there was a small disadvantage to the Liberal Party in 1993 (of the order of 0.3 percentage points), a disadvantage to the ALP in 1997 (1.7 percentage points) followed by a smaller disadvantage to the ALP in 2002 (0.5 percentage points) and finally in 2006 there was a disadvantage to the *Liberals* of 2.4 percentage points. These are quite variable results and at levels that are relatively low — even the latest is only half the size of the bias that caused the introduction of the fairness clause in the first place. Still, it is unsettling to see levels even this high and what I am doing now is working on the measures, to understand what is happening.

What would the Parliament or the Commission do if the next election produces a result which is clearly unfair?

My guess is that one wrong election outcome would be accepted but two would be a problem. Even then, if the fairness clause is shown to be an ineffective way of ensuring a fair result, the Parliament would not simply discard it without putting into place an alternative which would be likely to do a better job. One possibility would be increasing the size of the House of Assembly with top-up Members based on the State-wide two party preferred vote, to ensure proportionality. My guess is that *any* alternative to the present system would need to guarantee equity and fairness in a way that the current system could not; it is inconceivable that the South Australian Parliament will now turn its back on the fairness requirement.

Finally, the centrality of the fairness clause will now affect how the South Australian electoral system will be able to change in the future

The two party preferred count is so important to the methodology used by the Commission to assure fairness, that South Australia looks quite unlikely to change to an *optional preferential ballot* even if other States or the Federal Parliaments do.

Also, I do not think South Australia would adopt a *large electorate allowance* such as Queensland and Western Australia have introduced, even though there are two electorates in South Australia which would qualify in those states.

On the other hand, Members of other Australian Parliaments have proposed the introduction of a fairness requirement into *their* electoral legislation. It would be a more complex job to apply a fairness clause in a State where optional preferential voting is in place because there is no guarantee of a meaningful Statewide two party preferred vote. Similarly a State or Territory where there is a strong third party unaligned with either the ALP or the Liberal Party, might have problems working with a pendulum or creating a three-dimensional fairness test.

In summary, the fairness clause is something which many observers thought would be either dangerous or impractical, but the paper shows that the Commission has found ways to make it work. It is accepted by the parties and my guess is that even if it fails in the future the Parliament will look for a replacement mechanism that will guarantee both equity and fairness. ▲