

SUBMISSION TO THE JOINT STANDING COMMITTEE ON ELECTORAL MATTERS

21 October 2016

Dr Bede Harris
Senior Lecturer in Law
Charles Sturt University

I Introduction

1. This submission examines the results of the 2016 federal election and the operation of the electoral system from the perspective of fairness to voters and consistency with democratic principles. Part II of the submission discusses how the electoral system contained in the *Commonwealth Electoral Act 1918* (Cth) is unfair to minor parties and their voters. Part III examines the impact that the distortions in the electoral system have on the winning of government. Part IV discusses the affects that the electoral system has on the political process. Part V examines the extent to which the electoral system is compatible with democracy. Part VI concludes with recommendations to the Joint Committee.

II Unfairness to minor parties and their voters

2. The electoral system contained in the *Commonwealth Electoral Act 1918* (Cth) is markedly unfair to minor parties and thus by extension to their voters.
3. This is reflected in Figure A, which contains data from the 2016 election obtained from the Australian Electoral Commission. It compares (i) the percentage of the national first preference vote for the House of Representatives won by each party, (ii) the number of seats that those votes yielded and (iii) the notional number of seats that would have been yielded had the electoral system been such as to allocate seats in proportion to votes.
4. Approximately 4% of the national first preference vote was allocated to parties which failed to obtain representation in the House and these are not reflected in this table. For this reason the total number of seats in the fourth column does not add up to 150. It should also be noted that the stated percentage of first preference votes cast for Independents reflects the

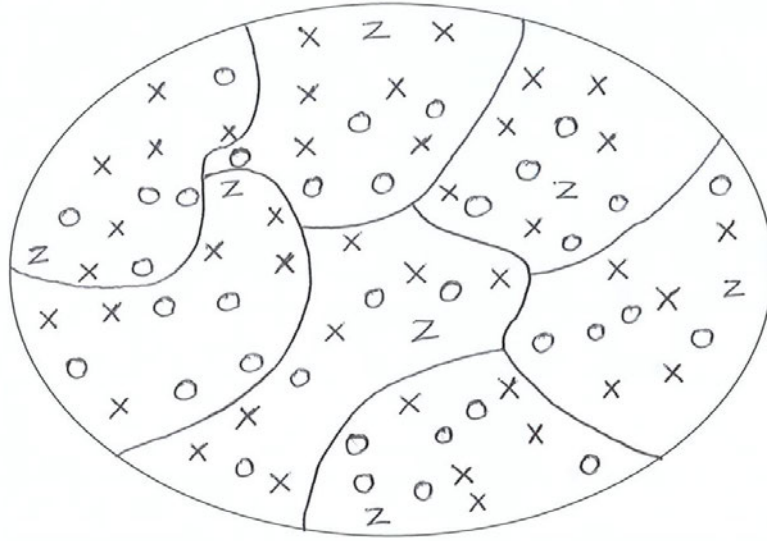
Australian Electoral Commission's combined percentage first preference vote cast for Independent candidates.

Figure A

	Percentage of first preference votes	Seats won	Notional seats allocated proportionately to share of first preference votes
Australian Labor Party	34.73	69	52
Liberal	28.67	45	43
The Greens	10.23	1	15
Liberal National Party	8.52	21	13
The Nationals	4.61	10	7
Independents	2.81	2	4
Nick Xenophon Team	1.85	1	3
Family First	1.49	0	2
Christian Democratic Party	1.31	0	2
One Nation	1.29	0	2
Katter's Australian Party	0.54	1	1
TOTALS	96.05	150	144

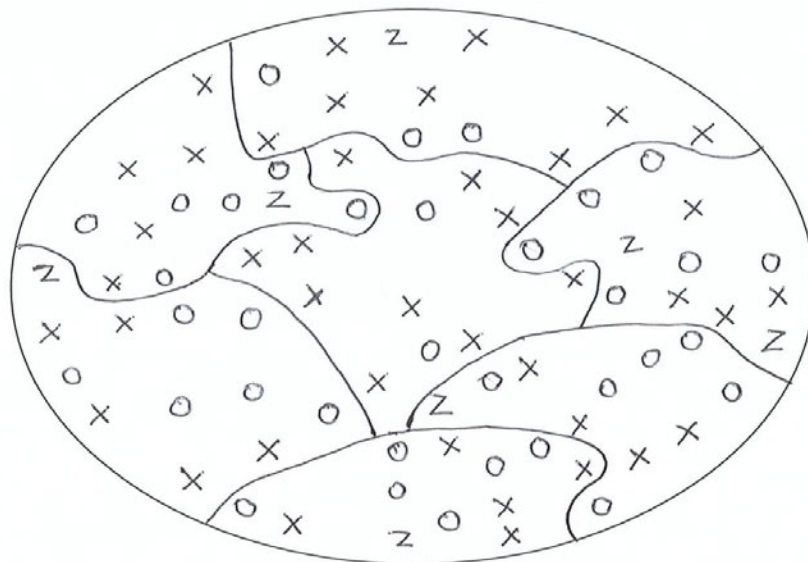
5. As is evident from these figures, the electoral system gives an enormous advantage to the two major political blocs constituted by the Australian Labor Party and the Coalition (Liberal / Liberal National / National). The Labor party's 69 seats significantly exceeds its notional entitlement of 52. Similarly, the Coalition's 76 seats are substantially in excess of its notional entitlement of 63.
6. This discrepancy is not surprising. It is a natural consequence of any voting system based on single-member electorates. Thus a similar effect is evident in United Kingdom, where in the 2015 general election the UK Independence Party won 12.7% of the vote but only 0.2% of the seats, and the Liberal Democrats won 7.9% of the vote and 1.2% of the seats.
7. The reason why an electoral system based on single-member electorates is inherently – and inevitably - unfair is illustrated by Figures B and C, which represent a hypothetical country with a seven-seat Parliament, 12 voters in each electorate and three political parties, X, O and Z. These diagrams represent on a small scale what happens on the large scale in Australia.
8. It is crucial to note that in each diagram *the number of votes won by each party X, O and Z remains exactly the same, as does the physical location of their voters*. The only difference lies in how the electoral boundaries are drawn.
9. Irrespective of how the boundaries are drawn, party Z wins none of the seven seats, even though its seven out of 77 votes would entitle it to one of the seven seats. The problem faced by party Z is that because its supporters are widely spread, there is no single constituency in which it has a majority.
10. What is also striking is how a change in electoral boundaries causes a *reversal* in the fortunes of parties X and O: In Figure B, party X wins a clear majority of seats, even though its vote is the same as the combined votes of parties O and Z.
11. However, in Figure C, party X wins a smaller number of seats than does party O, even though party X has more votes. Furthermore, party O would form government, even though its vote is less than parties X and Z combined, and is less even than party X on its own. In other words, the critical factor that determines the outcome of elections is not how much support a party has, but rather the accident of where its supporters happen to live. A more arbitrary electoral system is difficult to imagine.

Figure B



	Votes	Seats
	X: 42	X: 6
	O: 35	O: 1
	<u>Z: 7</u>	<u>Z: 0</u>
TOTAL	84	7

Figure C



	Votes	Seats
	X: 42	X: 2
	O: 35	O: 5
	<u>Z: 7</u>	<u>Z: 0</u>
TOTAL	84	7

12. The fact that the *Commonwealth Electoral Act 1918* (Cth) embodies alternative voting in no way ameliorates its unfairness to voters. The ability to cast a first-preference vote in favour of a minor party or Independent merely postpones the inevitable necessity of voting for one of the major blocs if one's vote is to affect the outcome in one's electorate – unless one votes in one of those few electorates where unique local circumstances favour the election of minor party candidates or an Independent.
13. In addition, all votes cast other than for the candidate who wins an electorate have no impact at all on the composition of Parliament, which means that in electorates which are safe for one or other of the major parties – a situation which can persist for decades - voters may as well not go to the polls.
14. The fact that the geographic distribution rather than aggregate number of votes is critical to a party's success, means that the electoral system not only confers an unwarranted dominance over the political process on the two major parties but also means that the random factor of the location of electoral boundaries has a decisive effect on election results. For example, while 12 930 814 votes were cast in the 2007 election, the outcome was effectively decided by just 8 772 voters in 11 electorates¹ who, if they had given their first preferences to the Coalition instead of to Labor, would have handed victory to the former – and this in an election which, the allocation of seats in Parliament (83 to Labor and 65 to the Coalition) gave the appearance of a Labor landslide. In 2010 the margin was even closer - 13 131 667 votes were cast, but had only 2 175 voters in two electorates² voted for the Coalition instead of Labor (and had the Greens and independents made the same decisions as to who to support in government), the Coalition would have won power. How can an electoral system be considered fair when the winning of government depends upon the arbitrary fact of the geographical location of a tiny number of voters?

III Impact of the electoral system on the winning of government

15. Even setting aside the fact that the decisive role played by the location of electoral boundaries always leads to parties receiving a different percentage of seats to that which their share of the nationwide vote would entitle them to, the single-member electorate system has the far more

¹ These electorates were: Bass, Bennelong, Braddon, Corangamite, Cowan, Deakin, Flynn, Hasluck, Roberston, Swan and Solomon.

² The electorates of LaTrobe and McEwen.

egregious consequences that it frequently leads to a party winning government without obtaining a majority of votes nationwide and sometimes even leads to a party winning a majority of seats with fewer votes than the major opposition party. This is illustrated by Figure D, containing the results from the federal elections held in 1990 and 1998:

Figure D

Year	Party	Nationwide percentage of first preference votes	Percentage of House of Representatives seats
1990	Labor	39.4%	52.7%
	Coalition	43.4%	46.7%
1998	Labor	40.1%	45.2%
	Coalition	39.1%	54%

16. What is striking about these results is that clearly the ‘wrong’ party won both elections, in that the victor (that is, the party which obtained a majority in the House of Representatives) was *less* popular in terms of nationwide share of the first preference vote than the vanquished. This is by no means a rare occurrence: Governments also came to power with fewer votes than were won by the opposition in 1954, 1961 and 1969.

IV Impact on the political process

17. Another result of a single-member electorate system is that it inevitably leads to a never-ending transfer in power between two parties, and thus the establishment of what is really a duopoly in place of a democracy. This, I would suggest, is a key reason why, as is frequently noted in the press and in public surveys, voters are becoming resentful of, and disengaged from, the political process in general and from the two major political parties in particular.
18. A reflection of this is the fact that an increasing number of voters are expressing their frustration by directing their first preference votes to parties other than Labor or the Coalition: In the 2007 election 14.5% of first preference votes went to minor parties or independents,³ but this increased to 18.2% in 2010, to 21% in 2013 and to 27% in 2016 – and this is despite the fact that a first preference vote cast other than for one of the major parties amounts, in

³ That is to parties other than the Liberals, Labor and the various manifestations of the Nationals (Liberal Nationals, Nationals and Country Liberals). The calculation ignores informal votes.

most instances to a gesture made before having to make a reluctant choice between the major parties, neither of which the voter may actually support.

19. Yet these figures probably fail to reflect the true level of support enjoyed by minor parties and independents, as their share of the vote would doubtless increase were there to be a real chance of their candidates being elected. Furthermore, in cases where the appeal of minor parties and independents is currently confined to specific regions (for example, the Nick Xenophon Team which draws the bulk of its support from South Australia, and One Nation which draws its support from Queensland), an electoral system which gave voters throughout the country the opportunity to contribute to candidates from these parties securing representation would also see more votes being cast in their favour.
20. The fact that the current electoral system has a deterrent effect on casting votes in favour of minor parties and independents – such votes being characterised as ‘wasted’ by the major parties – is pernicious, because it means that the system is not neutral as between parties, and that *the system itself*, and not just the true political sentiment of voters, becomes a factor in deciding how to vote. It is surely not consistent with democracy or equal opportunity as between political parties for this to be the case yet, to repeat what has been said earlier, a single-member electorate system has the inevitable consequence of dominance by two major blocs to the exclusion of other political formations and, in most electorates, deprives votes cast in favour of minor parties or independents having any effect on the outcome. The fact that the major parties exploit this fact - and indeed draw attention to it during election campaigns - shows how loaded in their favour the current system is.
21. Finally, under present electoral circumstances, a person aspiring to a political career must of necessity make their home with one of the two major parties - and trim their political views to conform to their discipline - if they want a realistic chance of being elected to Parliament. If our electoral system was changed to one based on proportional representation, the calibre of person who became involved in politics would likely be improved, because a broader range of parties representing a broader range of political views would have a real chance of electoral success and would therefore be able to draw on a wider pool of talent from the community.

V The electoral system and democracy

22. To what extent does our electoral system conform to the requirements of democracy? First, it is important to understand that democracy is a system of government, not a moral concept. Such moral value as attaches to democracy depends upon the extent to which it serves some

norm which is *external* to it. So what is the underlying norm served by democracy? According to political theory developed in Ancient Greece, it was the entitlement of citizens to participate in law-making. During the Enlightenment this came to be phrased in the language of rights – that each citizen was of equal status, from which flowed an equal right to participate in law-making, the only practical way of achieving that being through the mechanism of representative democracy. It was crucial to the success of vindication of that right that the franchise not be restricted by class or be distorted in its effect by, for example, weighting one person's vote differently from that of another, or by allocating law-making authority to legislative chambers representing social classes unequally.

23. Once one appreciates that democracy is a mechanism used to give effect to a higher norm, it follows that whether an electoral system is consistent with democracy is a question of degree, and depends on the extent to which that system gives effect to the right of citizens to *equal influence* over the law-making process. Thus the effectiveness of an electoral system in serving its purpose must be determined by how accurately it reflects the political sentiments of the voters, and an electoral system is less consistent with democracy the greater the extent that arbitrary factors distort that reflection.
24. It is therefore incorrect to say that compliance with the principles upon which democracy is based is satisfied simply by holding elections. That would be to reduce democracy to mere formalism and would mean that no principled distinction could be drawn between countries in which there is a right to vote but only for one party, those in which there is a multi-party system but government control over the media, those in which there is a multiparty system and free media but an electoral system which does not accurately reflect voter sentiment and those in which there is a multiparty system with free media and in which the electoral system is designed so as to ensure that every vote is of equal effect. Only the last of these categories would be fully consistent with the principles underlying democracy.
25. In comparison with the various systems of government in the world, Australia's system falls within the spectrum of democracies in that s 24 of the Constitution requires that Members of the House of Representatives be 'directly chosen by the people' and the *Commonwealth Electoral Act 1918* (Cth) establishes a system where people vote in free elections. However, given that the electoral system so obviously does not lead to the views of voters being accurately represented in the House of Representatives and that the effect of a person's vote depends on the arbitrary fact of the location of electorate boundaries, it cannot be said that it gives each voter an equal right to affect the outcome of elections. Furthermore, our electoral system not infrequently cannot pass even the most basic test of a democracy, which is that the

government should be formed by the party or parties which have the support of a majority of voters. For these reasons it is clear that the electoral system falls short of being truly democratic.

VI Recommendation

26. Our electoral system is fundamentally unfair to voters and to political parties. The fact that it is founded upon single-member electorates has the inevitable effect that it distorts rather than reflects the political sentiment of voters, because in the vast majority of electorates a voter who does not support either of the major political blocs is nevertheless forced to choose between whichever of them is the lesser of two evils if their vote is to have any chance of affecting effect on the outcome of an election – and votes cast for parties which fail to win the seat have no effect on the composition of the House of Representatives.
27. Our electoral system should give voters a real choice, a real voice and a real opportunity to see representatives reflecting their views gain representation in Parliament. Irrespective of where a vote is cast, it should have an equal impact on the composition of the House.
28. There are electoral systems which could ensure proportionality between the nationwide support parties have and the seats they win in the House of Representatives while maintaining connection between voters and an identifiable local representatives to whom they can take their concerns.
29. Under the Mixed-Member Proportional (MMP) system - used in Germany, New Zealand, Scotland and Wales – a voter has two votes, one for their single-member electorate and another for whichever party they favour, with the objective that the combined total of electorate seats won by a party plus its allocation of seats drawn from party lists must be proportionate to the percentage of party votes it obtained nationwide.
30. The Single Transferrable Vote (STV) system – used in the Republic of Ireland, Northern Ireland, Malta, Finland, Tasmania and the ACT – is based on multi-member electorates, where voters allocate votes to candidates in order of preference. The degree of nationwide proportionality achieved under this system depends on the number of seats per electorate – the larger the number of seats, the more proportional the outcome.
31. We need to recognise that our current system is defective and needs to be replaced. I therefore recommend that the Joint Committee establish an inquiry, the terms of reference of

which would be to examine the electoral system for the House of Representatives and to consider which alternative system(s) would best serve the principles of democracy - specifically that, as far as practicable, each vote should have an equal effect on the composition of the House of Representatives and each voter should have identifiable local representative(s).