

NO EIGHT-YEAR TERMS FOR THE HOUSE OF UNREPRESENTATIVE SWILL

By Malcolm Mackerras

On the afternoon of Tuesday, 17 September 2019 a welcome surprise came into my e-mail system. It was an invitation to participate in a Constitutional Roundtable on fixed four-year parliamentary terms. The reason for my surprise was that the last time I was invited to be on a panel at a federal Parliament House function was on 1 March 2016 when I opposed George Williams. Being on a panel with him again would be my welcome new meeting of him. During the 45th Parliament I never received a single invitation – even though I sought to appear before the Joint Standing Committee on Electoral Matters. Reasons for the refusal of my wish are explained on my website at www.malcolmmackerras.com. On that website I explain why I call the Senate “Unrepresentative Swill”. Indeed, that is the title of my blog. I give below further information about the above-mentioned meeting of the JSCEM on the morning of 1 March 2016 at which I expressed passionate opinions.

I suppose the reason why I received that spring-time 2019 surprise invitation from the House of Representatives Standing Committee on Social Policy and Legal Affairs is that my long-standing views on federal parliamentary terms are well-known. I favour no change to the present arrangements which I think are quite satisfactory. Furthermore, I deny the commonly held view that Prime Ministers have abused their power to cause an early dissolution. In my documents I have a file “Early Elections” that includes my article titled “Early General Elections for Australia’s House of Representatives”. I sent it to the Committee on the morning of Monday 23 September and asked that it be posted on the Committee’s website.

While I favour leaving all these arrangements as they are I am aware that most commentators favour fixed four-year terms for the House of Representatives. Where they differ is in relation to the Senate. I discovered early in the piece that there is virtually no support for the idea of giving senators terms of eight years – nor any belief that the Australian people would ever vote for such a proposal. For that reason, I decided not to proceed with an article arguing the case for the title I have given above. A better idea is to consider seriously the alternative proposal that terms for both houses be fixed at four years. The best exposition of that idea was presented by Crispin Hull in an article on page 27 of *The Canberra Times* for Saturday 21 September 2019. (Hull writes a column regularly each Saturday in the “Forum” part of the paper.) His article was titled “It’s time for Senators to come to the four”. The article reads as follows:

After next year, the Federal Parliament will be the only one in Australia with a term of three years. And so this week the chair of the House Social Policy and Legal Affairs Committee, Andrew Wallace (Liberal, Queensland) announced a public “roundtable” of constitutional experts to look at the issue in November. It is very well-trodden ground over more than 40 years that hitherto has hit a series of brick walls. The usual stumbling block has been the Senate. At present senators have a fixed six-year term. Generally, half of them are elected every three years, usually at the time of the House of Representatives election. If the House of Representatives went to four years there would be three options for the Senate.

First, retain the present terms with separate half-Senate elections every three years and separate House of Representatives elections every four years. This is obviously too expensive and would mean an election roughly every two years – the very thing the four-year term idea hopes to avoid. Secondly, have simultaneous elections for the House and

half the Senate, with senators having the equivalent of two House terms, or eight years. That is a long time between democratic drinks. Given the number of senators who change parties or resign early in their terms handing the seat for the rest of the term to a fellow party member it is doubly undemocratic. A senator could serve in the Senate for nearly 16 years and only face the people once. Of course, in Australia's most corrupt state, NSW, Upper House terms are eight years – a cosy little sinecure for some party hacks.

Thirdly, senators could have four-year terms, with the whole Senate being elected every four years at the same time as the House. Hitherto the major parties have objected. If the whole Senate is elected every four years it means all 12 senators from each state would be elected at once and the quota for election would be just 7.7 per cent, making it much easier for minor parties to win a Senate seat. This is what happens in double dissolutions. Last time that happened was in 2016 and three minor party senators were elected from every state, except South Australia which elected five of them – an aberrant result because of the Xenophon phenomenon. The 20 minor-party senators elected in 2016 formed the largest Senate cross-bench in Australia's history. The minor parties would love it, but the major parties, at least the LNP, would object, at least for now.

In 2019, the LNP won three out of six senators in every state except Tasmania. In the longer term, the LNP might well think that it could get a working majority in the Senate with the help of a couple of One Nation senators. In the longer term, however, that is likely to be delusional. The LNP only just scrapped its third seat on preferences in each state. The trend is for a declining vote for the major parties, a much lower chance of getting a third seat. Labor has no hope of ever winning a third seat in any state. In future half-Senate elections, a more likely result will be two senators each for the major parties and two for the minors. That trend would ultimately result in a Senate of 24 LNP; 24 Labor and 24 minors – a much less palatable result for the major parties than the average double dissolution.

The longer-term projection for electing all 12 senators in each state every election would be three seats for minor parties and four or five each for the majors. That would result in a Senate of 18 minors and 27 for each of the majors, give or take a bit from each. That, oddly enough, would be a better result for the major parties than the longer-term projection for half-Senate elections. The LNP - cocky after the 2019 result – is likely to be blind to that trend for now. But the 2019 result was a very lucky one for the LNP. Just a slight swing away would result in it not getting the third seat. In short, the major parties should not dismiss the idea of electing the whole Senate every four years.

Wallace points out, there are "community concerns about the revolving doors of politicians and policy" and about "stability and opportunities for longer-term outcomes". Whether the four-year term stumbles or not, there are still other things to do to meet those community concerns. For a start, there have been 46 House of Representatives elections since Federation, giving an average term of a tad over two and a half years. So, if you could stop Prime Ministers calling early elections, you could add five or six months to the term. If the term were fixed and the election held on say the last Saturday in November, or whatever, it would create a lot of certainty and stability. No more spooked markets over election dates. No more media guessing over the date. No more messed-up holiday or work arrangements for the public service and political staffers and so on.

To ensure the Parliament stayed on track we would have to do away with double dissolutions. There have been seven since federation. Each has caused either a subsequent half-Senate election on its own or a truncated term for the House that was elected at the time. This is because the Constitution deems senators' terms to be back-dated to the previous July 1 after a double dissolution. Only the 1974 double dissolution was a genuine attempt to break the deadlock between the House and the Senate. An easier way to break that would be that any legislation twice rejected by the Senate during a term could be passed (without amendment) by the House of Representatives on its own after the subsequent election.

That would be quite democratic because the actual words of legislation would have been before the people at the subsequent election. Senators' terms would be two terms of the House without any post-dating or back-dating as we have now. The House is in desperately in need of expansion. Each member now serves about 100,000 voters, substantially more than their counterparts in Britain, Canada and New Zealand. But there is no need for more senators, especially in Tasmania. Australia's system is pretty good on the whole, and certainly is more democratic than the British first-past-the-post system. Nonetheless, a few tweaks could improve it.

While I do not actually support Hull's proposal (for reasons given below) that article is certainly worth reading and presenting in full, as I have done. Its only actual mistake lies in the words "Senators' terms would be two terms of the House." Clearly, he means "Senators' terms would be the same as for the House." Before I give reasons for my overall negative view of Hull's proposal I make two further points in its favour. The first is that Senate election results would be more proportional in their distribution of seats between parties if every election were for the whole Senate. That is why this article is placed in my computer in a file titled "Proportional". That is why I attach tables which I now explain, beginning with Table 1.

Indeed, Table 1 scarcely needs explanation. Invented by an Irish political scientist, Michael Gallagher, it sums up all the deviations from proportionality into a single statistic. As can be seen all the recent Senate general elections (those following double dissolutions) have produced very proportional results. On some occasions half-Senate elections have produced very proportional results. In 1961 we had the unique situation whereby the House of Representatives result was more proportional than that for the Senate. Why? The House result in seats was very close while the Senate result yielded no seats for minor parties notwithstanding the high votes they enjoyed. The most disproportional Senate general election result was in 1974. The half-Senate elections in 1949, 1953, 1964, 1970, 1980 and 1993 produced more proportional results than that of 1974.

The essential reason why I collect tables in this way is that I am seeking a reform of the Senate voting system – to do away with above-the-line voting. For that reason, I opposed the Commonwealth Electoral Amendment Act 2016. That was not a proper reform, in my view. In my opposition during the years 2014, 2015 and the autumn of 2016 I asserted several things and made predictions which, I argue, are being proved correct. An important proposition I advanced was that, in distributing seats between parties the new Senate system would be less proportional (and, therefore, less fair) than was the case with the old system. The attached tables prove me to have been correct – so far, at least.

This is what I asserted loudly in those years: by the Commonwealth Electoral Amendment Act 2016 the Liberal Party is rigging the Senate voting system in favour of the Liberal Party and the Greens are rigging it in favour of the Greens. That my prediction has been proved correct is illustrated by the

Senate as composed after the May 2019 elections. For more detail see below. In the short term I asserted loudly that Senator Nick Xenophon was rigging the Senate voting system in favour of his Nick Xenophon Team. That was proved spectacularly correct in 2016. At that election he increased his numbers from one (himself) to three, two of whom won six-year terms – and one with a three-year term. See Tables 3, 4 and 5.

Xenophon proceeded to “blow it” with his quixotic seeking to be a major figure in the Parliament of South Australia. Xenophon’s behaviour had the effect that the Liberal Party and the Greens enjoyed the full benefit of their rigging in 2019. The cross-bench was reduced by six seats, and all six went to the Liberal Party. You read that correctly: a net six losses by the cross-bench resulted in a net six-seat gain by the Coalition. Compare and contrast Tables 4, 7 and 8. Notice, also, from those tables that Labor has exactly the same number of senators today (26) as it had three years ago.

The benefit to the Greens from their rigging of the system can be seen by comparing Table 2 with Table 6. To win a Senate seat in all six states it needed the Greens to get 13 per cent of the overall vote in 2010. By contrast, in 2019 it needed only 10 per cent.

In my first paragraph above I referred to the meeting of the Joint Standing Committee on Electoral Matters on the morning of 1 March 2016. It was a special meeting to consider the then Commonwealth Electoral Amendment Bill 2016. The Liberals, Greens and Senator Nick Xenophon sought to ask three academics to be the “cheer squad” for the Bill. Labor insisted that I too be invited to tell the Committee of my opposition. The three for the bill were heard in the order Antony Green first, George Williams second and Kevin Bonham third with Bonham not being present in person but speaking by telephone. The Hansard records that all four of us appeared in a private capacity.

In his article Hull was correct in this statement: “In 2019, the LNP won three out of six senators in every state except Tasmania.” Where I strongly disagree with Hull is in this statement: “Labor has no hope of ever winning a third seat in any state.” I confidently predict that at the next half-Senate election the result in South Australia will be three for Labor and three for the Liberal Party. I also confidently predict that the Liberal Party will keep the three senators it has coming up for election in Tasmania. Without Jacquie Lambie as a candidate why not? I see no reason, therefore, to doubt that the Coalition will win 20 of the 40 seats. That shows the effect of the Liberal Party’s rigging of the system. It is very likely the Coalition will win 50 per cent of the seats with an Australia-wide Senate vote of 36 per cent.

Consequently, my position is that Hull is right for a reason he does not state but wrong in the reasoning he does state. The best argument for getting rid of half-Senate elections is that those elections, absent my reform as described below, will yield unfair, disproportional results rigged in favour of the Coalition and the Greens.

The second-best argument for Hull’s proposal is again one he does not state. As part of the major constitutional reform Hull proposes it would be possible to change section 15 of the Constitution to do away with the party machines and state parliaments in the filling of casual vacancies. The present way can only be justified where there is rotation of senators. Where there is a vacancy caused by High Court disqualification that vacancy is presently filled by recounting votes from the previous election. That idea could easily be extended to all vacancies by changing section 15.

At the present time, with one exception, Australian proportional representation systems use recounting votes from the most recent general election in every case where there is no rotation of members. Thus, for the Legislative Council of Western Australia, for the Tasmanian House of

Assembly and for the ACT Legislative Assembly recounting votes is the method. It would, therefore, be sensible and logical to do away with the rotation of senators and, at the same time, fix up the method of filling casual vacancies. Although he has not discussed this in his articles I feel sure Hull would agree with me about that.

There is one exception at present to the logic of the above. The Victorian Legislative Council has no rotation of members. For illogical but political reasons casual vacancies are filled by party machine appointment. However, for many years the Proportional Representation Society has urged that vacancies should be filled by recounting votes. I confidently predict that such will be done during the present term of the Parliament of Victoria (59th Parliament). It will be done as part of the reform designed to drive the preference whisperer Glenn Druery out of business. I confidently predict that the 60th Parliament (the 2022-2026 term) will see this reform in operation.

Given the two plusses added above to those stated by Hull why do I remain so sceptical of the need for constitutional reforms in this area? The answer lies in part with the question of increasing the size of the House of Representatives. It can be done so easily by adopting the Senate reforms advocated by me in my blog titled "Unrepresentative Swill". It can be visited at www.malcolmmackerras.com. The chapter of my book "Increasing the Size of Parliament" can be found in the "Chapters" section.

The full text of Hull's recent article is quoted above. In that chapter I quote from an earlier article in which he cogently argues the case for increasing the size of the House of Representatives. The article is titled "Sounds odd but more MPs could halt political dysfunction" and was published in *The Canberra Times* for Saturday 8 July 2017 in the "Forum" part of the paper.

Where I disagree with Hull in both articles lies in his refusal to increase the size of the Senate. That can be done easily with 14 senators per state producing half-Senate elections for seven senators. That, accompanied by my other reforms, would solve all the problems of the Senate voting system. Consequently, I say that the adoption of my reforms producing a Senate of 88 and a House of Representatives of about 175 is the way to go. It would require a simple set of acts of parliament. It would be sold to the people after the political decision is made to do it. The people would accept it as an accomplished fact and it would receive substantial third-party validation from experts.

Going to a referendum selling a complicated reform is not wise. Hull's reform may be excellent – but that does not mean it would be carried. His articles are good - but he demonstrates a remarkable ability to devise a solution in search of a problem. In this case that is what I believe he has done. I deny that there is a problem in relation to federal parliamentary terms. The real problem lies in the lousy Senate electoral system foisted on the people in 2016. That can be fixed by my reforms which would produce fairness between both parties and candidates and – by having half-Senate elections for seven places – have as a by-product an increase in the size of the House of Representatives from 151 to a number about 175. New South Wales would have eight more members, Victoria seven, Queensland five and each of South Australia and Western Australia two. Tasmania and the territories would remain at their present numbers.

Table 1: Least Squares Indexes for Australia, 1949 to 2019

Election	Parliament	House of Representatives	Senate
1949	19th	7.50	3.42
1951	20th	5.36	3.03 (3 rd general)
1953	-	-	3.29
1954	21st	2.88	-
1955	22nd	6.84	6.52
1958	23rd	11.05	6.18
1961	24th	7.12	9.75
1963	25th	9.00	-
1964	-	-	2.06
1966	26th	10.83	-
1967	-	-	3.80
1969	27th	6.95	-
1970	-	-	3.16
1972	28th	6.90	-
1974	29th	5.96	3.72 (4 th general)
1975	30th	14.05	3.08 (5 th general)
1977	31st	15.02	7.30
1980	32nd	8.46	1.51
1983	33rd	10.41	3.37 (6 th general)
1984	34th	7.82	5.35
1987	35th	10.41	2.60 (7 th general)
1990	36th	12.49	4.39
1993	37th	8.06	3.33
1996	38th	11.24	4.54
1998	39th	11.85	7.34
2001	40th	9.81	8.47
2004	41st	9.07	8.69
2007	42nd	8.96	3.93
2010	43rd	7.81	4.12
2013/14	44th	10.06	4.22
2016	45th	9.10	3.16 (8 th general)
2019	46th	9.70	7.20

- Notes:
- (1) The average for the 28 general elections for the House of Representatives is 9.10.
 - (2) The average for the 21 periodical elections for half the Senate is 5.13.
 - (3) The average for the six Senate general elections is 3.16.

Table 2: Half-Senate Election, 2010

Date of Election							
21 August							
Further Information							
Seats filled:	40						
Total enrolment:	14,086,869						
Formal votes cast:	12,722,233 (96.3%)						
Informal votes:	495,160 (3.7%)						
Total votes:	13,217,393						
Party	Votes		Change since 2007	Change since 2004	Seats		Over-under Representation
	Number	%			Number	%	
Liberal-National	4,914,205	38.6	-1.3	-6.5	18	45.0	+6.4
Labor	4,469,734	35.1	-5.2	+0.1	15	37.5	+2.4
Greens	1,667,315	13.1	+4.0	+5.4	6	15.0	+1.9
Democratic Labor Party	134,987	1.1	+0.2	+0.6	1	2.5	+1.4
Others	1,535,992	12.1	+2.3	+0.4	-	-	-12.1

Note: The above statistics come directly from the Australian Election Commission. They also come from page 274 of the *Parliamentary Handbook of the Commonwealth of Australia 2011* produced by the Parliamentary Library.

Table 3: Half-Senate Elections, 2013 and 2014

Dates of Election

7 September 2013 for the seven eastern jurisdictions

5 April 2014 for Western Australia

Further Information

Seats filled:	40
Total enrolment:	14,749,709
Formal votes cast:	13,380,545 (97.1%)
Informal votes:	403,380 (2.9%)
Total votes:	13,783,925

Party	Votes		Change since 2010	Change since 2007	Seats		Over-under Representation
	Number	%			Number	%	
Liberal-National	4,951,196	37.0	-1.6	-2.9	17	42.5	+5.5
Labor	3,965,284	29.6	-5.5	-10.7	12	30.0	+0.4
Greens	1,234,592	9.2	-3.9	+0.2	4	10.0	+0.8
Palmer United	751,121	5.6	+5.6	+5.6	3	7.5	+1.9
Liberal Democrats	502,180	3.8	+2.0	+3.7	1	2.5	-1.3
Nick Xenophon Group	258,376	1.9	+1.9	+0.7	1	2.5	+0.6
Family First	149,994	1.1	-1.0	-0.5	1	2.5	+1.4
Motoring Enthusiasts	66,807	0.5	+0.5	+0.5	1	2.5	+2.0
Others	1,500,995	11.3	+2.0	+3.4	-	-	-11.3

Note (1): The above statistics do not come directly from the AEC. Rather they are a re-working from pages 274 to 281 of the *Parliamentary Handbook of the Commonwealth of Australia 2014* produced by the Parliamentary Library. The pages are introduced by this note on page 274:

“The following section presents national, State and Territory results for the 2013-14 Senate elections. Note that the High Court, sitting as the Court of Disputed Returns, declared void the 7 September 2013 Senate result in Western Australia following the loss of 1,375 ballot papers. Subsequently a special half-Senate election was held in that state on 5 April 2014, the results of which are shown here.”

Note (2): If Victorian Senator Helen Kroger had won and Ricky Muir had lost, the Liberal-National seat-number would have been 18, or 45 per cent of seats. The Coalition’s over-representation, therefore, would have been 8 per cent.

Table 4: Senate General Election, 2016

Date of Election						
2 July						
Further Information						
Seats filled:	76					
Total enrolment:	15,676,659					
Formal votes cast:	13,838,900					
Informal votes:	567,806					
Total votes:	14,406,706					
Party	Votes		Change since 2013	Seats		Over-under Representation
	Number	%		Number	%	
Liberal-National	4,868,246	35.2	-1.8	30	39.5	+4.3
Labor	4,123,084	29.8	+0.2	26	34.2	+4.4
Greens	1,197,657	8.6	-0.6	9	11.8	+3.2
Pauline Hanson's One Nation	593,013	4.3	+3.8	4	5.3	+1.0
Nick Xenophon's Team	456,369	3.3	+1.4	3	4.0	+0.7
Liberal Democrats	298,915	2.2	-1.6	1	1.3	-0.9
Derryn Hinch's Justice Party	266,607	1.9	+1.9	1	1.3	-0.6
Family First	191,112	1.4	+0.3	1	1.3	-0.1
Jacquie Lambie Network	69,074	0.5	+0.5	1	1.3	+0.8
Others	1,774,823	12.8	-4.1	-	-	-12.8

Table 5: Senate General Election as Half-Senate Election, 2016

Date of Election					
31 August ^(a)					
Further Information					
Seats filled:			36		
Other information:			See Table 17		
Party	Votes		Seats		Over-under Representation
	Number	%	Number	%	
Liberal-National	4,868,246	35.2	17	47.2	+12.0
Labor	4,123,084	29.8	13	36.1	+6.3
Greens	1,197,657	8.6	3	8.3	-0.3
Nick Xenophon's Team	456,369	3.3	2	5.6	+1.3
Pauline Hanson's One Nation	593,013	4.3	1	2.8	-0.5
Others	2,600,531	18.8			-18.8
Total Formal	13,838,900	100.0	36	100.0	

(a) That was the date of the Senate resolution reading as follows:

That, pursuant to section 13 of the Constitution, the senators chosen for each state be divided into two classes, as follows:

Senators listed at positions 7 to 12 on the certificate of election of senators for each state shall be allocated to the first class and receive 3 year terms.

Senators listed at positions 1 to 6 on the certificate of election of senators for each state shall be allocated to the second class and receive 6 year terms.

My comment: in effect that was a case of the Senate conducting its own half-Senate election. It was carried by 50 votes to 15, that being a Coalition-Labor gang-up feathering their own nests.

Table 6: Half-Senate Election, 2019

Date of Election					
18 May					
Further Information					
Seats filled:	40				
Total enrolment:	16,419,543				
Formal votes cast:	14,604,925				
Informal votes:	579,160				
Total votes:	15,184,085				
Party	Votes		Seats		Over-under Representation
	Number	%	Number	%	
Liberal-National	5,548,142	38.0	19	47.5	+9.5
Labor	4,204,313	28.8	13	32.5	+3.7
Greens	1,488,427	10.2	6	15.0	+4.8
Pauline Hanson's One Nation	788,203	5.4	1	2.5	-2.9
Jacquie Lambie Network	31,383	0.2	1	2.5	+2.3
Others	2,544,455	17.4	-	-	-17.4
Total Formal	14,604,925	100.0	40	100.0	

Table 7: 46th Parliament, Comparing Whole Senate Seats with 2016 Votes

Dates of Election

2 July 2016, 31 August 2016 and 18 May 2019

Further Information

Seats filled:

76

Other information:

See Tables 5, 14, 15 and 16

Party	Votes		Seats		Over-under Representation
	Number	%	Number	%	
Liberal-National	4,868,246	35.2	36	47.4	+12.2
Labor	4,123,084	29.8	26	34.2	+4.4
Greens	1,197,657	8.6	9	11.8	+3.2
Pauline Hanson's One Nation	593,013	4.3	2	2.6	-1.7
NXT – Centre Alliance	456,369	3.3	2	2.6	-0.7
Jacquie Lambie Network	69,074	0.5	1	1.3	+0.8
Others	2,531,457	18.3			-18.3
Total Formal	13,838,900	100.0	76	100.0	

Comparing the above table with Table 4 it will be noticed that Labor and Greens stay the same at 26 and 9 respectively. By contrast the Coalition has gained six seats, two from Pauline Hanson's One Nation and one each from Centre Alliance, David Leyonhjelm, Derryn Hinch and Bob Day.

Table 8: 46th Parliament, Comparing Whole Senate Seats with 2019 Votes

Dates of Election					
2 July 2016, 31 August 2016 and 18 May 2019					
Further Information					
Seats filled:			76		
Other information:			See Tables 5, 14, 15, 16 and 17		
Party	Votes		Seats		Over-under Representation
	Number	%	Number	%	
Liberal-National	5,548,142	38.0	36	47.4	+9.4
Labor	4,204,313	28.8	26	34.2	+5.4
Greens	1,488,427	10.2	9	11.8	+1.6
Pauline Hanson's One Nation	788,203	5.4	2	2.6	-2.6
Centre Alliance	28,416	0.2	2	2.6	+2.4
Jacquie Lambie Network	31,383	0.2	1	1.3	+1.1
Others	2,516,039	17.2			-17.2
Total Formal	14,604,925	100.0	76	100.0	