The Senate
Safeguard or Handbrake on Democracy?

*Helen Coonan**

A Dysfunctional Senate?

The Senate is the legitimate

> **"legislative powerhouse of the Parliament".**

This is an extraordinary claim.

It was reported in the Australian Financial Review[1] as being made by the Leader of the Australian Democrats, Senator Meg Lees in her key note address to the Democrats' National Convention on 23rd January, 1999.

It is largely because Senator Lees and the minor parties who hold the balance of power in the Senate are attempting to implement their mistaken concept that the Senate is today dysfunctional.

In making this claim, Senator Lees disregards the functions assigned to the Senate by the Founders during the Convention Debates and the circumstances, some fortuitous, some accidental, but none of them thoroughly thought out, which have combined to produce the Senate roadblock we have in 1999.

Having shifted its emphasis from "keeping the bastards honest" the Democrats, if Senator Lees' be accepted, are, denying the legitimacy of the Government with a majority of seats in the House of Representatives and seek to usurp the function of Government.

It is this approach, coupled with other factors I will discuss which mandate changing the Senate. For let there be no mistake. An efficient hard-working Senate, scrutinising, criticising and examining legislation and keeping the Government accountable is a great institutional safeguard for all Australians.

But an obstructional competitor in the government of the country, frustrating or at least substantially delaying urgently required responses to national problems and regional and world crises, is disabling Australia from realising and enjoying its full potential. The Senate safeguard has in fact become a handbrake on progress.

Australia requires and is entitled to the twin benefits of an effective and properly working government within the framework of a robust parliamentary democracy.

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[1] *Australian Financial Review*, Monday 25 January, 1999

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That is denied by the approach that underwrites the statement I have quoted . It is also undermined by claims to an equal and opposite mandate in the Senate. The point is well made by political scientist, Hugh Emy, who has observed that if competing mandates

> "were to prevail over existing constitutional practice, then given the frequent absence of a government majority in the Senate, it would be open to the major defeated party in the Senate to simply exploit the surrogate mandate of a minor party to have in effect, a second bite of the cherry of governing."[2]

In what I have to say I want to make it clear that I am not criticising any individual Senator. The Senate as an institution is not functioning the way it should and is in need of reform if it is to fulfil its role in a modern parliamentary democracy.

One of the most dramatic changes to the Australian political landscape in the last decade, has been the mood of profound disillusionment that has swept the electorate, especially in rural and regional Australia.

It has brought with it a sense of disengagement with the political process, alienation from traditional loyalties to the major political parties, a dislike and distrust of politicians of whatever persuasion, and frustration with the way parliaments and government are conducted. The Senate cannot escape a share of the blame for this. We are part of the problem.

Compelling evidence of the shift in political consciousness in this country is to be found in the million or so Australians who voted for One Nation at the last Federal election, giving it the highest national vote (9%) after the major parties.

As it happened, this voter support was not translated into seats, with One Nation winning only one Senate seat in Queensland, Senator-Elect Heather Hill having won a quota in her own right.

By contrast, the Australian Democrats whose primary support fell from 10.8% in 1996 to 8.5% in 1998, won two more Senate seats on the flow of preferences (Senator Elect Greig (WA) having gained a primary vote of 6.40% relying on Labor and Green preferences, and Senator Elect Ridgeway (NSW) having gained 7.35% of the primary vote, relying on Liberal/National and Green preferences), and will hold the balance of power in the new Senate from the 30th June.

Although no doubt consistent with the Federal design of our parliament, how representative is the Senate, for example when each of the twelve Tasmanian Senators represent a minuscule 27,000 voters whereas with ten times the population, New South Wales Senators each represent in the vicinity of 324,000 voters? Put starkly, Senator Harradine's primary vote at the last election was 24,254, 7.87% of Tasmania's voting population and 0.2% of the national vote.

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[2] Hugh Emy, *The Mandate, The Senate and Responsible Government,* Australia and World Affairs, No. 30, Spring 1996

What are voters to make of this?

The introduction in 1948 of a proportional representation system of voting for Senators was designed to allocate seats in proportion to the votes cast. But the increase in the number of Senators per State from 10-12 in 1984 and the reduction in the proportion of votes necessary to gain a quota for election, has had the unintended consequence that the major parties win approximately the same number of Senate seats at each election with candidates from the minor parties or independents who are elected on a small primary vote and a flow of preferences from the major parties, holding the "balance of power" in the Senate.

This electoral design entrenches a system where it will be virtually impossible for a government, whether Labor or the Coalition to win a majority in the Senate for the foreseeable future. Moreover the only formal constitutional mechanism available to resolve deadlocks between the two Houses has a built in incentive for minor parties whose electoral prospects are improved with a full Senate election that halves the required quota for Senate candidates.

Does this situation accurately reflect the intention of the founders of our parliamentary system? Was this the intended outcome at the time proportional representation was introduced, and were the likely consequences of the government not having a majority in the Senate adequately considered at the time of the electoral amendment? And for present purposes, is a minority government in the Senate really the outcome voters want and intend in the jumble of expectations they have at the time they cast their vote?

The Senate is not a law unto itself. It must exercise its co-equal powers within a system of responsible government that recognises the broad parameters of the government's right to govern and the overwhelming public interest in having a stable parliamentary system that is capable of managing day to day institutional conflict in a coherent way.

In fairness, part of the problem lies in the intense political brinkmanship that characterises modern political parties. In the Senate it provides an Opposition intent on electoral competition, implacably opposed to a Government's agenda, that effectively hands the casting vote on national legislation of immense importance, to the minor parties and independents. An example of this is the role taken by the Democrats in negotiating with the Government on industrial relations reform in the face of Labor's blanket opposition that allowed no compromise.

The shift in the way in which minor party Senators interpret their balance of power role has had important consequences. As Richard Mulgan has observed, the opposition parties in the Senate have moved beyond their traditional review role to sometimes use their voting power against the government

> "not just because they want to hold the government to account, but because they disagree with ***the substance*** of government policy and wish to bring it more into line with their own policy objectives and the interests of their own supporters."[3] *(emphasis added)*

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[3] Richard Mulgan, *The Australian Senate as a 'House of Review'*, Australian Journal of Political Vol 31, No 2 191, pg 193

If that is correct, and I believe it is, it marks a shift from the Senate playing a critical role in cataclysmic political events such as refusing supply in 1975, to one where it is ***habitually*** hostile to the Government's ideology and agenda, where it involves major modification of government policy strategies. In the first Howard administration, it has seen for example the rejection of the further sale of Telstra, rejection of the exemption for very small businesses from the unfair dismissal laws, despite all the fanfare about compromise, objection to core structural reforms in industrial relations, and also brought the country to the brink of a double dissolution after fifty-six hours of debate over reforms to Native Title.

Uncertainty over native title did have a significant impact on jobs, families and communities across Australia. Estimates suggest that Australia lost around $30 billion in mining revenue and foregone investment and that the value of new projects delayed totalled a further $10 billion. While the accuracy of these estimates may be disputed, the uncertainty surrounding an unworkable native title regime that was a legacy from the Keating Government was not helped by the inability of the Senate to resolve its differences in a more timely way.

The fact that, statistically, most of the Government's bills have been passed by the Senate eventually, therefore obscures the point. The issue is the significance of what is rejected or amended and at what cost to the community?

Nevertheless, the fact that bills are eventually passed does tend to dampen disquiet about the role of the modern Senate in Australian governance until the next crisis looms. It fortifies those who claim that a Senate hostile to the government of the day, is the price of a robust democracy, an essential guardian of individual rights and liberties and requires no further examination.

However, I do not think we can afford to be complacent. Following One Nation's success in the Queensland election, polls were predicting that with 13.5% primary support, One Nation would win ten to twelve Senate seats in a full Senate election.[4] What would have been the consequences for example, if as a result of the October 3 election, the balance of power in the Senate had shifted to One Nation, or indeed when the balance of power is once again held by a differently constituted Australian Democrats after 1 July this year with their claim to a competing mandate to oppose the inclusion of food in a GST and their own preferred policy positions on further industrial relations reform, removal of the unfair dismissals exemption for small business and removal of junior wage rates to mention a few? True it is that the presence of two independent senators who in the main have ultimately respected a government's mandate has allowed the passage of most, if not all contentious legislation in the first Howard administration.

But this has not lessened concern that a difficult to deal with Upper House is holding Australia back – that policies necessary for future economic prosperity and jobs growth are being frustrated by political opportunism that reduces any sense of common purpose to the lowest common denominator – and where a ready made platform for political point scoring undermines the prospect of securing any long term strategy for structural and economic reform that could provide a secure future for all Australians.

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[4] *The Bulletin*, June 30, 1998

There is a great deal at stake. Consider this. In the next Parliamentary term, the Senate might refuse the full sale of Telstra, strike down the regulations bringing into effect changes to the unfair dismissals regime, reject the retention of junior wage rates, object to further industrial relations reform and insist on changes to the GST legislation that will effectively dismantle the fundamental design of the tax reform package.

The Labor Party has emphatically rejected a GST in any form and will vote against it. The Democrats have, it would seem, a preferred policy version of a broad-based consumption tax that threatens to exempt food at a cost of about $6 billion to revenue and almost unimaginable complexity in definition and compliance costs.

In its submission to the Senate GST inquiry, Treasury has warned that exclusion of food, clothing and shelter from the tax base

> "would mean the package is unsustainable as a whole with likely highly adverse economic effects on the fiscal balance, monetary policy settings, growth and employment."[5]

Somewhat paradoxically, Treasury also warned that if there had to be substantial adjustments it would be difficult to adequately assess the impact of the whole package on lower income groups. If a legitimate concern is the impact of the package on the less well off, surely a more productive area of inquiry would be the adequacy of the compensation package rather than to fiddle with the fundamental design when the very objective of protecting the less well off will be more difficult to assess?

If the community could be confident that the inquiry process would endorse a fair and efficient GST, within the agreed time-table, then the community may be well served by the review process.

But the public must be wondering at the utility of no less than four Senate committees inquiring separately but simultaneously into the GST when inevitably, each will divide along party lines irrespective of what evidence comes to light on the select committee, with some eighty-four hours of debate set to commence on the 19 April, and a vote anticipated some time in June.

Is this the Senate in constructive review mode, or hell bent on obstruction and political grandstanding?

Let's take another example. Is the foreshadowed opposition in the Senate to junior wage rates really about wage justice for the young, or is it our signal failure as an Upper House to appreciate that the available work in our community needs to be distributed more widely instead of protecting the jobs of some workers while tolerating unacceptably high unemployment for others? The Senate divides on party lines on these important matters of public policy, whereas what the community requires of us and is entitled to expect is a better and more principled contribution to properly thought out national goals on unemployment.

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[5] Treasury submission to the Senate Select Committee on a New Tax System, 1998

This concern is widely reflected throughout the business community. Recently, the Australian Business Chamber warned that business is becoming increasingly worried,

> "about the poor capacity of political institutions to deliver the level of common purpose the country needs to accelerate economic and jobs growth."

Policy Manager Paul Orton was reported as saying,

> "Unless the nation can find a mechanism to identify and commit to strategies for long term business and jobs growth that does not provide just another platform for political points scoring, the prospects of doing more than muddling along seem remote."[6]

Many leading economists and business leaders have warned of the likely direct impact on the Australian economy of Senate obstruction and even delay in the present volatile and unstable international economy. With the Asian contagion and the Brazilian melt-down, the Australian Government must be able to act swiftly and decisively to changing global circumstances, yet as the Australian Financial Review pointed out the Australian dollar

> "could be undermined by the Senate with the powerful but self-promoting independents and the Australian Democrats wishing to frustrate the policy objectives of the Government."[7]

I want to stress again that this is not a personal attack on any individual or group. At the same time it would be naïve not to recognise at the very least a public perception that it is an unwieldy Senate, resistant to change, that is impeding the progress of reform in this country.

To summarise to this point, proportional representation has ensured that neither of the major parties will have a working majority in the Senate. At the very best that means that government will be by compromise. That in turn means at least delay, at worst inability on the part of Government to respond in what it considers to be effective and necessary ways to crises in the national and international spheres. Is this a necessary consequence of ensuring that all community views receive a proper hearing and consideration?

The changes to the Australian political landscape, the need for an efficient and effective government able to respond appropriately to the challenges we face as a nation, the interests of the Australian community in securing the best federal parliamentary system available, all combine to require a re-examination of the function, structure and working of the Australian Senate.

Do the undoubted difficulties facing the modern Senate lie in what might be broadly characterised as its ***institutional design***, its ***electoral composition*** that favours minor parties or the ***political brinkmanship*** inherent in electoral competition between parties?

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[6] *Australian Financial Review*, Jan 6, 1999, "Treasury insists on GST on Food"
[7] *Australian Financial Review*, Jan 18, 1999, pg 52

To consider these matters it is necessary to examine

- The founders' intentions for the design and function of our bicameral parliamentary system,
- The impact on the Senate of changes to the voting system,
- The effect of increasing the representation of Senators in 1984,
- The emergence of an activist Senate and the challenge to the Government's mandate,
- How representative is the Senate?
- Solutions – reform of Senate powers, structure, numbers and voting system
- Senate roadblocks to reform.

INSTITUTIONAL DESIGN

A bicameral "hybrid"

It was indicative of the controversial role the Senate was to play in the development of Federal democracy in Australia that

> "The single most contentious issue for the Australian founders and the one that took up most space in the convention debates…..was the design of the Senate and its accommodation with responsible government."[8]

The framers' deliberations resulted in what has been described as essentially a "hybrid combination" of an American-style federation with traditional British parliamentary responsible government.[9] The framers clearly intended that the national legislature would consist of two Houses of Parliament to be constituted on two different electoral bases, one representing the people as a whole, and one representing the people voting by their States, and that the consent of both Houses would be necessary for the passage of laws.

Speaking at the Australasian Federal Convention on the 30th March, 1897, Dr John Cockburn described it thus:

> "…..the great principle which is an essential, I think, to Federation – that the two houses should represent the people truly and should have co-ordinate powers. They should represent the people in two groups. One should represent the people grouped as a whole, and the other should represent them grouped in the states. Of course majorities must rule, for there would be no possible good government without majorities ruling, but I do not think the majority in South Australia should be governed by the majority in Victoria, or in New South Wales…..If we wish to defend and perpetuate the doctrine of the rule of majorities, we must guard against the possibility of this occurring."[10]

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[8] Brian Galligan, *A Federal Republic*, Chapter 3, The Senate and Representative Government, pg 75
[9] Galligan and Uhr, *Australian Federal Democracy and the Senate*, Public Law Review Vol 1 (4) Dec 1990: 309 – 328, pg 325
[10] Dr John Cockburn, Australasian Federal Convention, 30th March 1897, pg 340

What Federation required in achieving a union between the existing colonial states (the Original States) was a geographical distribution of votes in the Senate as a balance to greater numerical representation in the House of Representatives of the more populous states..[11]

Not a States' House

Whatever the founders may have intended, it is clear that the Senate does not function as a States' House in the sense that issues are decided by Senators on the basis of interests identifiable with their particular states Any expectation that Senators would vote in a block according to the State they represent is unsupportable, not the least because of the emergence of rigid party discipline which presently controls all but the two independent Senators and also because in a Federal democracy the Senate does not represent States' rights but rather represents electors voting by their States.

While the Federal structure protects the States by requiring (except following a double dissolution) a double majority for the passage of laws that will ensure the majority of votes is geographically distributed and not from a minority of States, the initial fears of domination by the more populous states has been well and truly overtaken by national parties and party discipline.[12]

There is no escaping the theoretical difficulties in reconciling Federalism and responsible Cabinet Government dubbed the *"Washminster* System*"*,[13] although, some commentators concluded that the principles and conventions of responsible government can be reconciled with Federalism and a strong Senate. [14] It must be said that delegates to the Constitutional Convention were warned of the potential for institutional conflict between responsible government and a powerful Senate with virtually co-equal powers, including the power of veto over money bills. Sir Alfred Deakin put it bluntly during debate in the 1897-98 Convention Debates in Sydney.

> "We must take into account the different quality of these two houses, and the enormously greater power of resistance we are giving to the second chamber in this federal constitution, far greater than any second chamber possesses in our several colonies. It is on the broadest franchise. Representing the people in every sense of the term, that chamber will be a far more formidable opponent of the chamber of representatives than any other legislative council could possibly be. Under this constitution we are creating on the one side a senate and other side a house of representatives with its executive – and the executive is an important element in most of these considerations. We are creating these two chambers, under our form of government, what you may term an irresistible force on the one side, and what may prove to be an immoveable object on the other side, and the problem of what might happen if these two were brought into contact."[15]

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[11] Odgers' Australian Senate Practice, Eighth Edition (describes the different bases of the two Houses)
[12] Galligan and Uhr: *Australian Federal Democracy and the Senate*, Public Law Review, Vol 1 (4) Dec 1990: 309-328, pg 326 (see discussion in)
[13] E.Thompson, *The 'Washminster' Mutation in Representative Government in Australia*, Weller & Jaensch ed., (1980)
[14] Galligan and Uhr: *Australian Federal Democracy and the Senate,* Public Law Review, Vol1 (4) Dec 1990: 309-328, pg 326 (see discussion in), (also see discussion in) Brian Galligan, *A Federal Republic: The Senate and Responsible Government*, 1995, pg 87 (and also) Richard Mulligan *The Australian Senate: A House of Review*, The Australian Journal of Political Science, Vol.31, No.2
[15] Alfred Deakin, Federation Debates, Sydney, 1897: 582

So how did the founders see the bicameral hybrid working on a day-to-day basis? As Galligan points out,

> "Since the Australian Founders did not specify the details of responsible government in the Constitution, it is hardly surprising that they did not define precisely how the Government would relate to the Senate."[16]

While responsible government equates to having and retaining the confidence of the House of Representatives, does this also extend to the Senate? This is not the place for a rehash of the events of 1974 and 1975. Suffice to say that there is no definitive answer, at least one provided by the Constitution.

Time was also taken up at the Convention discussing to break deadlocks. Despite the dire warnings by some over the Senate's power of veto over supply, and the insertion of the double deadlock provision in Section 57 of the Constitution it would seem that the founders did not have in contemplation that such a complicated and time consuming provision would be used to break deadlocks over supply for the simple reason that government could not function if supply was denied.[17]

There was a prevailing belief that conflicts over policy were another matter, not being seen as vital to the survival of a government. There was an expectation that practical politics would prevail to resolve inter cameral conflict between the Senate and the House of Representatives.[18]

IMPACT OF THE VOTING SYSTEM

The lead up to proportional representation

One of the more intriguing questions about the institutional evolution of the Senate is why a method of proportional representation was introduced in 1948 with its anticipated and now proven capacity to entrench minor parties with the balance of power and to challenge orthodox views of responsible government?

At first blush the reasons were obvious. There were times before the introduction of proportional representation where the opposition in the Senate had been reduced to a derisory number. Under the two previous systems, first-past-the-post and preferential voting, the prospect of one party winning all the available seats in one State was commonplace. This was certainly not healthy for parliamentary democracy. At a time when there were only thirty-six senators the Government held all but one Senate seat and there were two three-year periods when the Government had a thirty-three to three majority.

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[16] Brian Galligan, *A Federal Republic*: The Senate and Responsible Government, 1995, pg 87
[17]Brian Galligan, *A Federal Republic*: The Senate and Responsible Government, 1995, pg 85
[18] ibid, pg 85

However the reasons underlying the introduction of proportional representation and its timing were much more complex.

Proportional representation had been a contentious topic as early as the Convention debates. Clearly a proportional representation system of voting was not explicitly part of the original design of the Senate, although Section 9 of the Constitution gives Parliament the power to legislate for any "manner of voting" it sees fit. It has been suggested that a circumstantial case for proportional representation as part of the institutional design can be gleaned from the debates and the approach to representation in general.[19] However the dangers of proportional representation were also keenly appreciated at the time of Federation. Despite some proponents, proportional representation was emphatically rejected at the time the first Electoral Bill was introduced in the Senate in 1902. John Uhr attributes the defeat of proportional representation to the "correct" perception at the time that it would

> "introduce a war of representation into the new Federal Parliament, would probably challenge orthodox structures of cabinet government, and increase the potential of the Senate to compete for popular legitimacy with the House."[20]

Some of the more colourful criticisms of proportional representation at the time were that it would make the Parliament *"a kaleidoscope, not a representation of the majority"*.[21] There were concerns that *"the operation of majority rule would be incapacitated"*[22] and that political leadership would be hijacked by the activity of *"sections and fads"*.[23]

Although the 1929 Royal Commission on the Constitution had recommended the introduction of proportional representation for the Senate, the recommendations were not acted upon for another eighteen years. The Commission deliberated the method of election or composition of the Senate and also whether the Senate should be replaced by a body more representative of States' governments. Recommendations were made that the Constitution should be amended to provide for proportional representation for a period of at least ten years. The rationale appears to have been that the Senate would be better placed to act as 'a chamber of revision' if Senators were elected by proportional representation. Sir Hal Colebatch (WA) however commented separately noting that Parliament

> "would be more likely to embark on such an experiment with the right of retreat unfettered than to invite the Electors to put into the Constitution a provision tying the hands of parliament."[24]

[19] John Uhr, *Proportional Representation in the Australian Senate: Recovering the Rationale*, Australian Journal of Political Science (1995) Vol. 30, Special Issue pp 127-141, pg 137
[20] ibid, pg 137
[21] ibid, pg 137
[22] ibid, pg 137
[23] ibid, pg 137
[24] See Royal Commission etc Chapter XXII: General Recommendations Election of Senators.

Introduction of Proportional Representation

However it was the combined effect of the introduction of proportional representation as the basis for Senate elections in the Commonwealth Electoral Act 1948 and the enlargement of Parliament in the Representation Act 1948 increasing the numbers in the House of Representatives from 74 to 121 and in the Senate from 36 to 60 introduced

> "the most significant physical changes if not philosophical direction of the national electoral machinery since Federation."[25]

Although there was broad cross party support for proportional representation, Labor's motivation for introducing these measures at the time it did was tactically motivated. In the likely event that they would lose the next election, the intention was to take advantage of the increase in the number of Senators and a new voting system to secure the re-election of Labor Senators in the 1949 election and to improve their prospects of getting new Senators at the next half-Senate elections.

In the short term Labor retained control of the Senate despite losing government. But in the longer term the plan was misconceived with Labor failing to gain an absolute majority in the Senate from the 1951 double dissolution to the present day.

At the time, the Opposition strongly objected to Labor's short-sightedness, the then Leader of the Opposition, Robert Menzies saying,

> "I do not describe this manoeuvre as subtle, because there is nothing subtle about it. It is no more subtle than hitting a man over the head and taking his purse while he is unconscious." [26]

Walter Cooper, the Country Party Leader of the Opposition in the Senate was just as blunt:

> "Under the proportional representation system, it will be impossible for the Opposition to regain a majority in the Senate at the next elections. The Government realises that. It expects to "sit pretty"."[27]

But my point is that at the time, scant regard seems to be have been had to the long term impact the introduction of proportional representation would have on the founders' design that would require the co-operation of minority parties to secure the double-majority necessary for the passage of all legislation. As eminent constitutional commentator, L.F. Crisp observed,

> "proportional representation applied in Australia to the Federal Upper House, will almost certainly mean a too nicely – balanced Senate, especially since it is renewed by halves – it is likely to mean a Senate in a constant state of deadlock or near deadlock in itself or with the House of Representatives." [28]

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[25] G.S. Reid and Martyn Forrest, *Australia's Commonwealth Parliament 1901-1988: Ten Perspectives*, Melbourne University Press, 1989

[26] Commonwealth Parliamentary Database (CPD) 21 April, 1948, 196, 1001

[27] ibid, pg 1364

[28] L.F. Crisp, *The Australian Federal Labor Party 1901-1951*, 1978, pg 219

Crisp identified the contradiction between the philosophy of majority rule and responsible government and an electoral system which magnified the role and importance of minorities and where deadlocks or near deadlocks between the two Houses could threaten the stability of government.[29] While these pertinent observations were specifically directed at the Chifley Labor Government, the potential for these electoral changes to undermine the system of responsible Cabinet Government, made it an issue of equal significance for all those who participated in the debate irrespective of their political persuasion.

Certainly between 1948 and the raft of electoral reforms that were passed in the 1983 Electoral Legislation Amendment Act, there were many recommendations for electoral reform including the important and far reaching 1959 *Report of the Joint Committee on Constitutional Review*. Although there was a significant level of bi-partisan support for the recommendations which also included options for resolving deadlocks between Houses, it was never debated in detail. One of the most significant recommendations, that the 'nexus' between the numbers in the House of Representatives and the Senate be broken, was subsequently defeated in the 1967 referendum. While the introduction of proportional representation and the double-dissolution of Parliament in 1951 had certainly set the scene for potential conflict between the Houses, there were no recommendations to change or modify the method of electing Senators.

Academic commentators had however noted the significance of the 1948 changes on the electoral system with Professor G.S. Reid writing, in 1971:

> "The Senate is a growing counterpoise to the weight of Executive domination in the Representatives…..The Senate is weakening Executive rule mainly as a result of what seemed a largely technical change in the election system."[30]

INCREASED NUMBERS IN THE SENATE

Lowering the quota

If the introduction of proportional representation for the 1949 elections was to be a landmark in our electoral history, the increase in the number of Senators for each Original State from ten to twelve in the Representation Bill 1983 was a 'watershed'[31]. The increase followed the recommendation of the *Joint Standing Committee on Electoral Reform* where the impetus was to justify an increase in the size of the House of Representatives rather than an increase in the Senate numbers. However the constitutional nexus required a proportionate increase in the number of Senators, so with an increase of the House of Representatives from 125 to 148, the Senate too was increased from 60 to 76 (including the four Territory representatives). While it may be accepted that the Committee thought that increasing the number of Senators would also improve the prospects of one or other of the major parties in securing a majority, as Reid and Forrest point out,

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[29] L.F. Crisp referred to in Reid and Forrest, Australia's Commonwealth Parliament 1901-1988, pg 121
[30] ibid
[31] ibid, pg 125

> "It did not explore why a clear majority was desirable…..It assumed that one of the major parties had a right to a Senate majority and that the essential purpose of elections was to determine which one." [32]

In supporting Labor's Bill, the National Party obviously saw electoral advantage in entrenching their position as a permanent party of coalition. However, foreseeable risks were appreciated by some of the speakers in the debate on the bill, warning that with neither major party having a majority in the Senate, decisions would be made by a smaller party sitting between them, or that the lower quota could facilitate the election of single issue candidates.[33]

The introduction of proportional representation in 1948 had therefore entrenched a system that favoured minor parties and independents, and the increase in the number of Senators in 1984 from ten to twelve per State, six elected every three years and the reduction of the required quota from 16.66 per cent to 14.28 per cent in fact made it virtually impossible for a government to win four quotas or 57.12 per cent of the vote in any State.

This is because an entirely unintended consequence of the major parties winning approximately the same number of Senate seats has been that candidates from minor parties who are elected with only a small percentage of the vote make up the "balance" of power in the Senate.

A further far reaching consequence of the new numbers in the Senate is that it reduced the quota for a full Senate election to just 7.7% where minor parties' prospects are considerably enhanced. It makes it far more risky for a Government to contemplate resolving deadlocks over legislation by the use of the means provided in the Constitution.

Inexplicably, there appears to have been little or no public discussion at the time of the potential to bring about far-reaching changes to the political composition of the Senate. Be that as it may, it could not have been reasonably foreseen that there would develop in the Senate a new political culture and a disciplined coalition of minority interests that would routinely oppose and seek to change the shape of government legislation.

AN ACTIVIST SENATE

Given that no Government has held a majority in the Senate since 1981, what factors have led to the emergence of a combative and sometimes hostile Senate which has opposed both Labor and Coalition governments in turn since 1993?

Historically the Senate has been a thorn in the side of government at least since the end of the Menzies era when the Democratic Labor Party (DLP) supported the administration. The events surrounding the refusal to pass bills, the rejection of supply and the dismissal of the Whitlam Government continue to excite controversy.

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[32] ibid, pg 125

[33] See Steele Hall's contribution to the *Representation Bill* debate, 15 November, 1983

There were also periods of intense struggle between the Houses after Malcolm Fraser's majority in both Houses (that lasted from 1976 to 1981) came to an end and during the Hawke Government's attempt to introduce the Australia Card, when the Democrats joined forces with the Opposition parties and twice voted against the bill.[34] However, generally speaking, as the DLP had done for Menzies, the Australian Democrats support for Labor from 1981 until the early 1990's[35] meant the Senate did not pose the same obstacle to government that it does today.

But the early part of this decade saw a new political culture emerge in the Senate with minor parties prepared to exploit the balance of power to secure major changes to government policy. An indication of this was the almost unprecedented intervention of the Greens in the Budget process in 1993. With the election of the Coalition in March 1996 the attitude of the Opposition and the minor parties in the Senate could be fairly described as a 'culture of confrontation', where the Senate routinely opposes most of the Government's policy agenda.

A new political culture

Some clues to the genesis of the new interventionist Senate may be found in the immense social changes that took place in the 1970's and 1980's. Increased participation of women in the workforce, the evolution of environmental and heritage concerns, a growing awareness of Australia's role in the region following the Vietnam War, and the beginning of an indigenous land rights movement are just some of the changes that informed and influenced a more politically aware and activist community. Some of this activism no doubt found expression in the election of some minor party senators and independents as representatives of constituencies willing to pursue an interventionist agenda.

An early example of a new style of activist Senator saw the election in 1984 of West Australian independent Senator Jo Vallentine described as,

> "very much in the mould of the spiritual family of minority-based ideological parties".[36]

While owing allegiance to the Nuclear Disarmament Party she did not vote on issues unrelated to that constituency. She was replaced by Green Senator, Crystabelle Chamarette who was later joined by Senator Margetts. They were described by former Senate President Michael Beahan, as having

> "brought a different sort of pressure to bear on the Senate".[37]

Over a period of two decades the Australian Democrats shifted from their original accountability role touted by their founder Don Chipp as "keeping the bastards honest", to a broader agenda. Richard Mulgan has described the role of the modern Democrats in the following context:

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[34] The Democrats voted with the Coalition to defeat the Bill twice – 26:32 on 10/12/86 and then 27:35 on 2/4/87

[35] Papadakis and Bean, *Independents and the Minor Parties: The Electoral System*, Australian Journal of Political Science,Vol. 30, Special Issue pp97-110, pg 108

[36] Dr Gwynneth Singleton, *Independents in a Multi-Party System: The Experience of the Australian Senate*. Senate Occasion Lecture 22 March 1996, pg 10

[37] Michael Beahan "Majorities and Minorities: Trends in the Australian Senate", 1 Dec 1995, pg 8

> "There are two contrasting models of the Senate's role vis a vis the government of the day; one is an agent of accountability and review, the other as a partner in policy making. Minor parties such as the Democrats operate according to both models both *keeping the bastards honest* (review) and pursuing their policy preferences (policy partner)."[38]

In the present Senate the two independent Senators Harradine and Colston have been disposed to respect the Government's mandate. They are in a difficult position. Senator Harradine has been variously praised and condemned in turn for his pivotal role in the Senate's agreement to contentious legislation such as the sale of the first one third of Telstra and the resolution of the previously rejected compromise on Wik. But as he has said, finding himself in this position, what is he expected to do? Sit there and do nothing?

Duelling Mandates

One of the distinguishing features of the new culture in the Senate is the struggle that follows an election over mandates – who has one, to do what and on whose authority?

At the last election for example there were claims that because an overall numerical majority of voters did not vote for the Coalition there was a mandate to oppose the GST (Labor) and a mandate to oppose the inclusion of food in the GST (Democrats). However the competing mandate claims also raged after the 1996 Election when the Coalition held a forty seat majority and a share of the two party preferred vote that was just under fifty-four percent.

The overall majority argument conveniently overlooks the fact that our present system awards government to the party that secures a majority of seats in the House of Representatives. This is what the Coalition campaign was designed to do and is what it achieved. No one could seriously doubt with a twelve seat majority the Coalition decisively won the Election. Historically many governments have won elections without having an overall majority. A couple of recent examples are Premier Bob Carr's Labor win in New South Wales with only 47.8% of the two party preferred vote compared with the Coalition's 51.5%, and the 1990 Labor win under former Prime Minister Bob Hawke.

If the present system is to be criticised let's hear the proposals for change. It is of little use to complain about the rules after the game is over.

A much more difficult issue is what does a mandate entitle a government to do?

In defining the ***scope*** of a mandate, Mulgan makes the point that contrary to what is sometimes thought, a mandate does not depend

> " on any conscious intention on the part of voters…..the general mandate arises out of the support for a government of a majority in the lower house; the specific mandate arises from the inclusion of a policy in the Government's election programme regardless of whether any voters knew of it, let alone whether their votes were determined by it".[39]

[38] Richard Mulgan, *The Australian Senate: A House of Review*, The Australian Journal of Political Science, Vol.31, No.2, pg 199
[39] ibid, pg 196 (in footnote 1)

That this follows as a matter of logic is clear from the fact that most voters do not exhaustively examine the merits of party platforms even though they may be generally aware of the main policy position of a party and have formed a reasonable expectation that such policies will be implemented if that party wins government. In the last election the Coalition's GST policy had saturation coverage. No voter could be under a misapprehension that the GST would form the centrepiece of fundamental tax reform if the Coalition won, but not if Labor won. Even so, it is impossible to be precise about why people vote the way they do, whether they use their vote as a protest or as support for some or all of a party's policy platform.

Richard Mulgan also points to the potential contradiction between "a general right to govern and a specific right (and corresponding duty) to enact election commitments".[40] However, if responsible government is to function according to convention, in my view it requires the authority of the people **(a mandate)** to govern generally and in accordance with the specific promises and responsibilities spelt out in its policies. In our system, this authority is delivered to the party that wins a majority of **seats** in the House of Representatives and forms the Government. Whilst this is not a warrant for a blank cheque, neither should a legitimately elected government be confronted by claims to an equal and opposite mandate in the Senate, propounded by a coalition of the Opposition and minor parties. As Emy points out, to do so

> "is inconsistent with the core constitutional principle which establishes who is to *govern*".[41]

He also makes the pertinent observation that if an equal and competing mandate in the Senate were taken to its logical conclusion, it would allow the major defeated party in the Senate to hijack the claimed mandate of a minor party and effectively govern in the Senate.

Voting differently in the House and the Senate

This leaves open the beguiling question as to why there is a difference in primary vote support for parties in the House and the Senate. Attached is a table which compares the primary vote for major parties in each State.

The first point to be made is that there is no data available to show how many voters cast their vote differently in the House of Representatives and the Senate. While it is possible to show a differential in support, it is not possible to ascertain how many voters split their first preferences in the House and the Senate.

However there is anecdotal evidence that this occurs, and the question is why?

Venturing an answer is in the realm of speculation, although Federal Director of the Liberal Party, Lynton Crosby has reported the results of an exit poll which indicates motives for voting Democrat in the Senate varied:

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[40] ibid, pg 197

[41] Hugh Emy, *The Mandate, The Senate and Responsible Government*, Australia and World Affairs No.30, Spring 1996, pg 11

> "As for the Australian Democrats, their claim of a mandate is very hollow. 24% of Democrat voters cited the party's general approach as the main reason for voting for the party. 21% voted Democrat to keep the bastards honest. 15% voted Democrat because of their social attitudes. Only 13% cited the GST as reason for voting Democrat."[42]

It is, I believe easier to deduce what voters were not voting for in differentiating their vote than to pinpoint what they were voting for. In the mandate context, Emy suggests that a claim to enjoy a separate Senate mandate is

> "a claim to share in the exercise of Executive power which is surely not what Democrat voters intended."[43]

A logical extension of this argument is that Coalition or Labor voters who vote mainstream party in the House of Representatives and minor party in the Senate, can hardly intend to render their own vote (and in the case of those who voted for the Coalition) a Government's mandate, valueless by deliberately voting for competing policies in the Senate. The more plausible explanation is that those who differentiate their vote regard it as a form of insurance to make sure that the Government's mandate is policed and the legislation giving effect to the mandate, rigorously reviewed.

AN UNREPRESENTATIVE SENATE

I do not intend to revisit the contest about whether the House of Representatives or the Senate is the most democratically legitimate House. Rob Lundie[44] has effectively analysed the claim that the Senate is unrepresentative by reference to five criteria.

- A comparison of the number of Members of Parliament per head of population in each Chamber
- Evenness of representation in each Chamber
- Proportionality of representation between votes and seats in each Chamber
- How recently MP's were elected
- A comparison of the composition of each chamber as reflective of the Australian population.

However it is appropriate in the exercise I have embarked upon, to consider the nature of representative government in a wider context than the electoral process.

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[42] Lynton Crosby, Address to the National Press Club, Canberra, "Reflections on the 1998 Federal Election", 28th October, 1998, pg 6
[43] Hugh Emy, *The Mandate, The Senate and Responsible Government*, Australia and World Affairs No.30, Spring 1996, pg 11
[44] Rob Lundie, Politics and Public Administration Group, Department of Parliamentary Library, "Are Senators Unrepresentative Swill?" (unpublished)

The question is whether the single transferable vote (STV) method of proportional representation and the introduction of a form of list system in 1984, is a good fit with the institutional design of our parliamentary system? Virtues are said to include that it produces a proportional result that more closely reflects the national vote than does single member electorates in the House of Representatives and that it avoids wastage with surplus votes for an elected candidate being capable of being transferred according to preferences.

A compelling argument in favour of proportional representation is that the twenty to twenty-five percent (19.9% in 1996 and 25% in 1998) who do not vote for the major parties are entitled to have a voice and that proportional representation accordingly enfranchises significant groups of political opinion. As a matter of political theory, these propositions are sound. But as a matter of practical politics proportional representation has produced some distorted results in recent elections that challenge these assumptions. For example, despite a million or so people voting for One Nation, the party won just one Senate seat in Queensland where Senator-Elect Heather Hill won a quota in her own right. In contrast the Australian Democrats were able to win two Senate spots in NSW and Western Australia respectively, not because the party had sufficient primary support to win a quota for either seat, but because they were able to rely on preference flows not available to One Nation candidates. Thus proportional representation does not necessarily guarantee representation proportionate to the expression of primary voter support and a significant body of political opinion can and often is effectively excluded even with proportional representation.

Where did the preferences go?

Moreover it is often difficult to determine exactly what preferences elect various Senators as the distribution of specific preferences often contain preferences from excluded or successful candidates. It can produce some startling results.

- In the 1993 election every minor party Senator was elected on preferences other than Labor's. Queensland's Senator Woodley was elected by a combination of preferences from the Greens, the Confederate Action Party and the Liberal Party. Senator Lees (SA) was elected by a combination of Green and Liberal Party preferences. The Greens' Senator Margetts (WA) was elected by a combination of Democrat and Liberal Party preferences, and Senator Harradine (TAS) was elected by Liberal Party preferences.

- In the 1996 election NSW Democrat Senator Bourne was elected by a combination of preferences from the Liberal Party, Call to Australia, the Greens, and the Australian Shooters Party. Her colleague Senator Allison (VIC) was elected by preferences from the Greens and Australians Against Further Immigration. Senator Murray (WA) was elected by Liberal and National Party preferences. Senator Stott Despoja (SA) obtained a quota on first preferences, with Senator Kernot (Qld) relying on Labor Party preferences and Senator Brown (Green TAS) in turn relying on preferences from the Australian Democrats.

- In the 1998 election Democrat Senator Ridgeway, was elected in NSW on a combination of Liberal/National Party and Green preferences. His West Australian party colleague, Senator Greig was elected from a combination of Green and Labor preferences. Senator Lees maintained her spot with the assistance of the Greens, Senator Woodley, with support from both Labor and the Greens, and Senator Harradine, again with Liberal Party preferences. Only One Nation's Heather Hill obtained a quota on first preferences.

"One Vote, One Value"?

A frequent criticism of the voting system is that it permits the election of minor parties on a fraction of the national vote who may then be in a position to exercise on behalf of their minority interests not just a voice, which indeed should be able to find expression in a healthy democracy, but in effect to have a casting vote on national legislation.

It must be said again that a minor party or independent senator can only exercise this pivotal balance of power role if the Opposition and enough minor players oppose the Government. With the Democrats and Greens almost always siding with Labor, in the current line-up this usually means that whether the Government gets its bills through depends on how Senators Harradine and Colston will vote. The issue here is not that the Government is held to ransom by minor parties and independent senators, as bills only pass or get defeated by a majority of votes (even if the margin is one to pass and tied numbers to oppose). The point is, whether minority representatives who will not and cannot form government should be in a position to act as a minority government.

The anterior question is however whether it is in the national interest to perpetuate an electoral system that allows those who command only narrow electoral support to exploit the balance of power for the foreseeable future?

Minority parties and independents are an essential part of a democracy where power is well-distributed through the institutions of government. In my opinion, the interests of the broader community and good governance are not well-served when for practical purposes effective power is concentrated in the hands of a few, especially disproportionate to their electoral support. This is a profoundly undemocratic outcome which is entrenched by the present proportional representation.

The outcome was certainly not that envisaged by the founders who unequivocally supported the requirement for majoritarian rule. The requirement for a double majority in order to preserve the *"rule of majorities"* does not sit comfortably with the notion that a legislative programme is ultimately dependent on the votes of those supported by the political values and opinions of a minority.

Moreover, proportional representation does not overcome inequality between voters in different States. New South Wales, with 34% of the population is confined to the same representation in the Senate as the smallest state, Tasmania, with only 2.6% of the population. Although I readily acknowledge this is part of the federal design, can it be defended as a democratic outcome for a Tasmanian's vote to be worth thirteen times that of a New South Wales voter, or a South Australian's vote to be worth four times that of a New South Wales voter in the Senate?

TOWARDS REFORM

What to do?

If it is accepted that it is in the interests of a healthy democracy to have a Senate where effective power does not rest in the hands of a few and that the national interest is served by having a stable and effective government capable of meeting the needs of the people in a timely way, then steps should be taken to ensure that there is at least the **prospect** of the government of the day obtaining a majority in the Senate from time to time.

How can this be achieved? There are several possibilities.

- **Senate powers**

Changes that affect the powers of Parliament and relations between the two Houses require Constitutional amendment that can be achieved only by referendum. A number of major Constitutional reviews in Australia including parliamentary committees, a Royal Commission, a Constitutional Convention and a Constitutional Commission, have examined a range of problems affecting the working of the Constitution and made in some instances, far reaching recommendations for constitutional change.

The Report of the *House of Representatives Standing Committee on Legal and Constitutional Affairs*[45] sets out the text of the Constitution annotated with recommendations made by the various bodies and there is no purpose to be served in duplicating previous scrutiny.

The point to be made is that most of the recommendations have sunk without a trace! Many of the difficulties identified in these reviews still exist.

The 1959 *Joint Committee on Constitutional Review* was required to report on ways to resolve deadlocks between the two Houses. Two important recommendations were, to remove the requirement for a nexus between the size of the two Houses of Parliament and to modify Section 57 of the Constitution to distinguish between money and other bills and to give Governments options for settling deadlocks.

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[45] Australia. Parliament.House of Representatives Standing Committee on Legal and Constitutional Affairs.Report. Constitutional Change; Select Sources on Constitutional Change in Australia 1901-1997; P iii

With a substantial level of bi-partisan support, it was described by Geoff Turner as

> "probably the best chance Australia has had of achieving such reform…..The potential to be a watershed in the history of the Australian Commonwealth."[46]

Only two of the report's recommendations were put to referendum in 1967, the one relating to removal of the nexus, being defeated. It was approved by 40.25% of all electors and by a majority in New South Wales alone. The campaign against the referendum was supported by Senator Wright from Tasmania and the DLP.

The most recent major constitutional review, The Constitutional Commission, chaired by the late Sir Maurice Byers, recommended in 1988 that there should be a four year maximum term for the House of Representatives with no dissolution in the first three years unless the Government had lost a confidence motion and a government could not be formed. It further recommended in relation to disagreements about non-money bills that Section 57 should be amended to apply only to bills which the Senate may amend and that a double dissolution only be permitted in the fourth year of the term of the House of Representatives.

The proposal for a four year fixed term for members of both Houses was one of the four proposals that emerged from the Commission's recommendations to be put to referendum. All of them failed by large overall majorities in most States.

Given that of the forty-two referenda that have been put to the vote since Federation only eight have succeeded, the prospect of any far-reaching constitutional reform to the Senate's powers is remote.

However, notwithstanding the unresolved issues surrounding the Senate's powers over money-bills and deadlocks, in my opinion this does not impact on the functioning of the Senate. Such cumbersome machinery is totally inappropriate to resolve day to day institutional conflict and even if reform of these constitutional provisions were capable of achievement, it would not address the fundamental problem of disproportionate power concentrated in the hands of a few.

- **Senate Structure**

A critical provision in the distribution of power in the Federation is that the size of the Senate and the House of Representatives is linked by the requirements of Section 24 of the Constitution. The nexus requires as nearly as practicable a 2:1 ratio be maintained between the number of members of the House of Representatives and the Senate.

While the nexus remains, there is a constitutional entitlement to equal representation in the Senate for each of the Original States and representation in the House in proportion to population subject to a minimum of five. There were sound historic reasons for the nexus at the time of Federation as with tiny populations it was unlikely that Tasmania and Western Australia would join without such a safeguard.

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[46] Geoff Turner. *Consensus Betrayed; Lessons from the 1959 Joint Committee on Constitutional Review*. Australian Journal of Politics and History, Vol. 39 (2) 1993; 184-5

Had the referendum for Northern Territory statehood succeeded last year, it would have prompted a fundamental re-think about the distribution of power in the Federation as it affects Senate representation. Although the Commonwealth can admit new states on whatever terms and conditions it imposes, including the level of representation, the struggle over Senate representation for the Northern Territory would have inevitably raised the issue of the privileged position the smaller, less populous states are given under the Constitution. At its most extreme, New South Wales with nearly 34% of the population receives the same 15.8% of Senate seats as does Tasmania with only 2.6% of the population. It makes a nonsense of the notion of *one vote, one value.*

After one hundred years of Federation it is reasonable to ask whether the smaller States need to be protected by a Federal structure requiring equal representation of Senators, irrespective of population, when party discipline and national politics have made the prevailing concerns of the founders at the time of Federation, redundant.

The prospect of another referendum being put to remove the nexus is remote, mainly because it is highly unlikely the smaller States would accede and the referendum would again fail. Therefore the likelihood of an overhaul of the distribution of power in the Federation or indeed any far-reaching upper house reform, is not only remote, but almost impossible to achieve given the constitutional constraints that requires that a majority of voters in a majority of states vote in favour of constitutional change.

- **Senate Numbers**

However provided the ratio between the numbers in the Senate and the House is maintained, and there are an equal number of senators elected from each of the Original states, Parliament can either increase or decrease the numbers by legislation. It leaves open the possibility that the lack of a majority might be overcome by reducing the Senate to its pre-1983 size, returning ten Senators from each State with a higher quota required for election. This however would not only require the elimination of twelve Senate seats, but because of the nexus requirement, the exit of twenty-four members of the House of Representatives with all the associated problems of a redistribution.

While the reduction in numbers of politicians might have enormous voter appeal, the political reality is that (with the stunning recent exception of Tasmania) politicians are not going to willingly vote themselves out of existence any time soon. Moreover, given that the major parties' share of the vote in the 1998 election was 75 per cent, it is by no means certain that a government would obtain a majority in this event.

Similarly an increase in the number of Senators per State to twice an odd number would make it possible to win a majority. However, it would require swelling the ranks of Senators by twelve and Members by twenty-four – hardly a palatable proposition for voters in the current climate. An added disincentive would be the need for a national redistribution.

Former Federal Director of the Liberal Party, Andrew Robb has promoted the option of dividing each state into six regions with two Senators to represent each region, one at each election to be elected by preferential vote. By changing from proportional representation to preferential voting there would be the possibility of either a tight Coalition majority, a Labor majority or minority party control. The 1996 Coalition landslide for example would have delivered a four to six Senate majority whereas in the 1993, Labor would have secured a smaller majority.[47]

There are of course variations of this option such as three electorate divisions with two Senators for each half-Senate election being elected using proportional representation. As it requires 67% of the vote to win both seats it virtually ensures that a seat each will be won by the major parties. In the recent Federal election for the ACT however that assumption was undermined by the close result between Liberal Senator Margaret Reid and the Democrat candidate.

As a generalisation however there is a distinct possibility that this method would eliminate minor parties and independents.

Notwithstanding the obvious difficulties of having minor parties as a permanent "hinge" between the major parties, it must be said that a form of proportional representation which allows for the representation of non-major parties does introduce a broader coalition of interests and a more diverse representation of opinion in the Senate. It is both consistent with democratic principle and has positive political advantages to give minor parties and those they represent some say in government. Power-sharing and consensus-building is to be commended if it results in harmonisation of view-point. The problem arises however when minor parties insist on a share of power out of all proportion to their numbers and electoral support.[48]

The dilemma, as Campbell Sharman puts it is,

> "where to draw the line between giving the government enough power to discharge the wishes of the community but not so much power that it will tyrannise the community…is a tricky question over which opinions will differ."[49]

- **Senate Voting**

If the aim is to enhance the strength and stability of government, whilst retaining a system that recognises the legitimacy of minority representation, the most accommodating option is to alter the quota system for proportional representation. This is a method to alter the effective quota by imposing a formal threshold which a candidate must achieve, (a specified percentage of a quota of overall primary votes) before qualifying for distribution of preferences.[50] It can be a number, a percentage of votes, or a quota.

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[47] Andrew Robb, *Australian Financial Review*, "A bad brake from the Senate", 12 June 1997, pg 18

[48] Douglas J. Amy, *Real Choices/New Voices: The Case for PR Elections in the United States*, Columbia University Press, NY, 1993, pg 168

[49] Campbell Sharman, *The Senate and Good Government*, Senate Occasional Lecture Series, 11 Dec 1998

[50] The proposal for thresholds in the Australian context has been raised by Liberal Senator David McGibbon and Wilson Tuckey MP. See: Glenn Milne "Changing the rules to control the Senate", *The Australian,* 1 July 1996

Proportional representation is the voting method used by most Western democracies with the notable exceptions of the United Kingdom and the United States of America and many of those have set an arbitrary legal threshold below which a party or candidate cannot win seats. A threshold is therefore the minimum condition required to secure representation or continuance in a scrutiny process such as the distribution of preferences. It is designed to exclude parties or candidates that secure only a minimal share of the vote and who therefore are not supported by a significant enough body of political opinion to reach the threshold.

Germany which is the much admired model for electoral reform in Europe, introduced at the second post-war general election, a 5% hurdle to calculate distribution of Bundestag seats according to the nationwide party vote, requiring that a party receive at least 5% of the nationwide vote before it receives any seat allocation. This system has been adopted by many other countries.[51] The 5% threshold does not apply to parties which have won at least three constituency seats, or which represent a national minority (for example the Danish minority in Schleswig-Holstein or the Serbs in the Free State of Saxony).[52]

The 5% clause is the main reason for the sharp reduction in the number of parties represented in the Bundestag although recently minor parties have won seats by virtue of the direct voting system.

Israel by contrast, has had to cope with many small parties represented in the Knesset because of its very low threshold, recently raised to 1.5% with proposals to raise it further to 2.5%.

In recommending a two-vote mixed system "alternative vote plus" with an additional member top-up, the recent Jenkins Commission report on proposals to reform Britain's first-past-the-post voting system was at pains not

> "to design a position of constant privilege for a hinge party…".[53]

A formal threshold was not considered necessary as the Commission was not advocating a full list system and it was noted that the United Kingdom voting system itself imposes an informal threshold more severe than the Germans' 5%.[54] In concluding that a formal threshold was not necessary, the Commission referred to the last British election where the lowest percentage of the total vote which would have placed a party in likely contention for a Top-up seat, was 10.9% scored by the Liberal/Democrats in Nottinghamshire.[55]

In the Australian context, the imposition of a formal threshold would be consistent with the principles of representative democracy. No voter would be disenfranchised by the imposition of a formal threshold. The single transferable vote method of proportional representation used for counting Senate votes ensures that no vote is

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[51] Charlie Jeffery, *Electoral Reform: Learning from Germany*, Political Quarterly, Vol 69 (3) July/Sept 1998

[52] Gallagher et al , *Representative Government in Modern Europe*, 2nd Ed., Chapter 11: Elections and Electoral Systems

[53] *The Report of the Independent Commission on the Voting System*, Oct 1998, para 122

[54] ibid, para 144

[55] ibid, para 144

wasted irrespective of whether the candidate was so popular that the vote was not needed or so unpopular as to have no chance of election. Minor parties or unsuccessful candidates who do not achieve the necessary percentage of primary votes would have their preferences distributed in accordance with their how-to-vote directions. Where voters for minor candidates preference different candidates that distribution would be followed. Thus every voter, no matter how marginal their first preference candidate may be, is still able to exert an influence through allocation of preferences. The impact can be readily seen from the compilation of the flow of preferences to minor party senators in 1993, 1996 and 1998 (see pg 19). As the One Nation experience has demonstrated, a significant body of political opinion was effectively excluded from gaining direct representation because they were not preferenced by enough voters. However the point is that their Senate votes were not wasted as their next preference was counted.

But what effect would a formal threshold have in the Australian Senate? The following table *Fate of Minor Party Senators under Various Thresholds*, has assumed a threshold based on 5%, 7.14% (representing 50% of a half Senate quota). 10%, and 11.43% (representing 80% of a half Senate quota) of formal votes or percentages of the Senate quota and applied these thresholds to the 1993, 1996 and 1998 elections respectively. The table shows the primary vote received by each senator.

Fate of Minor Party Senators under Various Thresholds

Senator	Primary Votes	5.00%	7.14%	10.00%	11.43%
1998 Election					
Ridgeway (AD NSW)	**7.35**	✓	✓	**X**	**X**
Woodley (AD Qld)	**7.81**	✓	✓	**X**	**X**
Hill (HAN Qld)	**14.83**	✓	✓	✓	✓
Lees (AD SA)	**12.42**	✓	✓	✓	✓
Greig (AD WA)	**6.40**	✓	**X**	**X**	**X**
Harradine (HAR Tas)	**7.87**	✓	✓	**X**	**X**
1996 Election					
Bourne (AD NSW)	**9.55**	✓	✓	**X**	**X**
Allison (AD Vic)	**10.87**	✓	✓	✓	**X**
Kernot (AD Qld)	**13.21**	✓	✓	✓	✓
Stott-Despoja(AD SA)	**14.54**	✓	✓	✓	✓
Murray (AD WA)	**9.35**	✓	✓	**X**	**X**
Brown (GRN Tas)	**8.68**	✓	✓	**X**	**X**
1993 Election					
Woodley (AD Qld)	**7.05**	✓	**X**	**X**	**X**
Lees (AD SA)	**9.87**	✓	✓	**X**	**X**
Margetts (GRN WA)	**5.51**	✓	**X**	**X**	**X**
Harradine (HAR Tas)	**10.43**	✓	✓	✓	**X**

In the three elections a total of 16 minor party Senators were elected. If the most rigorous threshold were applied only four of these would have been elected. A 10% threshold would have seen Senators Woodley, Lees and Margetts defeated in 1993, Senators Murray, Brown and Bourne defeated in 1996 and Senators Harradine, Greig, Woodley and Ridgeway defeated in 1998. A 7.14% threshold would have resulted in the defeat of Senators Woodley and Margetts in 1993 and Senator Greig in 1998. A 5% threshold would have seen all sixteen minor party Senators elected.

Obviously expert advice would be necessary to conduct a thorough analysis of the impact of a threshold system but conceptually it offers the possibility of a solution to the *rule of minorities* that has so characterised the Senate in recent years.

Senate Roadblock

A more confronting question is how this or any other electoral reform that adversely impacts the interest of minorities, can be achieved when it has to pass the Senate road-block?

As mentioned earlier, the minor parties can only exercise such a pivotal role if the major party in opposition opposes a government measure. It is in the nature of electoral competition to oppose the government of the day. This role is well-understood and it has been taken successively by both major parties when in opposition. But as the Tasmanian experience has shown frustration with tactics adopted by minor parties can reach a point where the major parties will vote together to restore a coherent administration. The minor parties in the Senate cannot assume that this will not happen to them if the 'tail tries to wag the dog' too hard.

Labor's frustration with the Senate during the Keating Government was palpable, with the former Prime Minister railing against a hostile Senate which culminated in the vitriolic term "unrepresentative swill". The current Leader of the Opposition, Mr Beazley, criticised Senate obstruction of the Keating administration and

> "its impact on the good governance of Australia."[56]

But the exasperation of mainstream politicians in dealing with the Senate is probably best summed up by former Labor Leader of the Government in the Senate, Gareth Evans, who when departing the Senate for the House of Representatives said,

> "They've made my life an absolute and unequivocal misery. And as much as anything, that's why I am fleeing the Senate."[57]

He went on to say that negotiating with the Senate was,

> "The sort of thing that made grown men weep and jump off tall buildings."[58]

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[56] Kim Beazley – Address to the Business Council of Australia, 6 July 1995
[57] *The Independent Monthly*, pg 36
[58] ibid, pg 37

As a general proposition, Labor appears to concede the need for Senate reform, albeit, an examination of powers especially the power to block supply is favoured over electoral reform. The problem is that Labor's prescription for fixing the Senate involves constitutional change that would require a referendum.

However, if we do get around to reforming Senate powers, a compelling case can be made for a simplified method for resolving disagreements between the two Houses.

Australia is the only bicameral legislature that requires a double dissolution and a new election before there can be a joint session of Parliament to resolve deadlocks. Such a cumbersome, expensive, protracted and uncertain procedure can hardly serve the needs of a modern democracy.

Where the Senate disagrees with the House on two occasions over the same bill there should be provision for a joint session of both Houses. There are many other variations on ways to resolve conflict between bicameral legislatures that ought to be explored, including the conference committee system where the two houses each appoint an equal number of delegates who have a joint meeting to attempt to work out a compromise. Although rarely used, this method for breaking deadlocks applies in many democracies including France, Germany, Ireland, Japan and the United States.

A workable and efficient Government and Parliament are the essential urges that drive Australia. To this end, it is in the long term interests of both the major parties to take a bipartisan approach to restoring balance in the Senate. There are legitimate differences of opinion on what form this should take. I welcome that discussion.

But finding a workable solution is a national priority.

The message here is simple: as a young country with many major decisions ahead of us, can we afford a system of government that allows a roadblock to be built where there should be a highway? Rather let us ask how can we do better?

Let the debate begin!

Parliament House
3rd February 1999