WRONG WINNER ELECTION OUTCOMES IN SOUTH AUSTRALIA:
Bias, minor parties and non-uniform swings

Jenni Newton-Farrelly
Electoral Specialist
Wrong winner election outcomes in South Australia:
Bias, minor parties and non-uniform swings

At the 2010 South Australian state election, an exceptional marginal seats campaign returned Labor to government with a clear majority of seats in the House of Assembly, but without the support of a majority of voters across the state. The result weakens the democratic legitimacy of the government and also challenges the methodology used by South Australia's Electoral Districts Boundaries Commission, which for twenty years has worked under a constitutional requirement to ensure, as far as possible, that the boundaries it draws will allow a party will form government only if it has the support of a majority of voters across the state.

Three of the last six state elections in South Australia have produced these wrong winner outcomes. This paper reviews those elections, looks at the way the South Australian Parliament has responded and considers options for the future.

The election of 1989: bias

Prior to South Australia’s 1989 state election the Liberal Party argued that its support was so concentrated in country seats that it required more than 52% of the two party preferred vote across the state to win enough seats to form government (and that conversely the Labor Party could win government with only 48% of the two party preferred result across the state). This bias was due to geographical concentration of Liberal voters in country seats, eleven of them very safe for the Liberal Party. It had the effect of reducing the number of seats that Liberals could win with any given share of the state-wide vote, compared to the number of seats Labor could win with a similar share of the vote. The Liberals’ argument was confirmed at the 1989 state election when the Liberal Party won 52.1% of the two party preferred vote across the state but failed to win a majority of seats, and was not called to form government. The election was widely seen as a wrong winner outcome that lacked democratic legitimacy, and the eventual outcome was that the Constitution Act 1934 (SA) was changed to require the Electoral Districts Boundaries Commission to address this bias and to redraw electoral boundaries after each state election. In doing so the Commission is required to consider the effect of electoral boundaries on a subsequent election result, so that – as far as practicable – the newly drawn set of electoral districts would give a majority of seats to the party which had the support of a majority of voters.

Specifically the Act requires that:

In making an electoral redistribution the Commission must ensure, as far as practicable, that the electoral redistribution is fair to prospective candidates and groups of candidates so that, if candidates of a particular group attract more than 50 per cent of the popular vote (determined by aggregating votes cast

---

1 Wrong winner elections are those that result in a party winning a majority of seats and forming government, even when they have not won the support of a majority of voters. For a discussion see Siaroff 2003; for examples see Hughes 1994 for Australia; Renwick 2009 for New Zealand; Blau 2004 for the UK; Massicotte 2007 for Canada.

2 SA Parliamentary Debates 9 August 1989:113 (Griffin).

3 Actually to examine, and if necessary to redraw.
throughout the State and allocating preferences to the necessary extent), they will be elected in sufficient numbers to enable a government to be formed.\(^4\)

The intention of the Parliament was much broader than giving both of the major parties a “fair go” leading into the next election – the change to the Constitution Act requires the Commission to do what it practicably can to draw electoral districts that will provide a fair outcome at the next election.

To address the problem of partisan bias in electoral boundaries, and to create the conditions for fair outcomes, the Commission had to be able to see how drawing boundaries to include or exclude voters living in different areas could change the election outcome for a seat; the Commission consequently became the first independent redistribution authority in Australia to be allowed to look at voting figures.\(^5\) The Commission applies the most recent state election data to its new boundaries to assess whether the seats it draws would advantage either of the major parties leading into the next election. The task was a new one for any of Australia’s independent redistribution authorities and the Commission has developed a new methodology in consultation with the political parties and analysts over five redistributions covering a period of nearly twenty years. That methodology is based on an assumption of uniform swing, which accepts that the swing across the state at any election will be expressed in some seats by a larger-than-average swing and in some seats by a smaller swing, but holds that the same number of seats would change hands even if the same particular seats might not change hands. Outside the Commission, uniform swings are almost universally assumed where patterns of future voter support are predicted on the basis of past voting: for example, in order to understand the implications of opinion polls and in assessing the results of elections, as well as in analyses of bias. The Commission has adopted this political construct for the same reasons that parties, political scientists and analysts use it - it generally works, and there is nothing else that is as simple and straightforwardly understood by the legal, political and electoral community involved in the electoral and redistribution process.\(^6\)

The Commission also adopted a second important concept, the two party preferred vote,\(^7\) which expresses all formal votes in terms of support for either one or the other of the two parties which could form government. The Commission’s focus is on eliminating partisan advantage leading into the election so that the party which wins majority support will be likely to win enough seats to be called to form government, so for this focus the two party preferred vote seems the most suitable of the various measures of electoral support.

To address the problem of bias caused by the geographic concentration of Liberal support locked in a series of very safe country seats, the Commission drew one country seat (Frome) as Liberal but quite marginal. The result at the next election – 1997 – was seen to be fair, and the next set of boundaries drawn by the Commission after that 1997 election was assessed at the time as not likely to advantage either party leading in to the next

---

\(^4\) Constitution Act 1934 (SA) s.83 (1). A similar fairness requirement forms part of the good governance criteria imposed by Donald E Stokes and Larry Bartels as Chairmen of New Jersey’s independent redistribution commission (Hirsch 2002; Stokes, 1993 and 2007)

\(^5\) While the parties and commentators have always judged redistributions by applying previous voting figures to the new seats, commissions around Australia have been prevented from taking voting data into account. As a result they have often perpetrated bias or created it where it had not previously been a problem (Newton-Farrelly 2009).

\(^6\) A probability-based model was proposed in early hearings but the commission was not confident that it would be precise enough in relation to individual seats to be a major advance (Fischer 1991).

\(^7\) Total first or subsequent preferences cast for ALP candidates as a percentage of all formal votes vs total first or subsequent preferences cast for the Liberal Party candidates as a percentage of all formal votes. The sum of the ALP and LIB 2PP votes is 100%.
election, so the fairness requirement was widely regarded as useful and the Commission as effective.

The election of 2002 challenged that view.

The election of 2002: minor parties and Independents

The result at the state election of 2002 was not unfair, but what happened in the week following the election did challenge the Commission. At the election, the Labor Party won 23 seats, the Liberal Party won 20 seats, and four independent or minor party candidates won seats that would, in their absence, have been Liberal seats. The two party preferred vote across the state was 50.9% Liberal indicating that the majority of voters across the state supported a Liberal rather than a Labor candidate in their electorates. Confounding this situation, one of these minor party Members representing a conservative electorate gave his support to the Labor Party to govern. With that agreement the Labor Party could assure the Governor that it would have a majority of votes on the floor of the House and could expect to form stable government, and the Labor Party was called to form government.

The actual election result was fair, in that the statewide vote showed majority support for the Liberal Party, and a majority of Members - 24 of the 47 - represented conservative seats (either as Liberals or as minor party or independents in conservative seats) and could have been expected to support a Liberal government. When the Commission assessed the boundaries it had drawn for this 2002 election, it concluded that the boundaries had produced an election outcome that was fair, saying that:

Events subsequent to the last general election cannot be used to properly qualify the use of those results when meeting the fairness demands of s 83(1).

The Commission's main difficulty was how it should express the election result and prepare a set of boundaries for the next election. Should the Commission consider Peter Lewis (Hammond, CLIC) who initially made it possible for Labor to govern, as a de facto Labor Member and part of the government group, or should his seat be shown on the conservative side of the pendulum? The Commission decided to consider each of the four Members elected as minor party or Independent Members as the primary candidate of the Liberal group in their seats, and therefore to express the election result in three of the four seats in terms of a recounted result (NAT:ALP, CLIC:ALP, IND:ALP) and to show them on the Liberal side of the pendulum. In one seat (Fisher, represented by Bob Such) the Commission considered that the Member's stance was sufficiently independent of both parties that the election result should be best expressed in terms of the two party preferred vote.

These considerations altered the expression of the election result from a two party preferred basis, according to which the election result was 49.1% Labor to 50.9% Liberal, to a two group basis, according to which the election result was 48.1% to the (Labor) government group and 51.9% to the non-government group. The awkwardness of describing the government group's vote across the state, as opposed to the two party preferred election

---

8 In each of these seats the Liberal candidate came second in the count and the Labor candidate came third after the distribution of preferences. To express the result in these seats in terms of the voters’ preference for Labor as opposed to Liberal, a recount was conducted, allocating the ballot papers of the independent or minor party candidates to Labor or Liberal according to the preferences shown on each ballot paper, and expressing the election result in each of these seats in two party preferred terms.


10 Mr Lewis’s party was the Community Leadership Independence Coalition.
outcome, was increased in late 2004 when the other two\textsuperscript{11} of the original group of four minor party and independent members joined the Labor Ministry, but the Commission had firmly confined its focus to the election results of 2002, and did not find it necessary to take these later changes into account.

Was 2002 another wrong winner election? Certainly the party that won the support of a majority of voters did not form government, but was that a failure of the electoral system or a failure of the Liberal Party leadership group to reach agreement after the election with the minor party and independent Members? If 2002 was not a wrong winner election, the agreements reached after the election nonetheless generated a wrong winner outcome, and (as in 1989) the democratic legitimacy of the government was called into question. This time, it was not possible for the Commission to provide an electoral answer to the problem. Nor would it be possible for the Commission to prevent the same thing happening again. The wrong winner outcome after the 2002 election had a political, rather than electoral basis, and avoiding its repetition will require consideration of the process of forming government. For example, in a situation where Independents or minor party Members can support either party into government, are they currently constrained by constitutional conventions or even by democratic ideals of legitimacy? Should they be obliged to support the party which has the support of a majority of voters – or should they at least be constrained against supporting the party that has only minority support across the state? Is it possible that in South Australia the Parliament’s adoption of the fairness clause, and its approval at referendum by the electors of the state, might now imply a predisposition in the South Australian constitution against the appointment of governments that do not have the support of a majority of voters? If that were the case might a new convention be developed, that would constrain the behaviour of Independents or minor party Members who find themselves in a position to support either of the major parties into power?

Another consideration is the Governor’s role in the formation of governments. It is generally understood that, by convention, when neither of the major parties has an absolute majority of seats, the party with the most seats is given first opportunity to form a coalition. Where Independents or minor party Members could make it possible for either party to govern, could we explore the idea that this be changed so that the party with the majority of votes be given the first opportunity?

Finally, as an alternative to change through conventions or instructions, the parliament could make its intentions clear through another constitutional amendment.

It was a simpler constitutional and electoral situation after the 2006 election when the Labor Party won the support of a majority of voters in its own right and won a majority of the seats in the House of Assembly, and was reappointed to government. At that election Karlene Maywald (National) and Rory McEwen (Independent) who had served in the Labor Ministry for the second half of the 2002-2006 term, were reappointed to the Ministry. This time the Commission considered that their re-election meant that their conservative electorates had given them each a mandate to work with the Labor government, and on this basis the Commission treated them in the same way as it had treated the Independent Member for Fisher in 2002, and expressed the results in their seats in terms of the two party preferred vote.

2010 and non-uniform swings

At the recent state election of 2010 South Australia has recorded another wrong winner election result. The Labor Party has won a majority - 26 - of the Assembly’s 47 seats with

\textsuperscript{11} Karlene Maywald (Chaffey, National) and Rory McEwen, (Mt Gambier, Independent).
only 48.5% of the two party preferred result across the state. This time the problem was neither electoral bias nor political agreements after the election, but something much more problematic for the Commission: non-uniform swings.

The ALP ran the most successful defensive marginal seats campaign seen in South Australia. The swing across the state was 8.3% away from the ALP on a two party preferred basis; had it been uniform Labor would have lost 7 seats to the Liberal Party, but in fact Labor lost just three seats, and even made two of its most marginal seats safer.

Campaigns have two layers – a broad, often presidential-style, campaign designed to win votes across the state, and an intensive second layer campaign brought into effect in seats targeted for protection or to win. The presidential component of Labor’s campaign in 2010 was muted, responding to opinion polling which showed that the Premier’s approval rating had dropped substantially. Labor’s focus in marginal seats targeted for protection was very much on local issues and on effective local representation by Labor sitting members. The overall effect allowed a drop in Labor support but quarantined it to safe seats, and produced swings of quite different sizes – and even in different directions - across Labor’s seats. At the same time, the Liberal campaign was leader-focussed and resulted in fairly uniform swings across seats that went into the election as Liberal-held. Many of the biggest swings occurred in safe Labor seats and in fairly safe Liberal seats, where the changes in voter support did not result in seats changing hands.

The 2010 election in South Australia raises constitutional issues for the state – it is clearly a wrong winner election – and also methodological issues for the Commission. In resolving both questions, attention will inevitably be focussed on the Commission’s ability to comply with the fairness requirement.

Unlike the situation after the 2002 state election, the problem in 2010 has a clear electoral basis, and any preventative measures or remedies will need to be electoral rather than political. The parliament has few alternatives. It could perhaps regard the fairness clause as idealistic and impractical, but that road leads straight back to commissions that unwittingly perpetuate bias or poor responsiveness in electoral redistributions, parties protesting after each redistribution that they have been robbed in the process, and reinforcement of the public’s increasingly cynical attitude towards government. This road is unattractive and it would also be politically difficult: winning support to abolish a constitutional provision about fair elections would not be an easy task.

As an alternative, in hearings for the next redistribution the parties and the Commission could agree that a different methodology might enable the Commission to draw seats that would allow for non-uniform swings. The problem here is that it is not likely that another method can be found to replace the uniform swing assumption. The most likely outcome is that the parties and the Commission will agree that the Commission did indeed “ensure, as far as practicable” that the seats it drew would produce a fair outcome, but that the Commission cannot practicably plan for non-uniform swings. That assessment will raise a further question. If the parties agree that the fairness requirement remains relevant, and that the Commission should continue to attempt to produce seats that will not advantage either party going in to a subsequent election, they will now need to answer a question raised by the Commission in the first hearings under the fairness clause: what will the tolerance be for wrong winner outcomes? How often will parties accept a wrong winner election outcome, and how many seats or what percentage of the two party preferred vote will become the de facto allowable tolerance? Quite reasonably the question was not answered in 1992, as it was simply too early to know how robust a system the Commission could build, but it may now be re-considered.

If the parties cannot advocate for a methodological change yet have no appetite for an agreement on tolerance, they will need to create a remedy for future wrong winner elections.
One remedy that has been discussed from time to time involves supplementary seats that would only come into existence at an election where a party wins a majority of the votes but not of the seats; these new seats would “top-up” that party’s seat count to the extent of giving it a bare majority of the (new) total seats in the House of Assembly, and would cease to exist at the following election. The size of the imbalance between votes and seats in 2010 can be seen by the fact that even if the three Independents who won conservative seats this time agree to support a Liberal government, six new Liberal seats would need to come into existence to give the Liberals a majority on the floor of the House.

Another remedy could be complete system redesign. After two consecutive wrong winner elections in 1978 and 1981, the democratic legitimacy of New Zealand’s government seemed weak and the Parliament was in a difficult constitutional position. In that country electoral safeguards and constitutional remedies seemed too complex, and the country adopted a mixed-member proportional (MMP) electoral system as a simpler solution. Roughly half of the seats in their (unicameral) parliament are now elected as single member districts and the other half using proportional representation according to a formula that equalises parties’ share of the total seats according to their share of voter support across the country. The price of adopting MMP in South Australia would probably be two-fold: permanent coalition government and amalgamation of the two Houses of the South Australian Parliament, because there are not enough seats in the House of Assembly alone to make MMP work.

There is a final alternative – inaction. Unlike the situation in 1989, South Australia’s newly-elected Labor government has a secure majority on the floor of the House, and taking action against a future wrong winner election may seem too complex and too hard to sell to make it worthwhile. Besides, the Labor Party has not been disadvantaged so far. But Labor could find itself in its opponents’ shoes at the next state election. Inaction could be a risk to both sides of the parliament.

---

12 Given the parliament’s experience in 2002, consideration of this remedy would need to take minor party and independent candidates into account.
13 Unlike the Commonwealth Constitution’s s.48 which links the number of House of Representatives and Senate seats, the Constitution Act 1934 (SA) contains no link and there would be no implications for the Legislative Council ballot.
14 See Zanella 1990 for Malta’s use of this system.
Constitution Act 1934 (SA)


