



Objection 466

Professor Kim Rubinstein

5 pages



To the: Augmented Electoral Commission

The Hon. Ms Susan Kenny AM KC, Dr David Gruen AO, Mr Tom Rogers, Mr Aneurin Coffey, Mr Craig Sandy LS and Mr Andrew Greaves

Locked Bag 4007, Canberra ACT 2601 and email:

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28 June 2024

Dear Augmented Electoral Commission members,

Re: Victorian Federal Redistribution: Objection to the proposed abolition of the seat of Higgins

I am writing to lodge an objection to the proposed abolition of the seat of Higgins, in Victoria.

My background

I am a Professor in the Faculty of Business, Government and Law at the University of Canberra, a graduate of the University of Melbourne and Harvard University, and one of Australia's leading experts on citizenship, both around its formal legal status and in law's intersection with broader normative notions of citizenship as membership and participation.

This has led to my scholarship around gender and public law, which includes my legal work and my oral history work around women lawyers' contributions in the public sphere.

I was the Director of the Centre for International and Public law at the ANU from 2006-2015 and the Inaugural Convener of the ANU Gender Institute from 2011-2012.

I am a Fellow of the Australian Academy of Law and the Australia Academy of Social Sciences, and I have recently been informed that I am the recipient of the 2024 Council of Australian Law Dean's *Lifetime Achievement Medal*, in recognition of my significant and impactful contributions to legal research in Australia, which will be awarded next week.

I am writing this objection considering my legal knowledge and research.

In addition, I have been advising Lucy Bradlow and Bronwen Bock in their campaign to run as a job-sharing candidate, after Lucy Bradlow approached me in November 2022 to inquire about the legal issues, having been told of this chapter I had written:

https://press-files.anu.edu.au/downloads/press/n7864/pdf/02_rubenstein.pdf

And the shorter version, opinion piece version:

<https://www.broadagenda.com.au/2020/sharing-the-load-why-cant-two-people-represent-a-single-electorate/>

In February of 2023 I joined Lucy Bradlow and Bronwen Bock in writing a letter to Mr Rogers and Dr Kath Gleeson at the Australian Electoral Commission requesting a meeting to discuss the nomination form in the Commonwealth Electoral Act 1918 (Electoral Act).

Considering Mr Roger's response to that letter, I organised a meeting with the Attorney General, and I have subsequently met with the adviser to the Special Minister for State, Senator Don Farrell and other members of Parliament.

That is relevant to the extent that I support the *separate* objection of Lucy Bradlow and Bronwen Bock.

I am writing this objection based on my own expertise and interest in gender and representative democracy, and my constitutional interest in legal structures and representative democracy.

Representative Democracy and the Electoral Act

The purpose of the *Electoral Act* while not specifically stated in a preamble, is to ensure the constitutionally enshrined system of representative democracy, as evidenced through sections 7 and 24 of the Constitution, which includes requiring members of Parliament to be 'directly chosen by the people'.

As the High Court has stated in various judgments, being 'directly chosen by the people' must have meaning – including, for instance that people have access to information (political speech) upon which they can make a judgment about who to choose. (See *Australian Capital Television Pty Ltd & New South Wales v Commonwealth* [1992] HCA 45; (1992) 177 CLR 106 (30 September 1992) and discussion at the Attorney General's [website](#).

In addition, the *Electoral Act* implements the maintenance of representative democracy by mandating citizens' responsibility to vote – and it furthers sections 24 and 29 of the Constitution in developing a mechanism for establishing electoral divisions (and 'the number of members to be chosen' for each division) for the House of Representatives.

Section 24 specifically requires that the number of members chosen in the several States shall be in proportion to the respective numbers of their people, protecting a *minimum* of five members for each original state.

The Court has spoken about evolving principles of representative democracy – and Chief Justice Gleeson in *Roach v Electoral Commissioner* [2007] HCA 43, (2007) CLR 162 confirmed that universal suffrage could be seen to be *constitutionally protected* –

Just as the concept of a foreign power is one that is to be applied to different circumstances at different times, McTiernan and Jacobs JJ said that the words "chosen by the people of the Commonwealth" were to be applied to different circumstances at different times. Questions of degree may be involved. They concluded that universal adult suffrage was a long established fact, and ***that anything less could not now be described as a choice by the people***. I respectfully agree. As Gummow J said in *McGinty v Western Australia*[9], we have reached a stage in the evolution of representative government which produces that consequence. I see no reason to deny that, in this respect, and to this extent, the words of ss 7 and 24, because of changed historical circumstances including legislative history, have come to be a constitutional protection of the right to vote. [para 7 of Gleeson CJ- ***my italics***]

These *evolving principles of representative democracy* underpin all aspects of the Electoral Act, including redistribution and the way decisions are made under the Act about redistribution.

Gender and Representative Democracy

In 1995 I joined with Deborah Cass to write "Representation/s of Women: Towards a Feminist Analysis of the Australian Constitutional System" (1995) 17 *Adelaide Law Review* 3
<https://classic.austlii.edu.au/au/journals/AdellawRw/1995/2.html>

A core question of that piece was: “Does the Australian constitutional system represent women in a manner consistent with an evolving standard of representative democracy?”

One example, for instance, in answering that question was recognising there are ‘neutral’ structures in our constitutional system that impact on the quality of our representative democracy and the extent to which women and their life experiences are being properly ‘represented’ in our legal and political system.

Section 125 of the Constitution - the Seat of Government, mandates that (what we now know as) Canberra ‘shall be in the state of NSW and be distant *not less than one hundred miles from Sydney*’. The Convention debates indicate this requirement was largely to ensure the location of the capital *not favour* NSW. As Justice Elizabeth Evatt observed, women (who were not present at the drafting of the Constitution) would have never agreed to this, recognising the impossibility of leading a normal domestic life while participating in such a peculiarly located parliament. This is one example of a gender-neutral structure continuing to have an impact on women and men who take on equal responsibilities in family life, and not choosing to run for Parliament, to this very day.

Another example of neutral structures that impact on outcomes is in the *Electoral Act* itself. For instance, the composition of the Redistribution Committee in the State of Victoria is determined by neutral factors - being constituted by the role of Electoral Commissioner, the Australian Electoral Officer for Victoria and the Surveyor General of Victoria. In this instance, this results in three men making up the Redistribution Committee.

The Augmented Electoral Commission’s membership is formally neutral but produces a composition of one woman and five men.

Making lawful decisions that also address the quality of Australian democracy and that inform the way that the Australian Electoral Commission fulfils its responsibilities under the Act is incumbent on the Commission.

As such, it is incumbent on the Commission to ensure that aspects of gender and representation are clear and transparent to decision makers themselves in the making of their own decisions under the Act, and to the community impacted by the decisions of the Committee in fulfilling its responsibilities under the *Electoral Act*.

Representative Democracy and Redistribution

Sub-section 59(2) of the *Electoral Act* specifies that a redistribution process should be undertaken when:

- the number of members of the House of Representatives to which a state or territory is entitled has changed, or
- the number of electors in more than one-third of the electoral divisions in a state (or one of the electoral divisions in the Australian Capital Territory or the Northern Territory) deviates from the average divisional enrolment by over ten per cent for a period of more than two months, or
- a period of seven years has elapsed since the last redistribution process was determined.

The purpose of electoral redistribution is to ensure that representative democracy is fulfilled around the principle of ‘one vote, one value’ and to uphold *evolving conceptions of representative democracy*.

Moreover, in making decisions about redistribution, as the Redistribution Committee stated in its final May 2023 report:

“In relation to each proposed electoral division, the Redistribution Committee is also required by the Electoral Act to give due consideration to:

- *community of interests* within the proposed electoral division, including economic, *social* and regional interests,
- means of communication and travel within the proposed electoral division,
- the physical features and area of the proposed electoral division, and

- the boundaries of existing electoral divisions in Victoria, with this factor being subordinate to those above.

The Redistribution Committee can only balance the different criteria against each other so far as they affect each of the electoral divisions in Victoria and try and achieve the best balance overall. *Given the primacy of the two numerical requirements, it is impossible to satisfy all the statutory criteria to the same extent in each electoral division.*"

I have placed italics over each of those terms/sentences above to suggest that in thinking through the concept of *community of interests*, and in making decisions where *two or more electorates could be chosen for removal and still satisfy the numerical requirements*, then the substantive aspects of representative democracy, including the gendered outcomes, should also be relevant to the decision-making process.

The members of the Redistribution Committee could have taken this into account when it made its decision but there is nothing in the Redistribution Committee report that addresses the consequences of the decision on gender and representative democracy. In fulfilling its responsibilities in reviewing the objections, the Augmented Commission should consider this aspect and its impact on representative democracy.

Moreover, there is nothing in the Redistribution Committee report explaining why Higgins was chosen *over Hotham for instance for removal*, or indeed any of the other electorates that *satisfied the numerical requirements for removal*. While Higgins was chosen 'unanimously' by the all-male committee, the report does not explain why it was selected over the other Electorates that *would have also satisfied* the requirements.

The Hope of Higgins

My objection seeks to highlight aspects of gender and representative democracy that should be relevant in making that decision and were neglected in the process and should be taken into account in the final decision.

As Professor Rosalind Dixon wrote on 26th April 2024 after the publication of all the candidates for the seat of Higgins (and before the Redistribution Committee made its recommendation).

"What is clear, however, is that Australian politics is entering a new and more vibrant and inclusive era. A competition among women, with different backgrounds and visions, is a truly inclusive contest, which suggests that the system is on the verge of change – to become open to all.

Contests of this kind also help shift our perceptions of what politicians look like, and how they should behave: when women go up against men, their behaviour is often judged against a male standard. But when women go up against other women, the full shades of individual approaches can shine through, without gendered yardsticks or forms of judgment.

Even the idea of a political job-share also helps shift our frame, to rethink what it means to lead or represent an electorate, and how we can redesign all jobs – to make them more fit for purpose for working families in the 21st century.

Whatever the naysayers might say, politics is a tough and all-consuming job. Sharing the load is thus not about shirking – but rather stepping up to make change. And we desperately need change in all sectors if working parents – and especially working mothers – are to play a full and equal role in our nation's economy and politics."

<https://pathwaystopolitics.org.au/2024/opinion-the-hope-of-higgins/>

A seemingly 'neutral' decision to remove Higgins from the electoral system is not neutral in its outcome in its impact on representative democracy.

For this reason, and the material included in this objection, I urge the augmented distribution committee, in reviewing all the objections, to consider the impact of the removal of Higgins on the electors for the quality of Australian representative democracy.

Those electors in Higgins, and the *community of interest* of Higgins voters, will be denied the opportunity of *choosing for themselves*, from a diverse range of *woman only* candidates, including the first ever job-sharing candidate.

This will not result in the Augmented Redistribution Committee making a partisan/political decision by taking these matters into account, but rather considering a significant factor for representative democracy as protected by the Australian Constitution.

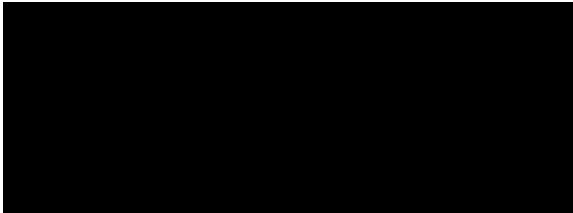
The report clearly indicates there is *more than one electorate that can be removed*.

The fact that Higgins is presenting its electors, *for the first time in the Commonwealth's history*, and the first time since universal suffrage was provided through the *Commonwealth Franchise Act 1902*, the range of candidates that will impact on the quality of Australian democracy, should be a clear and transparent factor to be given significant weight.

In addition, I urge the Augmented Electoral Commission to determine not to proceed with the removal of Higgins and to choose another of the *available* electorates.

I would be happy to answer any questions the Augmented Commission may have in its finalising of the decision,

Yours sincerely,



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