

## SAVINGS PROVISIONS IN AUSTRALIAN ELECTORAL LAW: THEIR FORMS, FUNCTIONS AND HISTORICAL DEVELOPMENT

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### I INTRODUCTION

The introduction of universal suffrage in 1902 established voting as a right for adult Australians who were British subjects and over 21 years of age.<sup>1</sup> However, parties, parliaments, and electoral authorities have not been content with merely ensuring that citizens are entitled to vote. They have also enacted measures that aim to *maximise* citizen participation in elections. Turnout was made compulsory in 1925, which largely solved the ‘problem’ of voluntary abstention from the ballot box. A second concern has been disenfranchisement caused by incorrectly completed ballot papers. This situation arises when a voter submits a ballot that fails to comply with the legal requirements for a formal vote. Since the introduction of compulsory voting, debates about how to improve electoral turnout have largely concentrated on how to reduce rates of informality.

The ‘problem’ of informality has long occupied the attention of electoral authorities and policy makers. This is due, in part, to the fact that rates of informality in Australia have been consistently high relative to other mature democracies.<sup>2</sup> Moreover, the prevailing view in much of the Australian literature is that most informal voting is the result of mistakes and therefore ‘accidental’ or

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1 *Commonwealth Franchise Act 1902* (Cth) s 3. However, the right of the individual to vote in Australia is not absolute. In *Roach v Electoral Commissioner* (2007) 233 CLR 162, the High Court did find for an implied constitutional right to vote but only to the extent that it prohibits the exclusion of ‘groups’ from accessing the franchise unless Parliament ‘can establish to the Court’s satisfaction reasonable grounds for such a denial’: Graeme Orr and George Williams, ‘The People’s Choice: The Prisoner Franchise and the Constitutional Protection of Voting Rights in Australia’ (2009) 8 *Election Law Journal* 123, 124.

2 To put the Australian situation into context, the rate of informal voting at the federal election in 2013 averaged 5.91 per cent. This compares to 0.67 per cent in Canada (2011), 1.03 per cent in the United Kingdom (2010) and 1.55 per cent in Germany (2013). Among established democracies, only Belgium and Luxembourg register higher average rates of informal voting than Australia: International Institute for Democracy and Electoral Assistance, *Voter Turnout* (5 October 2011) <<http://www.idea.int/vt/country-view.cfm?id=-1>>. See M Mackerras and I McAllister, ‘Compulsory Voting, Party Stability and Electoral Advantage in Australia’ (1999) 18 *Electoral Studies* 217.

‘unintentional’.<sup>3</sup> Estimates of unintentional informal voting at national elections vary, but usually fall within the range of 80 to 85 per cent of informal votes cast.<sup>4</sup> Even by the more conservative estimates of the Australian Electoral Commission (‘AEC’) the average rate of unintentional voting in the four national elections conducted in the period between 2001 and 2010 was 60.45 per cent.<sup>5</sup>

Attempts to reduce informality in Australia have relied upon three key strategies. First, the use of educational campaigns to improve voters’ understanding of balloting requirements, as well as authorised voter assistance on polling day. A second approach has been modification of the ballot to provide an alternative method of filling in a valid ballot slip. This has become customary practice across Australian voting districts for elections in which candidates are elected by the single transferable vote (‘STV’) in electoral districts that return more than one member (ie, multi-member electorates).<sup>6</sup> A third strategy, and the focus of this article, has consisted of a remedy in the form of savings provisions. These are rules that ‘save’ certain ballots even though they do not comply with formality requirements.

While the practice of ‘saving’ votes is long established in Australian political and legal practice and discourse, the laws designed for this purpose have not received sustained attention in the literature. This article aims to fill this gap by undertaking a focused examination of savings provisions. We examine their function, forms, interactions with other electoral system components, and historical dynamics at the federal level.

This article has five main Parts. The first two substantive Parts examine the theoretical dimensions of this subject: Part II outlines the functions and forms of savings provisions and Part III explores their interactions with other relevant electoral system components. In Part IV, we survey the variation in savings provisions currently operative across Australia’s nine lower house electoral jurisdictions and in a selection of international jurisdictions. In Part V, we summarise the historical development of savings provisions at the federal level. Part VI develops a theoretical account to explain the historical observations of

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3 See generally Murray Goot, ‘Electoral Systems’ in Don Aitkin (ed), *Surveys of Australian Political Science* (Allen and Unwin, 1985) 179, 203.

4 Lisa Hill and Sally Young, ‘Protest or Error? Informal Voting and Compulsory Voting’ (2007) 42 *Australian Journal of Political Science* 515, 520; Antony Green, Submission No 73 to Joint Standing Committee on Electoral Matters, Parliament of Australia, *Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto*, 31 March 2005, 6.

5 Australian Electoral Commission, ‘Analysis of Informal Voting: House of Representatives, 2010 Federal Election’ (Research Report No 12, 29 March 2011) 27. The AEC categorises informal ballot papers with incomplete numbering, non-sequential numbering, or ticks and crosses as unintentionally informal. Ballot papers that are blank or which contain scribbles, slogans and other protest vote marks are assumed to be intentionally informal: at 12, 23.

6 Voters are presented with the option of voting either above or below the line: AEC, *Ballot Paper Formality Guidelines* (Guideline, September 2015) 15, 20. In voting above the line, the voter is required to cast a single preference for one of the groups listed above the black line on the ballot paper, with subsequent preferences allocated in accordance with that group’s pre-registered group ticket vote: at 16. In voting below the line, the voter is required to allocate a sequential preference for every candidate listed below the black line: at 17, 19.

the previous Part; the account turns on the distinction between primary and secondary electoral laws and the interactions between these classes of electoral law.

In Part VII, we review the preceding analysis and identify several important issues concerning savings provisions that fall beyond the scope of this paper. We explain that, beyond improving our understanding of an under-studied class of electoral law, this study is instructive for two reasons. First, savings provisions can have practical electoral consequences. While Australian electoral authorities do not record how many votes are saved due to savings provisions, such votes can be decisive in close electoral contests. This was apparent in the federal seat of McEwen in 2007 when a recount resulted in the election of the first declared candidate, Rob Mitchell, being overturned and awarded to Fran Bailey. Bailey's subsequent victory hinged on 153 formerly reserved votes that had been salvaged as a result of the operation of the savings provisions.<sup>7</sup> Second, an analysis of savings provisions may provide insights about a set of largely inconspicuous and ignored electoral laws, those we refer to as 'secondary' laws. These are the electoral laws that are typically viewed as being administrative and politically unimportant; they can be contrasted against 'primary' laws, which are central considerations in politicians' calculations regarding the electoral system. Savings provisions are an archetypal example of secondary electoral laws, and thus several of the observations we make in this context may be relevant for understanding other laws in this category.

## II SAVINGS PROVISIONS: FUNCTIONS AND FORMS

### A Functions

Savings provisions (or clauses) are rules that aim to 'save' ballots which do not comply with the official instructions. Justice Brennan described them as legal conditions that 'are designed to minimise the exclusion of ballot papers from the scrutiny provided the voter's intention clearly appears from the voter's partial compliance with the method prescribed' in the Act.<sup>8</sup> Savings clauses do *not* 'prescribe an alternative method; they merely save from invalidity some ballot papers which are not filled in in accordance with the method which the Act prescribes'.<sup>9</sup> Thus they complement the formality requirements by expanding the

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7 *Mitchell v Bailey [No 2]* (2008) 169 FCR 529. A petition was filed with the Court of Disputed Returns to review the conduct of the recount in the division of McEwen on 25 January 2008. Following the initial count, Rob Mitchell (Australian Labor Party) was declared elected by a margin of six votes: at 531 [3]. Following the recount, Fran Bailey (Liberal Party of Australia) was declared elected by a margin of 12 votes. The basis of Mitchell's petition was 'that at least 40 of the 643 reserved ballot-papers had been wrongly rejected by the [Australian Electoral Officer]': at 532 [5]. The Court ruled in favour of Bailey on 2 July 2008.

8 *Langer v Commonwealth* (1996) 186 CLR 302, 317.

9 *Ibid* 318–19 (Brennan J). But see Gaudron and Toohey JJ, who disagreed with this interpretation of savings clauses: at 328, 331.

opportunities for voters to cast an effective vote. However, savings provisions only address informality due to noncompliance with formality requirements; they provide no remedy for informality due to other causes, such as a ballot that has not been duly authenticated or if the voter can be identified.

The principle of ‘saving’ a ballot follows from the idea that a ballot paper is a ‘means to an end, and not the end itself’.<sup>10</sup> Given that the purpose of a ballot paper is to capture a voter’s preference, a ballot paper can perform its function so long as the voter’s intention can be discerned, which can include circumstances when a ballot paper is improperly filled out. It is generally accepted that the value of saving a ballot with an accidental error outweighs the value of strict adherence to official instructions. This means that savings provisions can enhance the legitimacy of elections because they improve the chances that such ballots will count towards the final result. This consideration seems particularly relevant for democracies that impose compulsory voting: if citizens must vote, ‘every effort should be made to make it as easy as possible for an elector to comply with the legislation and in doing so be as effective as possible in casting a meaningful vote’.<sup>11</sup>

While savings provisions are designed to advance normatively desirable goals, their actual operations can pose problems for an electoral regime. To begin with, the notion of a savings clause is predicated on two assumptions about a noncompliant ballot that might not be true in fact. The first is that it is always possible to distinguish accidental from deliberate errors; and the second is that it is possible to determine the intentions of a voter even when she cannot affirm or contradict a particular interpretation of her ballot. Furthermore, savings provisions introduce a ‘moral hazard’ – their existence may cause voters to alter their behaviour in ways that are problematic. In particular, there is a risk that voters will exploit such clauses by intentionally filling out ballots that will breach formality requirements but still be ‘saved’. This is the reason why savings clauses are not publicised by the electoral authorities. In fact, the law often prohibits any promotion of their existence; legislation in five Australian jurisdictions makes it an offence to promote any form of voting contrary to formality requirements.<sup>12</sup> Finally, it can be difficult to design an effective saving provision regime. To do so, lawmakers must gain an understanding of some technical aspects of electoral law. Moreover, they must strike the right balance between fundamental but competing objectives: maximising opportunities for

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10 *Kean v Kerby* (1920) 27 CLR 449, 459 (Isaacs J).

11 Andy Becker, Submission No 103 to Joint Standing Committee on Electoral Matters, Parliament of Australia, *Inquiry into the Conduct of the 2010 Federal Election and Matters Related Thereto*, 12 May 2011, 2.

12 *Electoral Act 1992* (ACT) ss 297–8; *Parliamentary Electorates and Elections 1912* (NSW) ss 122A(6)–(7); *Electoral Act 1992* (Qld) s 185; *Electoral Act 1995* (SA) s 185; *Electoral Act 1907* (WA) s 191A.

voters to cast a valid vote and preserving the electoral system's underlying principles.<sup>13</sup>

## B Forms

Australia is not unique in including savings provisions in its electoral Acts. Forms of savings provisions exist in the electoral laws of several countries (see Table 1 below). They are typically located in the main electoral Act under sections that set out the voting procedure, and following on from the requirements for a formal vote. Savings clauses are generally supplemented by official guidelines and election manuals, which aim to ensure consistency in electoral authorities' interpretations of provisions.<sup>14</sup> Court decisions often provide crucial reference points for these official guidelines.<sup>15</sup>

The savings provisions that operate across these settings can be categorised as either *broad* or *enumerated*. A *broad* savings provision does not specify the source or cause of the noncompliance. Broad clauses are often expressed within electoral Acts as 'intentions clauses', authorising the returning officer to treat a ballot as valid when the voter's intention can be reasonably adduced. In contrast, an *enumerated* savings provision makes allowances for a specific kind of noncompliance. The clause stipulates a class of error that is deemed to be insufficient on its own to render the ballot invalid.

Our survey of savings provisions in 15 state and national jurisdictions (see Table 1 below) indicates that enumerated provisions target four classes of noncompliance:

1. *Incorrect signifier*: A savings clause might provide recognition for alternative forms of markings that have not been stated in the formality requirements. Such a clause might protect ballots that have utilised a signifier that is contrary to the formality requirements. It might also provide clarification on how to treat ballot papers that contain certain types of unintelligible markings, such as poorly formed numbers or spelling errors;

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13 At different times, parliamentarians on both sides of the aisle have raised concerns about the possible unintended effects of obsessive tinkering with the rules in an attempt to reduce informal voting. A case in point is Sir John Carrick who argued that 'excessive pre-occupation with methods of reducing informal votes will achieve mechanisms which significantly damage the true nature of particular voting systems': Sir John Carrick, 'Dissenting Report to the Joint Select Committee on Electoral Reform' in Joint Standing Committee on Electoral Reform, Parliament of Australia, *First Report* (1983) 223, 224.

14 See, eg, Australian Electoral Commission, *Ballot Paper Formality Guidelines* (Guideline, September 2015); Elections Canada, *Deputy Returning Officer & Poll Clerk Guidebook: Ordinary Poll* (Publication No EC 50340, March 2015); New Zealand Electoral Commission, *Operations Manual 2014 Election* (Manual, May 2014); United Kingdom Electoral Commission, *Dealing with Doubtful Ballot Papers in GB* (Booklet, 24 March 2010).

15 In cases such as *Mitchell v Bailey [No 2]* (2008) 169 FCR 529, the Federal Court elaborated guiding principles for dealing with noncompliant votes. See also Alan Henderson, 'Review of Ballot-Paper Formality Guidelines and Recount Policy' (Review, Australian Electoral Commission, October 2008) 16, Attachment 2 ff.

2. *Doubtful placement of preference*: A savings clause might provide clarification on how to treat a ballot when the signifier has been placed in an alternative location to that stipulated in the instructions (ie, outside of the circle or box, or not immediately along the printed line). Similarly, it can include a qualification for when the voter has scribbled out their original marking and subsequently written over it;
3. *Partial or incomplete markings*: A savings clause might provide an allowance for one or more blank squares despite voting instructions requiring all squares to be filled. Under these conditions, the provision may permit consideration of preferences prior to the blank square, with the blank square assumed to be a last preference and treated as such in the vote count. A variation on this is an allowance to treat incomplete ballots in a manner consistent with a registered ticket vote lodged by a candidate prior to the election, provided the voter cast her first preference vote for that candidate. Ballot papers with only one preference, or partial preferences that are consistent with a candidate's registered voting ticket, are then taken to have been marked in accordance with that voting ticket. A further type of allowance is to save ballots that contain a single vote even though the voter is required to award two votes, typically one for a party list and one for a member of parliament; and
4. *Non-consecutive numbering*: A savings clause might authorise some degree of non-consecutive numbering where there is a requirement for the ballot to contain a partial or complete preference ordering. Savings provisions may permit those preferences prior to any repetition or omissions in numbering to be counted.

Thus, savings provisions can take various forms, or configurations, depending on whether they are broad or enumerated; and, in the latter case, depending on the specific enumerations that are in place. As we explain in the next Part, there are close connections between the savings provisions that operate in a jurisdiction and other key components of its electoral system. Due to such connections, the presence of certain electoral system structures, which we identify in detail below, will tend to make it more likely that certain configurations of savings provisions will also operate in that electoral system.

### **III ELECTORAL SYSTEM INTERACTIONS: BALLOT STRUCTURE, ELECTORAL FORMULA AND SAVINGS PROVISIONS**

Savings provisions, whichever form they take, operate alongside other electoral laws and therefore as part of the electoral system of a jurisdiction. Two other classes of electoral laws are of special importance for understanding the composition and effects of savings provisions: first, the structure of the ballot paper, or how the names of candidates and/or parties are organised on the voting slip; and second, the electoral formula, or the mathematical rules used to translate

electoral votes cast into parliamentary seats. There is an affinity between the structure of the ballot and the configuration of savings provisions. This is because different ballot structures tend to generate particular kinds of voting errors.<sup>16</sup> Since savings provisions make allowances for voting errors, the ballot structure will influence which forms of savings provisions might be necessary and practical. There is also a (stronger) affinity between electoral formula and ballot structure, because a specific electoral formula will usually impose constraints on the structure of a ballot paper. It follows therefore that electoral formula and savings provisions are connected. This Part discusses these systemic interactions.

### A Ballot Structure, Electoral Formula and Voting Errors

The structure of the ballot paper can be viewed as the linchpin in the three-way interaction of savings provisions, ballot structure, and electoral formula.<sup>17</sup> The variation in ballot structure is usually mapped using a three-fold classification scheme: a *categorical* ballot invites voters to express a single preference;<sup>18</sup> a *dividual* ballot gives the voter two votes, one for each of two lists of candidates printed on the ballot;<sup>19</sup> and an *ordinal* ballot allows voters to rank-order the candidates on the ballot.<sup>20</sup> These ballot structures are strongly associated with particular electoral formulas. The categorical ballot is a characteristic of the single-member plurality system ('SMP'); dividual ballots are frequently used alongside list-proportional and mixed-member systems ('MMP'); and the ordinal ballot is a feature of proportional representation using the single transferrable vote ('PR-STV') and the alternative vote ('AV').<sup>21</sup>

The categorical ballot is the simplest ballot structure, and thus we might reasonably expect voter errors to be less frequent when this ballot structure is used. In addition, the fact that voters are required to express only one preference means that the instructions can authorise use of a simple signifier such as a tick or cross, and even multiple types of signifiers. Because of this, poor literacy and numeracy are less likely to be obstacles to casting an effective vote. However, categorical ballots are not error-proof. A voter can render her ballot informal by 'overwriting' (ie, expressing more than one candidate preference), marking her

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16 Ian McAllister and Toni Makkai, 'Institutions, Society or Protest? Explaining Invalid Votes in Australian Elections' (1993) 12 *Electoral Studies* 23, 25; Clive Bean, 'Electoral Law, Electoral Behaviour and Electoral Outcomes: Australia and New Zealand Compared' (1986) 24 *Journal of Commonwealth & Comparative Politics* 57, 63–4.

17 Michael Gallagher and Paul Mitchell, 'Introduction to Electoral Systems' in Michael Gallagher and Paul Mitchell (eds), *The Politics of Electoral Systems* (Oxford University Press, 2005) 3, 9–10. See also Douglas W Rae, *The Political Consequences of Electoral Laws* (Yale University Press, revised ed, 1971) 17–18.

18 Rae, above n 17, 17.

19 Ibid.

20 Ibid.

21 These electoral formulas apply different mathematical rules to determine election winners: see generally Gallagher and Mitchell, above n 17.

ballot using an unauthorised and/or unintelligible signifier, or placing the signifier in an incorrect location on the ballot paper.<sup>22</sup>

Dividual ballots are also prone to problems of overwriting, doubtful signifier placement and indecipherable marking. However, the dividual ballot structure has the potential to generate other types of errors. It is susceptible to ‘underwriting,’ where the voter fails to complete all of the requirements for casting a formal vote. For example, a voter might allocate both preferences against one list, rather than one for each list, or correctly complete only one half of the ballot. Scope for voter error is even greater under the ordinal ballot. First, there is a heightened risk of underwriting. The voter might accidentally spoil her ballot paper by not ranking a sufficient number of candidates (in the case of a semi-preferential system) or every candidate (in the case of a full-preferential system). The potential for indecipherable markings and doubtful placement is also accentuated because the voter is generally instructed to use numerals in order to distinguish between candidates. The ordinal ballot can also give rise to two additional complications: the voter replicating or repeating numbers, or providing a non-consecutive ordering of the candidates.

## B Savings Provisions

The suitability of *enumerated* or *broad* savings provisions, and which kinds of enumerations are likely to be specified, depends on the particular characteristics of noncompliance associated with different ballot structures. For example, a broad savings provision may be sufficient to remedy the most common and innocuous forms of error, such as voter failure to use the authorised signifier or placement of the marker in an incorrect location on the ballot paper. Moreover, the familiar errors are likely to be such that the voter’s intentions will be relatively easy to discern. For these reasons, a broad provision might be deemed sufficient if voters confront a categorical ballot.

Under complex ballot structures, efforts to pre-empt voter error are more effectively addressed by enumerated savings provisions than by broad clauses. Broad clauses may be too crude to deal with the range of errors that voters can make when presented with a complex ballot. Broad clauses may also prove too blunt an instrument for electoral officials to apply. Here there is the risk that when used in conjunction with complex ballots that generate more diverse forms of error, a broad clause may give electoral authorities considerable discretion to determine the fate of noncompliant ballots. In contrast, enumerated provisions allow for a precise specification of which errors are permissible and how such errors should be treated by electoral authorities. This may be necessary if noncompliant votes are to be ‘saved’ without this process undermining the electoral system’s underlying principles. For example, the decision to admit ballots with missing numbers requires clear guidance about how such errors should be treated in order to preserve the integrity of the specific electoral formula.

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22 Australian Electoral Commission, *Ballot Paper Formality Guidelines* (Guideline, September 2015) 18.



However, the relationship between ballot structure and savings provisions is not axiomatic. Lawmakers have significant discretion in the design of savings provisions irrespective of the ballot structure in use. For example, a categorical ballot can operate with a broad clause or enumerated provisions while the complex ballots can operate alongside various combinations of enumerated provisions. In some cases, enumerated provisions are combined with a broad clause, designed to capture noncompliant ballots, which do not correspond to one of the specified kinds of error but which nonetheless reveal a clear intention. Moreover, an electoral system can function without any savings provisions.

This indeterminacy in the relationship between ballot structure and savings provisions has implications for our understanding of the relationship between ballot structure, electoral formula and savings provisions. It means that we cannot explain any given savings provision regime by reference alone to the electoral formula. There are two reasons why we believe this interpretation is correct. First, while a given electoral formula will usually necessitate a specific ballot structure, the connection between a specific ballot structure and a configuration of savings provisions is much weaker. At most, a particular type of ballot structure increases the likelihood of certain types of savings clauses and decreases the likelihood of other forms being necessary. However, since savings provisions are only weakly related to electoral formula, an explanation of a savings provision regime by reference to a specific electoral formula will necessarily be incomplete.

Secondly, to the extent that the savings provision regime can be explained by the electoral formula, the resulting explanations are quite superficial because they assume that the electoral formula is always the ‘fixture’ and savings provisions are always the ‘variable’. In fact, both are variables – lawmakers can change the electoral formula in much the same way that they can change the savings provision regime. Therefore, a fundamental explanation of savings provisions must account for how and why lawmakers choose *both* the specific electoral formula and the specific savings provision regime.

The Parts that follow build on this argument that savings provisions should be understood within, and not apart from, the broader electoral system of which they are part. In Part IV, we follow this approach to elaborate the savings provisions that operate in Australia’s jurisdictions and in several overseas jurisdictions. The subsequent Parts discuss the historical dynamics of savings provisions in Australia. Part V provides the necessary historical background, detailing the ways in which savings provisions have evolved in the Australian context, and the circumstances in which these changes occurred. This is followed, in Part VI, by a theoretical answer to the question of how one can explain the emergence and transformation of savings provisions while taking account of their location in a broader electoral system.

## IV SAVINGS PROVISIONS IN AUSTRALIAN ELECTORAL LAW

In this Part, we aim to map the various savings provision regimes that operate across Australia. Our analysis follows the argument, developed earlier, that savings provisions should be examined using a contextual approach, which relates these structures to other components of an electoral system. Table 1 below presents details of the savings provisions, as well as electoral formulas and ballot structures, that currently operate for lower house elections in Australia's nine jurisdictions. To facilitate further comparisons, we have also provided details of the savings provisions, electoral formulas and ballot structures that operate for national lower house elections in several other countries.

As Table 1 shows, all Australian jurisdictions operate with some form of savings provision regime. It is also apparent that there has been widespread adoption of enumerated savings provisions across all Australian jurisdictions. There are several widely shared characteristics. For example, eight jurisdictions make allowance for at least one blank square, providing all other aspects of the ballot satisfy the formality requirements. Similarly, broad savings provisions have been included in the electoral Acts of all jurisdictions except for the Northern Territory. In that respect, the Northern Territory is the outlier. South Australia also stands out compared to other jurisdictions because of its adoption of a radical solution to the problem of blank squares in the form of the 'group ticket vote'.

More generally, an important dimension of difference concerns the apparent restrictiveness of the savings provision regimes. New South Wales, for example, lies at one extreme. It operates with a highly inclusive savings provision regime, which includes enumerations for three specific classes of noncompliance (incorrect markings, non-consecutive numbering and incomplete markings) alongside a broad 'general intentions' clause. At the other end of the spectrum, Tasmania's electoral Act permits non-consecutive markings provided that there are no omissions or duplications within the first 'n' numbers (ie, before the minimum number of preferences that must be specified).

The Australian jurisdictions all conduct lower house elections using preferential voting and therefore utilise an ordinal ballot. This electoral formula is unusual by international standards,<sup>23</sup> and likely to be a key reason why Australia's jurisdictions appear to have elaborate savings provision regimes when compared to several other countries.<sup>24</sup> The categorical ballot, which has the simplest structure, is used for Canadian and United Kingdom elections. However, despite having the same ballot structure these jurisdictions operate with different savings provision regimes, which illustrates our point that savings provisions are not fully determined by ballot structure. The United Kingdom operates with only

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23 David M Farrell and Ian McAllister, *The Australian Electoral System: Origins, Variations and Consequences* (UNSW Press, 2006) 52–3.

24 This observation is consistent with Orr's description of Australian electoral law as 'exceedingly detailed': Graeme Orr, *The Law of Politics: Elections, Parties and Money in Australia* (Federation Press, 2010) 4.

a broad clause while Canada operates with enumerated provisions, which specify the range of permissible noncompliance. With the exception of Malta, the countries that conduct their elections using ordinal ballots also operate with savings provision regimes consisting of enumerated provisions. The specific enumerations vary between jurisdictions (as in Australia).

Table 1: Savings Provisions in Australian and International Jurisdictions

Jurisdiction	Legislation	Electoral Formula	Ballot Structure	Savings Provisions	Form
<b>Australia</b>					
Commonwealth	<i>Commonwealth Electoral Act 1918</i> (Cth) ss 268, 270	AV	Ordinal (full)	Incomplete markings Intentions clause	Enumerated
Australian Capital Territory	<i>Electoral Act 1992</i> (ACT) ss 132, 180	PR-STV	Ordinal (partial)	Incomplete markings Non-consecutive marking clause (implicit) Intentions clause	Enumerated and Broad
New South Wales	<i>Parliamentary Electorates and Elections Act 1912</i> (NSW) s 122A	AV	Ordinal (optional)	Permissible markings Non-consecutive numbering Incomplete markings (blank squares) Intentions clause	Enumerated and Broad
Northern Territory	<i>Electoral Act 2004</i> (NT) s 94	AV	Ordinal (full)	Permissible markings Incomplete markings	Enumerated
Queensland	<i>Electoral Act 1992</i> (Qld) ss 122–3	AV	Ordinal (optional)	Non-consecutive numbering Incomplete markings (blank squares) Intentions clause	Enumerated and Broad
South Australia	<i>Electoral Act 1985</i> (SA) s 94	AV	Ordinal (full)	Incomplete markings (blank squares, voting ticket) Intentions clause	Enumerated and Broad

Jurisdiction	Legislation	Electoral Formula	Ballot Structure	Savings Provisions	Form
Tasmania	<i>Electoral Act 2004</i> (Tas) ss 102–3	PR-STV	Ordinal (partial)	Non-consecutive numbering Intentions clause	Enumerated and Broad
Victoria	<i>Electoral Act 2002</i> (Vic) s 93	AV	Ordinal (full)	Incomplete markings (blank squares) Intentions clause	Enumerated and Broad
Western Australia	<i>Electoral Act 1907</i> (WA) ss 140, 140A	AV	Ordinal (full)	Incomplete markings Non-consecutive numbering Intentions clause	Enumerated and Broad
<b>International</b>					
Canada	<i>Canada Elections Act</i> , SC 2000, c 9, ss 279(2)–(3)	SMP	Categorical	Permissible markings	Enumerated
Ireland	<i>Electoral Act 1992</i> (Ireland) s 118(2)	PR-STV	Ordinal (optional)	Permissible markings	Enumerated
Malta	<i>General Elections Act 2012</i> (Malta) c 354, s 71(3)(d)	PR-STV	Ordinal (optional)	Intentions clause	Broad
New Zealand	<i>Electoral Act 1993</i> (NZ) s 178(5)(a)	MMP	Dividual	Intentions clause Incomplete markings	Enumerated and Broad
Papua New Guinea	<i>Organic Law on National and Local-Level Government Elections 1997</i> (Papua New Guinea) s 139	AV	Ordinal (full)	Permissible markings (misspelling) Incomplete markings	Enumerated
United Kingdom	<i>Representation of the People Act 1983</i> (UK) c 2, sch 1 item 47(2)	SMP	Categorical	Intentions clause	Broad

## V THE HISTORICAL DEVELOPMENT OF FEDERAL SAVINGS PROVISIONS

This Part presents an historical overview of the origins and transformation of savings provisions in federal election law. This discussion provides the necessary groundwork for the theoretical account of the historical dynamics of savings

provisions in Australia, which we develop in Part VI. In this Part, where we present this history in narrative form, our analysis concentrates on the following significant reform episodes: in 1919, when the first savings provisions were introduced for elections of the House of Representatives; in 1983, when savings provisions were introduced for Senate elections and enhanced for House elections; in 1984, when the Senate provisions were reformed; in 1996, when the Senate provisions underwent further reform; and in 1998, when the House provisions were altered following the removal of the enhanced savings provision from the *Commonwealth Electoral Act 1918* (Cth).

Each reform episode, as well as the periods of stasis between them, can be explained in terms of the unique circumstances of the historical period. We argue, however, that a broad pattern can be discerned which connects these developments. We develop this idea in the theoretical account of Part VI. That account builds from the observation, which we have stressed throughout this article, that the symbiotic relationship between savings provisions and other electoral system components, especially the electoral formula, is crucial to understanding their forms and historical evolution. While our account focuses on the evolution of federal savings provisions, we suspect it may also explain the development of savings provisions in other settings. Moreover, it has the potential to be instructive for understanding the dynamics of electoral laws beyond savings provisions. The literature on electoral systems focuses principally on change and reform of electoral formula. However, the dynamics of savings provisions reform display some distinctive characteristics when compared to the dynamics of electoral formula reform. Most significantly, party-political considerations play a less critical role in the evolution of savings provisions than in reforms of electoral formulas. We contend that ‘savings provisions,’ as a class of electoral law, have evolved in ways that cannot be adequately explained by reference to established theories alone.

### A The Pre-savings Provision Regime

The first federal election, in 1901, was conducted by the state governments using different electoral arrangements because the *Constitution*'s framers did not specify a nationwide regime. As a result, the introduction of a uniform electoral system was among the constitutional priorities for the new government led by Sir Edmund Barton. Historical accounts emphasise that this debate concentrated on the choice of electoral formula.<sup>25</sup> Farrell and McAllister explain that the Electoral Bill ‘endeavoured to cover all things electoral’ but the ‘core feature’ of this legislation was the Barton Protectionist Government’s proposals for the House and Senate electoral formulas.<sup>26</sup> The Barton Government proposed preferential

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25 B D Graham, ‘The Choice of Voting Methods in Federal Politics, 1902–1918’ in Colin A Hughes (ed), *Readings in Australian Government* (University of Queensland Press, 1968) 202; David M Farrell and Ian McAllister, ‘1902 and the Origins of Preferential Electoral Systems in Australia’ (2005) 51 *Australian Journal of Politics and History* 155; Farrell and McAllister, *The Australian Electoral System*, above n 23, 21–46; L F Crisp, *Australian National Government* (Longman, 1965).

26 Farrell and McAllister, ‘Origins of Preferential Electoral Systems’, above n 25, 163.

systems for both chambers: AV for the House and PR-STV for the Senate. Plurality systems, namely SMP for the House and block vote for the Senate, were the widely discussed alternatives to these proposals.<sup>27</sup> The most rigorous debate of the Bill occurred in the Senate, which considered the matter before it was debated in the House.

In the end, the proposed preferential systems were rejected in favour of plurality systems. The series of events that led to this outcome are explored in detail elsewhere.<sup>28</sup> It is necessary for our purposes, however, to highlight the reasons behind this outcome. Historical accounts highlight three key factors. First, partisan interest was a crucial factor. There was widespread acknowledgement that the governing Protectionist Party had fared badly in the 1901 elections under the block vote. While the Barton Government expected a change of electoral formula for Senate elections to improve its prospects, this would likely be at the expense of seats for the opposition parties, the Free Traders and Labor, who together commanded a Senate majority. The Free Traders were strongly opposed to any proportional system. However, Labor, somewhat curiously, held an uncertain position on proportional representation.<sup>29</sup> The Barton Government's strategy centred on convincing sympathetic Labor members to vote with them. Crucially, the Senate debates, where the Government was most vigorous in prosecuting the case for proportional representation, were decidedly one-sided. Principled objections against proportionalism, especially the argument that it would create narrow factions that would undermine the national interest, resonated strongly.<sup>30</sup> Thus, the second important contributing factor to the initial electoral system choice was the competition of ideas about the ideal electoral system, which the proponents of proportionalism lost.

The Senate's rejection of the PR-STV proposal significantly impacted on proceedings in the House. The Protectionists commanded a larger plurality in the House than in the Senate, and party discipline was stronger in the lower chamber. Thus, at first glance, the Bill had better prospects in the House than in the Senate. Indeed, the Barton Government initially planned to debate the Bill in the House before the Senate, but the House agenda was already full. Once the Senate had vetoed PR-STV, the chances of success for AV in the House were significantly reduced. For the Barton Government to prevail, it would need to convince members to support an electoral system that would require voters to use crosses for Senate ballots but numerals for House ballots. Such a scenario would give rise to a high risk of voter confusion. The evidence suggests that even the Barton Government was unconvinced of the merits of this argument.<sup>31</sup> Following the

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27 The block vote is used in multi-member districts, but is otherwise identical to SMP: see generally Gallagher and Mitchell, above n 17.

28 See John Uhr, 'Why We Chose Proportional Representation' in Marian Sawer and Sarah Miskin (eds), *Representation and Institutional Change: 50 Years of Proportional Representation in the Senate* (Department of the Senate, 1999) 13.

29 Graham, above n 25, 206–7. This uncertainty was largely due to the fact that Labor's strength was rising, but from a low base.

30 Ibid 206.

31 Ibid 207; Farrell and McAllister, 'Origins of Preferential Electoral Systems', above n 25, 165.

Senate vote on the Bill, Home Affairs Minister William Lyne, who was responsible for leading the Electoral Bill through the House, swiftly withdrew the AV proposal and recommended SMP instead. Thus the third reason for the initial choice of voting system: the importance of sequencing of the proposal between the two chambers. It is probable that the Bill's fate would have been different if it had been considered first by the House rather than the Senate.<sup>32</sup>

At this early stage in the debates on the electoral system, savings provisions had not been countenanced. The first *Commonwealth Electoral Act 1902* (Cth) specified that ballots which did not comply with the formality requirement were to be rejected, and could only be readmitted to the count by order of the Court of Disputed Returns.<sup>33</sup> These sections contained no explicit measures for salvaging noncompliant votes. This state of affairs remained the case for nearly two decades. Despite this, rates of informal voting during this period remained low; they hovered around 2.5 per cent and exceeded 3 per cent only once (in 1906).<sup>34</sup> These observations from the 1902–19 period suggest two points relevant to our discussion in Part VI. The first point to note is that the federal electoral system functioned for several years without savings provisions; clearly, savings provisions were neither an essential nor inevitable constituent element of the electoral apparatus. Secondly, savings provisions were not necessary to maintain a low rate of informality when the voting system was undemanding. The federal experience suggests that, without savings provisions, informality can remain at a low level if voters are confronted with simple ballots, as exemplified by the plurality voting systems in operation during this time.

## B The First Savings Provisions

The first savings provisions, which dealt only with House elections, appear in the *Commonwealth Electoral Act 1918* (Cth). The relevant clause was included to complement the change of electoral formula for House elections, from SMP to AV – a preferential system. Historical accounts emphasise the centrality of party-political calculations in this episode of electoral reform. As Farrell and McAllister note, by 1918 ‘narrow partisan advantage had taken precedence over electoral system ideals’ in parliamentary debates about electoral reform.<sup>35</sup> For the governing Nationalist Party, AV solved the ‘problem’ of factional divisions in elections for House seats. On several occasions, Labor had emerged victorious in contests where the Nationalists had fielded multiple candidates. AV would allow

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32 See Farrell and McAllister, ‘Origins of Preferential Electoral Systems’, above n 25, 166.

33 *Commonwealth Electoral Act 1902* (Cth) s 157. However, it should be noted that s 158 included the procedures for determining informality.

34 Two of the conditions known to aggravate the rate of informal voting were not present in the system at this time. Voting was not compulsory and the number of candidates contesting elections was quite low, with an average number of 2.02 candidates per vacancy for the seven elections held up until 1918: Australian Electoral Commission, Supplementary Submission No 87.4 to Joint Standing Committee on Electoral Matters, Parliament of Australia, *Inquiry into the Conduct of the 2010 Federal Election and Matters Related Thereto*, April 2011, 4.

35 Farrell and McAllister, *The Australian Electoral System*, above n 23, 40.

multiple Nationalist candidates, and conservative forces more generally, to compete against each other without incurring an electoral penalty.<sup>36</sup>

While the electoral formula change was driven by partisan-political considerations, the introduction of savings provisions was motivated by practical concerns. The record of House debates shows that many members were anxious that preferential voting would lead to greater voter confusion and increased rates of informality, especially in light of the retention of the block vote for Senate elections. These arguments were most forcefully put by Labor MPs.<sup>37</sup> The introduction of a simple savings provision was an important part of the solution to this problem of voters being forced to follow different instructions for House and Senate ballot papers. The Act ‘saved’ noncompliant votes when there were no more than two candidates; in this circumstance, a ballot could be treated as a valid vote if the voter indicated only one preference, and even if a cross was used to indicate that preference.<sup>38</sup>

Thus, the 1918 electoral reforms introduced an electoral formula that was likely to increase informality because it was more complex than the old system, alongside savings provisions designed to minimise informality. To make sense of this particular reform episode, it is necessary to consider the underlying dynamics of decision-making over electoral reforms. As we explain below, the Australian experience suggests that politicians hold genuine concerns about the functioning of the political system and aim to improve its efficiency and legitimacy by passing measures to reduce the rate of informality. Crucially, though, functional concerns are usually trumped by partisan-political concerns, which results in a clear rank-ordering of decision-making priorities: functional problems are solved after the solutions to political problems have been determined.

Moreover, this episode reveals that decision-makers prioritised *partisan advantage in the House* regardless of its electoral consequences for levels of informality in the Senate. The Senate voting system was eventually changed in 1919 to mirror the new method of voting in House elections. Preferential block voting was chosen because it was the equivalent of AV for multi-member

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36 Graham, above n 25, 210–11.

37 This view is captured in the words of one Labor Senator who opined:

I do not think it would be wise to change the present method, as proposed in the Bill, until some other system of marking ballot-papers for Senate elections has been devised by the Electoral Officers, so as to prevent any elector being confused on the day of election by having placed in his hands two ballot-papers, one for the House of Representatives and another for the Senate, each of which has to be marked differently ...

Commonwealth, *Parliamentary Debates*, Senate, 15 November 1918, 7896 (David O’Keefe).

38 *Commonwealth Electoral Act 1918* (Cth) s 133(1)(c):

in elections for the House of Representatives it has no vote indicated on it, or it does not indicate the voter’s first preference for one candidate and in the case of any election where there are more than two candidates his contingent votes for all the remaining candidates: Provided that in elections for the House of Representatives at which there are not more than two candidates, the voter’s preference for one candidate shall be deemed to be sufficiently indicated in the case of a ballot-paper marked so as to indicate the voter’s first preference only: Provided further that for the purpose of the last preceding proviso a cross in the square opposite the name of one candidate shall be deemed to indicate the voter’s first preference for that candidate.



constituencies. This change was not accompanied by the introduction of savings provisions for Senate elections.<sup>39</sup> The change in the electoral system produced a marked rise in rates of informality: before the reforms informality rates for Senate elections averaged 4.7 per cent, but the informality rate rose to 8.6 per cent in the 1919 election and 9.4 per cent in the 1922 election. Although informality floated around these levels in future Senate elections, no savings provisions were introduced for the Senate until the 1980s. Two other developments make this absence of reform seem curious. First, there was the fact that the House provided the obvious counterfactual: House elections operated with savings provisions and registered consistently lower rates of informality than Senate elections. Second, there was a clear window of opportunity in 1948, when the Senate replaced its preferential-majoritarian formula with STV, a preferential-proportional electoral formula ('PR-STV'). Yet there was no move to introduce savings provisions despite this electoral reform activity, and growing concerns that the high levels of informality at Senate elections were due to simple voter errors.<sup>40</sup>

### C Provisions for Senate Elections and Enhanced Provisions for House Elections

Savings provisions for Senate elections were eventually introduced in 1983 as part of wideranging reforms designed to make voting easier and more accessible to electors. The headline change was introduction of above-the-line voting, which enabled voters to indicate preferences for 'groups' of candidates (usually political parties). This new method overlay the pre-existing method of full preferential voting, so voters could still choose to rank-order candidates in the traditional way. The reforms included the introduction of savings provisions for both above- and below-the-line voting. For below-the-line voting, a noncompliant ballot could be saved in two circumstances. First, in an election with fewer than nine candidates, a ballot could be saved if the ballot contained some non-consecutive numbering provided 'no more than 3' numbers were affected.<sup>41</sup> In this case, the blank square was assumed to indicate the voter's least-favoured candidate. Second, in an election with more than nine candidates, a ballot could be saved if: (a) at least 90 per cent of the squares were completed; and (b) the ballot contained some non-consecutive numbering provided 'no more

39 There is reason to suspect that the Hughes Nationalist Government *may* have contemplated introducing a savings provision that would allow for non-consecutive numbering of ballot papers with the introduction of preferential voting for the Senate. However, the Government's enthusiasm may have waned when the Labor opposition indicated that it would advocate vote plumping (ie, voting for the same candidate multiple times): Commonwealth, *Parliamentary Debates*, House of Representatives, 21 October 1919, 13 626 (Frank Tudor).

40 One Labor Senator commented on the case of 50 000 Senate ballot papers in NSW that had been rendered invalid because all but one of the 13 squares on the ballot paper had been completed: Commonwealth, *Parliamentary Debates*, Senate, 30 November 1939, 1802 (Adam Dein).

41 *Commonwealth Electoral Legislation Amendment Act 1983* (Cth) s 103, inserting *Commonwealth Electoral Act 1918* (Cth) 133B(1)(b)(ii). This provision is currently contained in *Commonwealth Electoral Act 1918* (Cth) s 270(1)(b)(ii).

than 3' numbers were affected.<sup>42</sup> Provisions were also introduced to deal with ballot papers that contained markings both above- and below-the-line.<sup>43</sup> Such ballots could be treated as valid if at least one section was completed correctly: if only one section of the ballot was correctly filled then that section was treated as valid; but if both parts were completed correctly then the preferences expressed below-the-line trumped those above-the-line.<sup>44</sup>

To explain these reforms, several factors must be acknowledged. The reforms were set against the backdrop of high rates of informality at Senate elections which, by the 1980s, had emerged as a persistent problem. The increase in informality that followed the 1919 electoral reforms did not abate, and informality in Senate elections remained at much higher rates than in House elections.<sup>45</sup> Fuelling this problem was the advent of unwieldy tablecloth-sized Senate ballot papers caused by a surge in the number of candidates. The 'crisis' of informality was unfolding in the context of increasingly slim governmental majorities in the Senate, and the spectre of the chamber's resurgence.

The case for reform was given additional impetus by the availability of hard data on the determinants of informal voting. A review of informal ballot papers was conducted by the AEC at the request of the Joint Select Committee on Electoral Reform.<sup>46</sup> The study found that 75 per cent of informal votes were inadvertent, which suggested that large numbers of electors were effectively being disenfranchised for committing fairly trivial errors when completing their ballot papers.<sup>47</sup>

The final important consideration driving reform was the election of the Hawke Labor Government to office, which had declared electoral reform as a priority during its eight years in opposition. Concern about informality was particularly pronounced within Labor ranks. Like its mainstream party counterparts, Labor had a significant stake in the fundamental legitimacy of elections. But there was now an academic study to support Labor's long held concerns about the party-differential effect of informal voting. Analysis conducted by Gregg Snider concluded that the 'Labor component of the informal vote' generally exceeded the anti-Labor component by a significant margin. This partisan differential could have huge political and electoral ramifications. Indeed,

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42 *Commonwealth Electoral Legislation Amendment Act 1983* (Cth) s 103, inserting *Commonwealth Electoral Act 1918* (Cth) s 133B(1)(b)(i). This provision is currently contained in *Commonwealth Electoral Act 1918* (Cth) s 270(1)(b)(i).

43 *Commonwealth Electoral Legislation Amendment Act 1983* (Cth) s 80, inserting *Commonwealth Electoral Act 1918* (Cth) s 106(5).

44 *Commonwealth Electoral Legislation Amendment Act 1983* (Cth) s 102, inserting *Commonwealth Electoral Act 1918* (Cth) s 133A(2). This section refers to s 123(1A) which was inserted by *Commonwealth Electoral Legislation Amendment Act 1983* (Cth) s 98 and allows a voter to vote above-the-line.

45 The rate of Senate informality averaged 9 per cent for the period between 1919 and 1980. For the full figures, see Stephen Barber and Sue Johnson, 'Federal Election Results, 1901–2014' (Research Paper Series 2014–15, Parliamentary Library, Parliament of Australia, 2015) 120–40, 144.

46 See Joint Select Committee on Electoral Reform, Parliament of Australia, *First Report* (1983) 284–97, app 3.

47 *Ibid* 62.

Snider pointed to it as ‘a factor’ that contributed to the ‘downfall of the last Whitlam Government’ in 1975.<sup>48</sup>

The activity around reform of the Senate voting system afforded the Hawke Government the opportunity to turn its attentions to savings provisions for House elections. The Hawke Government expanded the savings provisions for the House, albeit in lieu of its preferred reform, namely, the adoption of optional preferential voting for House elections.<sup>49</sup> The enhanced savings provision applied to ballots containing three or more candidates (as against two previously) and made allowance for numbering errors. Specifically, the new section stated that a ballot paper would not be rendered informal in a House election if it contained one blank square and/or non-consecutive numbering. Under either such circumstance, the preferences below the first preference were to be exhausted up to the point where the error had occurred.<sup>50</sup>

#### D The Langer Case

In 1996, savings provisions became the subject of debate following the jailing of Albert Langer for promoting forms of voting consistent with the then-operative savings provision for House elections. This case has been discussed in depth elsewhere and we do not intend to rehearse the specifics here.<sup>51</sup> It is necessary to mention only a few material points. Langer was an activist who had campaigned against the political direction of the Labor Party, and more generally against the Australian ‘two-party’ system, for over a decade. In the run-up to the 1996 election, he authorised an advertisement that showed voters how to withhold preferences when casting their ballot without rendering their vote informal. The voter needed simply to scribble a ‘1, 2, 3, 3’ preference ordering, effectively transforming their ballot from a full-preferential vote to an optional-preferential vote. Langer’s advice was intended to assist voters to withhold preferences from the major parties.<sup>52</sup>

However, Langer’s campaign contravened section 329A of the *Commonwealth Electoral Act 1918* (Cth), which prohibited publication of material ‘with the intention of encouraging persons voting at the election to fill in a ballot paper otherwise than in accordance with section 240’, which in turn outlines the requirements of a full preferential vote. Interestingly, section 329A

48 Gregg Snider, ‘The Partisan Component of the Informal Vote’ (1979) 14 *Politics* 82, 88.

49 Labor submitted a recommendation to the 1983 Joint Committee on Electoral Reform for the introduction of optional preferential voting. However, Labor did not pursue the matter after doing a deal with the National Party over the enlargement of Parliament: Joan Rydon, ‘The Hawke Government: Electoral Reform and the Elections of 1984’ (1985) 57 *The Australian Quarterly* 319, 332 n 1.

50 *Commonwealth Electoral Act 1918* (Cth) s 270(2), later repealed by *Electoral and Referendum Amendment Act 1998* (Cth) ss 129–31.

51 See, eg, Jacqueline Lipton, ‘Case Note: *Langer v Commonwealth*’ (1997) 23 *Monash University Law Review* 441; Graeme Orr, ‘The Choice Not To Choose: Commonwealth Electoral Law and the Withholding of Preferences’ (1997) 23 *Monash University Law Review* 285.

52 Joint Standing Committee on Electoral Matters, Parliament of Australia, *Report of the Inquiry into All Aspects of the Conduct of the 1996 Federal Election and Matters Related Thereto* (1997) 28 (‘1996 Federal Election Report’).

applies only during the ‘relevant period in relation to a House of Representatives election’. Thus, Langer’s advocacy would have breached no law had it taken place prior to the issuing of the writ for the election or if it were restricted to statements about how to vote in Senate elections.<sup>53</sup> But the advertisements were placed during the relevant period and they targeted voting in House elections. The validity of section 329A was confirmed by the High Court in *Langer v Commonwealth* (‘Langer’),<sup>54</sup> and Langer was jailed for contempt of court when he refused to cease his advocacy activities.

The *Langer* case raised important questions about the right to free speech, compulsory voting and the rigidity of the Australian party system. It also had an immediate effect on the *Commonwealth Electoral Act 1918* (Cth), with Langer’s activities featuring prominently in a post-election report by the Joint Standing Committee on Electoral Matters.<sup>55</sup> Based on its recommendations, section 240 was amended in 1998 to specify that *Langer*-style voting (using repeated numbers) would invalidate a vote.<sup>56</sup> With section 329A also repealed, the net effect was ‘victory for free speech, but not for the ideal of freedom of elections which preference withholding entails’.<sup>57</sup> As a result of this reform, the savings provision regime was returned to its pre-1983 configuration, and it has remained unchanged since.

## VI EXPLAINING THE HISTORICAL DEVELOPMENT OF FEDERAL SAVINGS PROVISIONS

In this Part we develop theoretical propositions to account for the dynamics of savings provisions: what induces lawmakers to adopt them and in the particular manner of construction that they do. In developing this account we build on a large comparative scholarship that analyses the dynamics of electoral systems. Much of this work traces its origins to Maurice Duverger’s classic text *Political Parties*,<sup>58</sup> which developed conjectures about the relationship between electoral laws and party systems. Crucially, the comparative scholarship has tended to follow Duverger’s lead by treating the *electoral system* as essentially the same thing as, and therefore largely reducible to, the *electoral formula*.<sup>59</sup> The

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53 Orr, ‘The Choice Not To Choose’, above n 51, 296.

54 (1996) 186 CLR 302.

55 *1996 Federal Election Report*, above n 52.

56 *Electoral and Referendum Amendment Act 1998* (Cth) sch 1 item 125.

57 Orr, ‘The Choice Not To Choose’, above n 51, 311.

58 Maurice Duverger, *Political Parties: Their Organization and Activity in the Modern State* (Barbara and Robert North trans, John Wiley, 1954). See also Kenneth Benoit, ‘Electoral Laws as Political Consequences: Explaining the Origins and Change of Electoral Institutions’ (2007) 10 *Annual Review of Political Science* 363; Carles Boix, ‘Setting the Rules of the Game: The Choice of Electoral Systems in Advanced Democracies’ (1999) 93 *American Political Science Review* 609; Josep M Colomer, ‘It’s Parties That Choose Electoral Systems (or, Duverger’s Laws Upside Down)’ (2005) 53 *Political Studies* 1.

59 See Duverger, above n 58, 205.

latter, in turn, is typically reduced to three variants: ‘majoritarian’, ‘proportional’ or ‘mixed’.<sup>60</sup> In general, the research in this area pays little attention to the dynamics of electoral laws beyond the electoral formula, including savings provisions.

Our investigations of federal savings provisions suggest that such clauses do not develop according to the logic expressed in theories of electoral formula reform. The most fundamental difference concerns the importance of partisan electoral considerations in reform processes. Theories of electoral formula reform underline political parties’ calculations of electoral interest to explain reform.<sup>61</sup> It is generally assumed that governing parties will enact reforms to improve their long-term electoral prospects. This may mean that the governing party (or coalition) alters electoral laws to its advantage, or that a few major parties cooperate to exclude competitor parties.<sup>62</sup> These basic propositions can go a long way in explaining episodes of electoral reform in most democracies.<sup>63</sup> Australia is no exception: observers frequently cite ‘party-political expediency’ when explaining the occurrence (or absence) of electoral system change.<sup>64</sup>

However, a focus on partisan advantage seems less than adequate for understanding the historical development of savings provisions. The dynamics of reform in this case lack several hallmarks of highly partisan processes. Reform of savings provisions draws little attention from party-political elites in parliamentary debate or in official parliamentary inquiries on electoral matters. When it does, the elites of rival parties usually agree on the nature of the problem and the need for a response.<sup>65</sup> Indeed, there appears to be something of a consensus that such matters are largely ‘administrative’ in nature, despite the fact that savings provisions may exert an effect on electoral outcomes, even if only at the margins. At certain historical junctures, notably in the 1980s, Labor was the more enthusiastic proponent of savings provisions. But any disagreement was not fundamental: different views about the gravity of the issue co-existed with broad agreement on the desirability of reform and the broad direction it should take. In short, the Australian ‘political class’, including elected officeholders from both sides of politics, does not appear to divide on the desirability of savings

60 See, eg, Nils-Christian Bormann and Matt Golder, ‘Democratic Electoral Systems around the World, 1946–2011’ (2013) 32 *Electoral Studies* 360; Matt Golder, ‘Democratic Electoral Systems around the World, 1946–2000’ (2005) 24 *Electoral Studies* 103; Pippa Norris, ‘Choosing Electoral Systems: Proportional, Majoritarian and Mixed Systems’ (1997) 18 *International Political Science Review* 297.

61 However, they also identify a range of contingent factors. See Alan Renwick, *The Politics of Electoral Reforms: Changing the Rules of Democracy* (Cambridge University Press, 2010) 10–17.

62 For the classic statement of the latter scenario, see Richard S Katz and Peter Mair, ‘Changing Models of Party Organization and Party Democracy: The Emergence of the Cartel Party’ (1995) 1 *Party Politics* 5.

63 See Boix, above n 58.

64 Graham, above n 25, 202; Farrell and McAllister, *The Australian Electoral System*, above n 23, 21–46.

65 This is not to suggest that parties will always agree on every detail of the wording of a savings clause, only that they agree in principle to the desirability of such an enactment. For example, while the Liberal opposition were opposed to the Labor Government’s original savings provision clause for the House in 1983, they were also at pains to point out that they would work with the Government to ‘find a way to bring the votes into the count and yet to maintain what we think is a desirable electoral environment’: Commonwealth, *Parliamentary Debates*, Senate, 2 December 1983, 3211 (Peter Baume).

provisions and the forms they should take. Indeed, both Labor and Coalition governments have enacted measures to expand the scope of federal savings provisions in order to reduce informal voting, and have agreed to delete those clauses from the electoral Act when they deem their continued operation problematic.

If considerations of partisan advantage do not adequately explain savings provision reforms, then what does? The obvious alternative to the *political* logic of the partisan theory is a *functionalist* logic. A functionalist logic holds that reform episodes are attempts to fix generally agreed-upon – or ‘objective’ – problems. In the case of savings provisions, the objective problem that they seek to address is informal voting. Therefore, following this functionalist logic, we would expect to be able to account for alterations to savings provisions based on changes in informality rates. Some of the historical evidence is consistent with this expectation. The savings clause introduced for House elections in 1918 appears to have been an attempt to pre-empt any likely increase in informal voting arising from the introduction of preferential voting<sup>66</sup> while the provisions introduced in 1983 were explicitly aimed at addressing already high rates of informality at Senate elections.<sup>67</sup> However, other observations run counter to a strictly functionalist logic. It is difficult to explain the absence of savings provisions for Senate elections until the 1980s despite stubbornly high rates of informality. The reforms to saving provisions for House elections during the 1980s are also difficult to reconcile with the functionalist logic, since these modifications occurred during a period when rates of informality at House elections tended to be relatively low.

Perhaps most significantly, a functionalist logic suggests that the principal actors in this area – politicians, parties, and election administrators – are strongly motivated by the goal of minimising levels of informal voting. Yet, there

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66 The responsible Minister explained the modest 1918 savings provision on the grounds that ‘if the elector marks one candidate only ... [it will] ... have just the same effect as if he marked both candidates in sequence’: Commonwealth, *Parliamentary Debates*, House of Representatives, 4 October 1918, 6679 (Patrick Glynn). Notwithstanding the Government’s uninformative justification, it is reasonable to deduce that this concession, which need not otherwise have been inserted into the Act, was included in anticipation of a likely increase in informal votes.

67 See generally Joan Rydon, ‘The Federal Elections of 1987 and Their Absurdities’ (1987) 59 *The Australian Quarterly* 357.

have been electoral reforms (in 1918<sup>68</sup> and 1948<sup>69</sup>) that increased the rate of informality, and it was anticipated that they might do so, because they made the electoral system more complex. These counter-examples hint at the more general problem that follows from attempting to explain the dynamics of savings provisions using functionalist logic alone: savings provisions are treated in isolation from the electoral system. It should be noted that the separation, for analytic purposes, of an element that is constitutive of a system is not *necessarily* problematic. The insights gained as a result of such detachment might improve our understanding of both the element and the dynamics of the system as a whole.<sup>70</sup> But this scenario does not apply in the case of savings provisions: their de-contextualisation comes at a high price. And explanations of their dynamics which downplay electoral system interactions are likely to be less successful than explanations which place these interactions centre stage.

Thus, efforts to account for the configuration of a savings provision regime that depend on either party-political or functionalist theorising may not be sufficient. We suggest an alternative approach that draws on both theories in a quite specific way. This approach concentrates on savings provisions but it does so while focusing on their interactions with other components of the electoral system. To begin with, we propose that the dynamics of electoral law reforms might be better understood by differentiating classes of electoral laws based on perceived *political status*. Specifically, we distinguish between *primary* and *secondary* electoral laws. We recognise that the distinction between these two classes is neither straightforward nor entirely unproblematic. But for the purpose of this article, we define as *primary* those electoral laws that set down the fundamental architecture of the electoral system and which, as a result, politicians perceive as being the major determinants of their chances of winning elections. We define as *secondary* those electoral laws that are corollaries of the

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68 The Hughes Nationalist Government conceded that preferential voting was ‘complicated insofar as expression and apprehension are concerned’ but remained wedded to its implementation nonetheless: Commonwealth, *Parliamentary Debates*, House of Representatives, 21 October 1919, 13 623 (Patrick Glynn). This was in spite of Labor’s concerns that preferential voting would generate ‘a greater proportion of informal votes under this Bill than have ever been recorded under any system of voting’: at 13 627 (Frank Tudor). Labor further warned that the new electoral system would create ‘endless confusion throughout Australia’ as voters would be subject to different rules for filling out ballots for both elections of both chambers: Commonwealth, *Parliamentary Debates*, House of Representatives, 25 June 1918, 6364 (William Mahony).

69 The Chifley Labor Government acknowledged that there was the risk of  
 an even greater number of informal votes being cast. Nevertheless, it is better to take the risk of that evil than to endure the evil of exhausted votes by which the will of the people is not truly recorded. The intelligent members of the community will understand the procedure well enough, but I am afraid that there will always be some who will fail to understand the system, and who, as a consequence, will cast informal votes.

Commonwealth, *Parliamentary Debates*, Senate, 6 May 1948, 1483 (Nicholas McKenna).

70 An example is the analytic separation of ‘party system’ from ‘political system’, which has been a catalyst for an improved understanding of both: see, eg, Duverger, above n 58, 352.

primary electoral laws and which, as a consequence, are likely to be perceived by politicians as peripheral to their electoral fortunes.<sup>71</sup>

With this distinction in hand, our theoretical account can be summarised in three propositions:

1. The historical development of primary electoral laws tends to be driven by partisan considerations while secondary electoral laws evolve mainly in response to functional considerations arising from the operation of the primary electoral laws;
2. Secondary electoral laws tend to *adapt* to the structure of primary electoral laws and not the other way round. If a primary electoral law remains stable, then the secondary electoral laws designed to complement it will change over time in ways that are designed to improve the primary electoral law. Similarly, if the primary electoral law is modified or revised, then any resultant secondary electoral law will eventually evolve in response to any perceived limitations generated by the changes to the primary electoral law; and
3. The efficacy of a secondary electoral law is typically assessed according to its perceived capacity to enhance the primary electoral law it was enacted to serve. A secondary electoral law will be amended or repealed if and when its operation is deemed to undermine the operation of the primary electoral law.

These three propositions, we argue, may help us to better understand the development of savings provisions in Australia. Following this theoretical account, the next crucial step is to classify savings provisions and other relevant electoral system components in terms of political status. The electoral formula lies at the top of the hierarchy of electoral laws. Politicians tend to view the formula as the most consequential aspect of electoral law, and it is their primary concern during debates about electoral reform.<sup>72</sup> While the electoral formula is the archetypal example of a primary electoral law, savings provisions are the ideal-type secondary electoral law. The design of savings provisions *could* affect electoral and political outcomes but politicians appear to view this as a negligible possibility. Savings provisions receive relatively little attention from political elites, even when electoral issues are being debated. When they do draw

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71 It is important to stress that this is an argument about which aspects of electoral law *politicians appear to prioritise* in their calculations. They may not prioritise certain laws, which are objectively very important, such as district magnitude, as explained in below n 72.

72 While empirical studies suggest that district magnitude is at least as important as electoral formula in determining outcomes, electoral formula appears to matter much more in real-world debates: see, eg, Rae, above n 17, 124 A potential reason why is that the electoral formula is exceptionally manipulable; it can often be changed without the need to alter other institutions as well. Change to district magnitude usually necessitates change to other major structures such as federalism arrangements, which reduces the chances of any episode of district magnitude reform.



attention, it is often due to prompting from the AEC about the problem of high rates of informal voting.<sup>73</sup>

Consistent with our theoretical propositions, savings provisions have developed over time in ways that are intended to complement an existing electoral formula. In particular, savings provisions have been introduced or modified when a chosen electoral formula has led to an increase in the rate of informality. However, informality rates have not impacted on the choice of electoral formula, an observation that is also consistent with our theoretical propositions. Simplifying the ballot structure would be the most direct and effective way to reduce levels of informality, but this would require a change to the electoral formula.<sup>74</sup> If this were to happen it would mean that the primary electoral law would be evolving for functional reasons – an electoral reform dynamic that is extremely unlikely, our theory suggests. The *Langer* case demonstrated that a relaxed savings provision regime could have an effect similar to change of the electoral formula, since voters could be enabled to vote contrary to the established electoral formula. But lawmakers eliminated this possibility soon after it became widely known among electors, which is what we should expect given the political status of savings provisions.<sup>75</sup>

Furthermore, the distinction we draw between primary and secondary electoral laws offers a rationale for the activities of electoral commissions. Electoral commissions are tasked with electoral administration and offer advice and suggestions in this area while steering clear of electoral politics and partisanship. The distinction between these two areas is theoretically fuzzy,<sup>76</sup> but in practice appears to approximate our distinction between primary and secondary laws. Thus, following our theoretical account, electoral commissions face the challenge of maximising the functionality of the electoral system given the political choice of electoral formula. When the challenge is presented in this way, it becomes clear why the AEC's advocacy of structural reforms to minimise

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73 Some scholars have been critical of what they regard as the AEC's excessive zeal in regards to informal voting. Joan Rydon complained that

the Commission takes the view that every vote is worth salvaging, no matter how carelessly or stupidly it may have been recorded. And it refuses to recognise any right to abstain or to acknowledge that there are electors who wish to express an absence of any preference among the alternatives presented to them. Every informal vote or blank paper is deplored though it may express a more considered and informed decision than many formal votes ...

See Rydon, above n 67, 357, 360.

74 The major parties have been reluctant to countenance other types of savings provisions for the House following the repeal of s 329A, such as the model of ticket voting used in SA. In 2009, this option was rejected by the Commonwealth Joint Standing Committee on Electoral Matters even though it was estimated that had it been adopted it may have saved almost 90 149 votes at the 2007 federal election: Joint Standing Committee on Electoral Matters, Parliament of Australia, *Report on the Conduct of the 2007 Federal Election and Matters Related Thereto* (2009) 240. The Committee argued that this option 'is a step too far, in that it may actively encourage optional preferential voting rather than operating as a genuine savings provision': at 243.

75 *Electoral and Referendum Amendment Act 1998* (Cth) sch 1 item 125.

76 See James H Svava, 'The Myth of the Dichotomy: Complementarity of Politics and Administration in the Past and Future of Public Administration' (2001) 61 *Public Administration Review* 176.

informal voting has largely focused on savings provisions.<sup>77</sup> Reform of electoral formula (and ballot structure) could reduce the rate of informality substantially, and perhaps also improve other problems with the electoral system. However, this would necessitate a change to primary electoral laws, the realm of *electoral politics*, and therefore beyond the purview of electoral administrators. Savings provisions provide electoral commissions with a solution to the problem of informal voting that does not pose risks to ‘administrative legitimacy’ or require encroachment into the realm of ‘the political’.<sup>78</sup>

## VII CONCLUSION

This article has explored several issues relating to efforts to address informality using savings provisions. We clarified the functions and forms of savings provisions. We then examined the theoretical connections between savings provisions, ballot structure, and electoral formula. The key observation is that there are important interactive relationships among these different elements of an electoral system. In the case of savings provisions, the connections are associational rather than fixed: a particular ballot structure or electoral formula does not determine the savings provision regime, but it does make some designs more practical, and therefore more likely to be enacted, than other designs.

Building on from this, the article explored savings provisions empirically, first by comparing savings provision regimes across a number of electoral jurisdictions, and then through an historical overview of their development at the federal level. In the final Part of the article, a theoretical account of the evolution of the savings provision regimes was proposed. It is suggested that savings provisions have developed to address the electoral and political consequences that result from electoral formulas that are chosen for party-political reasons.

While this study makes a contribution in terms of new knowledge about savings provisions, it also raises a number of questions that this article does not attempt to address. One set of issues pertains to the empirical consequences of savings provisions. We contend that their purpose is to reduce the overall levels of inadvertent informal voting, and we also argue that they have been introduced and reformed in line with this objective. An empirical question suggested by these observations is whether savings provisions have actually succeeded in achieving this purpose. The answer to this question requires rigorous analysis of the relationship between rates of informality and the presence, absence, and type of savings provisions; and also the interactive effects of different combinations of savings provisions, ballot structures, and electoral formulas on the rate of informality.

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77 In addition, this account suggests that the highly bureaucratic character of Australia’s electoral system may be a result of its complex electoral formula, rather than a cause.

78 Svava, above n 76, 176. See generally Carl Schmitt, *The Concept of the Political* (Rutgers University Press, 1976).

A further question is prompted by the theoretical account that is developed in this article's final Part. Our account of the evolution of the federal savings provision regime turns on the distinction between primary and secondary electoral laws. We argue that secondary electoral laws are enacted in order to compensate for certain functional problems that a primary electoral law might produce. Our account treats savings provisions as the archetypal secondary electoral law and electoral formula as the archetypal primary electoral law. It might also be reasonable to include in the *secondary* category, laws regarding the procedures (as against the requirements) for voter enrolment, maintenance of the electoral roll, and the nomination and registration of parties and candidates; and to include in the *primary* category compulsory voting, rules regarding eligibility to vote, and the rights of candidates and parties to compete at elections. But it may be more difficult to classify several other classes of electoral law. For example, laws regarding political financing and re-districting have characteristics that could be associated with both the primary and secondary categories. Furthermore, this line of reasoning raises the question of whether and how a particular kind of electoral law can transition from the secondary category to the primary category (or vice versa), which is tantamount to the 'politicisation' (or 'de-politicisation') of an electoral law issue. Nonetheless, we propose that the primary/secondary distinction might provide a fruitful basis for further research into the differences between, and interactions of, the political and administrative aspects of electoral systems.