

Chapter Six

Electing the Australian Senate: In Defence of the Present System*

Malcolm Mackerras

The purpose of this paper is to enter a strong defence of the current electoral system for the Australian Senate.

Two minor proposals for change

In opposing what I call “radical reform”, however, I do not want it to be thought that I oppose all change. In fact, I do favour two minor changes. The first relates to the ballot paper.

In my opinion there is one criticism of the present system which is correct: the elector is not given a reasonable opportunity to vote below the ballot line. My mantra is, “Voting is a right, not a burden,” so I seek to reduce the burden on the voter.

Take two examples of ballot papers from the September 2013 Senate election. In New South Wales and the Northern Territory (indeed, in all States and territories) above the ballot line and on the extreme upper left-hand corner it reads: “YOU MAY VOTE IN ONE OF TWO WAYS”. Below that it reads: “EITHER”, and below that “**Above the line**” and below that “By placing the single figure **1** in one and **only one** of these squares to indicate the voting ticket you wish to adopt as your vote” and then the parties and their squares are listed in rows to the right.

In New South Wales there were 110 candidates. Consequently the words below the line read “OR” and below that it reads: “**Below the line** By placing the numbers **1 to 110** in the order of your preference”. In the Northern Territory there were 24 candidates so the words below the line read “OR” “**Below the line** By placing the numbers **1 to 24** in the order of your preference”.

My proposal is that the words above the line remain the same. Below the line I would have (for all ballot papers) these words: “OR” “**Below the line** By placing the numbers **1 to 15** in the order of your preference. You may, if you wish, vote for additional candidates by placing consecutive numbers beginning with **16** in the squares opposite the names of those additional candidates in the order of your preference for them.”

My second proposal for change relates to the registration of political parties. At present registration requires a party to demonstrate that it has 500 members. I propose that the number be raised to 2,000. I propose also to increase the required fee from \$500 to \$2,000. Also, I think there should be stiffer documentation required to register a party. By making it more difficult to register a minor/micro party the size of the ballot paper could be reduced. I think also that Julia Gillard’s late-January calling of the 2013 general election had the effect of increasing the size of Senate ballot papers. I criticised that calling at the time on the ground of the disrespect it showed towards the Governor-General. As a good constitutional monarchist I cannot imagine that Tony Abbott would make the same mistake in 2016.

Present System for Electing the Senate: the Defence

My defence of the current Senate system starts with the Constitution of Australia. It is quite clear on the kind of electoral system the future Commonwealth of Australia should have. Section 7 provides: “The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate.” Section 24 provides: “The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators.”

The words to note are “directly chosen by the people”. Those words command that only candidate-based electoral systems are acceptable and that applies to both the Senate and the House of Representatives. Within that constraint the Parliament may make its own decision, in accordance with section 9. It provides: “The Parliament of the Commonwealth may make laws prescribing the method of choosing senators, but so that the method shall be uniform for all the States. Subject to any such law, the Parliament of each State may make laws prescribing the method of choosing senators for that State.”

Technically speaking we have had three electoral systems for our House of Representatives and six for the Senate. However, I think it is more sensible to say that we have had three Senate electoral systems which can be described as “winner takes all” (up to 1946), “single transferable vote/compulsory voting/compulsory preferences” (1949 to 1983, inclusive) and “single transferable vote/compulsory voting/ticket preferences” (1984 to 2014, inclusive). I argue that this third system, (the present one, which I call “the second STV system”), has been by far the most successful.

The effects of “winner takes all” were best illustrated by the general elections of 1910, 1943 and 1946. In 1910 Labor carried all six States and so won every one of the 18 seats then contested. In 1943 Labor again won all six States and so won every one of the 19 seats then contested. (The 19th seat was the consequence of a death in Western Australia. In that State the first three elected served the six-year terms. The fourth elected – Dorothy Margaret Tangney – filled the casual vacancy and was thus required to seek re-election in 1946.) In 1946, Labor won five of the six States and so won 15 of the 18 seats then contested. The consequence was that, when the electoral system was reformed in 1948, the situation was one of 33 Labor Senators sitting on the government benches and three Coalition Senators (all elected from Queensland in 1946) sitting on the Opposition benches.

So the first of our three systems was a failure. My task now is to demonstrate that the current system (the third) is superior to the second system which operated at Senate elections from 1949 to 1983, inclusive.

In one respect, level of informal voting, my task is easy. Under the previous method (1949-83), informal voting ran at a rate of nine percent. Since 1984, informal votes have been 3.5 percent of the total.

However, given the current propaganda against the system, a more general defence is clearly needed. So, what are the characteristics of a good electoral system? I argue that a good system should, while maintaining the sensible checks and balances of the Constitution, bring a reasonable level of harmony between the House of Representatives and the Senate. On this score the first STV (1949-83) system fell down.

There were far too many double dissolutions. These occurred in 1951, 1974, 1975 and 1983. By contrast, there has only been one double dissolution under the current system – and it occurred in 1987 which was early in the life of the system. From 1949 to 1983 every change of government occurred at a double dissolution election (1975 and 1983) or, if it occurred at a House of Representatives election, or a House of Representatives plus half-Senate election, it was next followed by a double dissolution election (1949 followed by 1951 and 1972 followed by 1974). By contrast, under the current system, all three changes of government have occurred at a House of Representatives plus half-Senate election, in 1996, 2007 and 2013. So far none of these has produced a double dissolution.

I am struck at how often I hear it said that the current Senate is dysfunctional and that it is all the fault of that dreadful system which first operated in December 1984. My response is to ask the person to say whether he or she thinks Australian democracy has been more prone to choose bad policies since 1984 than it was in the period from 1901 to 1984. Almost always the response is that the reverse is the case. That seems a pretty good answer for me. The Australian Parliament has operated better since 1984 than was the case from 1901 to 1984. In that circumstance no reform is needed.

In defending the operation of the current Senate electoral system I begin by considering the Greens. They won three Senate seats in 2007 (one each in Western Australia, South Australia and Tasmania) with nine percent of the Senate vote. Then, in 2010, they won six Senate seats (one from each State) with 13 percent. At the 2013 they have won three Senate seats (one each in Victoria, South Australia and Tasmania) with 8.6 percent. So their vote is down but the rotation of Senators means they keep nine seats, Scott Ludlam (WA) being defeated but Janet Rice (Victoria) replacing him next July. (Note: As a consequence of the re-run of the periodical election of Senators in Western Australia in 2014, Senator Ludlam retained his place.)

Purely as an exercise in arithmetic I decided to add together the 1,667,315 Senate votes for the Greens in 2010 to the 1,159,502 in 2013 and express it as a percentage of the combined formal vote of the two elections. In other words, over the two elections, they won 10.8 percent of the Senate vote. For that they are rewarded with nine Senators which is 11.8 percent of the Senate of 76.

The Greens are not the most unreasonable complainers, however. That title must go to the Liberals in New South Wales who complain that David Leyonhjelm has been elected using the title, “Liberal Democrats”. From the way they are carrying on one would think he had taken the seat of Arthur Sinodinos. Not so. Sinodinos (Liberal Party, third on the Coalition’s joint ticket in NSW) has been elected through the well-worn process of preference harvesting so, in actual fact, Leyonhjelm will take a seat from Labor. Why on earth would the Liberals complain about that? It seems to me they should get used to the Liberal Democrats just as the Australian Labor Party has been compelled to get used to the Democratic Labor Party.

Senator Helen Kroger (Liberal, Victoria) and Senator Don Farrell (Labor, South Australia) has each been defeated and I am personally sorry about that. However, let us face it. They are party machine appointees to the Senate: Kroger, an accountant from the most blue-ribbon Liberal seat in Melbourne; and Farrell, a trade union official from Adelaide. Both Kroger and Farrell will have no trouble re-entering the Senate at

the next election or earlier if another vacancy arises. The most persistent complaint about the Senate electoral system, however, comes from those who think it is a wicked thing that Kroger should have been defeated by Ricky Muir of the Australian Motoring Enthusiast Party. I think this complaint is quite misguided – as I explain below.

A friend from South Australia recently sent an e-mail letter to me in which he said that “the SA Senate result was a complete shock to me and a clear case of people not getting what they voted for, and demonstrating the need to reform the system.” I disagree with him completely and, next time we meet, I shall explain why and explain it in great detail.

I go further, however. I assert that the South Australians have given themselves the most capable collection of Senators elected for any State. In order of election the Senators in question are Cory Bernardi (Liberal), Nick Xenophon (Independent), Penny Wong (Labor), Sarah Hanson-Young (Green), Bob Day (Family First) and Simon Birmingham (Liberal).

Here I must divert myself. I wrote above as though it were a fact that Senator Scott Ludlam had been defeated but that, as a consequence of a re-run of the periodical election of Senators in Western Australia, in April 2014, he retained his place. The fresh periodical election arose because, as a consequence of a close contest, and loss of 1,370 ballot papers, the September 2013 election has been declared void by the High Court sitting as a Court of Disputed Returns.

That initial result in Western Australia was entirely defensible in democratic terms. Those elected were: David Johnston (Liberal); Joe Bullock (ALP); Michaelia Cash (Liberal); Linda Reynolds (Liberal); Zhenya Wang (Palmer United Party); and Louise Pratt (ALP). However, had the missing votes incident not occurred, I would have had no difficulty defending the recount result in democratic terms. As it is I shall have no need to do so. Suffice it to say that, on Monday 4 November 2013, the positions were declared and Zhenya Wang and Louise Pratt were not among the winners. Instead their places were taken by Scott Ludlam and Wayne Dropulich of the Australian Sports Party. I gave Dropulich no chance of winning a seat at the fresh election and Ludlam only about one chance in five.

In the event, at the re-run, Labor won only one seat and Ludlum kept his.

Those who demand radical reform to the system seem to me to be in two categories. There are those who are very steeped in the details of the system. I think they are too much preoccupied with individual trees so that they cannot appreciate the beauty of the forest.

Then there are those who are peeved for some reason. They think Senators who are machine appointees of the big parties are more worthy than a blacksmith from Ballarat (John Madigan, DLP) or a sawmill operator from central Gippsland (Ricky Muir, Australian Motoring Enthusiast Party).

Two types of reform have been proposed. One is to place a threshold below a party's vote and cut out any party with less than, say, three percent. The trouble with that proposal is that it would be unconstitutional. My basis for that assertion is section 7 of the Constitution: “The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate.” The words, “directly chosen,” command a candidate-based election. Few people seem to understand this point but the fact is that the

present system is candidate-based. Once you put in a threshold you change it to a party-list system and Senators would then no longer be “directly chosen by the people”.

The other proposed reform is to import the system operating for the New South Wales Legislative Council, the details of which I do not have the space to elaborate. I think that is a goer but I shall oppose it. It is true that when it was implemented in New South Wales I did not oppose its introduction so I had best explain why.

There have been three successful elections under that system, in 2003, 2007 and 2011, each for 21 members at a half-Council election. Take the 2003 result. There were 15 groups and 284 candidates. The result of the election was the return of ten candidates from the Labor group, seven from that of Liberal/National, and two from the Greens. Then there were elected John Tingle from Group C (Shooters Party) and Gordon Moyes from Group N (Christian Democratic Party). The point is that, with 21 to be elected, the quota for election is only 4.6 percent of the vote. Consequently, the NSW system does not discriminate against minor parties. Indeed, in the present Legislative Council, there are 19 from the Coalition, 14 Labor, five Greens, two Shooters and Fishers, and two Christian Democrats.

Once you import that system to a Senate election for only six places you WOULD discriminate against minor parties. I do not dispute that radical reform is supported by distinguished electoral analysts. Indeed, I seem to be the only one opposed. Nevertheless, I still think it is just a means whereby big party machines would take back seats they have lost to smaller parties.

People might think me unreasonable to use the term “radical reform”. I say a reform is radical if it is unconstitutional. In the case of New South Wales, the system for their Legislative Council is consistent with their optional preferential vote for their Legislative Assembly. It is not consistent in principle with the full preferential vote for the federal House of Representatives which has operated successfully since 1918.

The reality of our recent election (September 2013) is that it showed the existence of a substantial body of Australians who intensely dislike all of the Liberals, the Nationals, Labor and the Greens. That is why there will be eight “other” Senators from 1 July 2014. So let me quote the overall percentages and the seats compared with the 1996 election, the last time a Labor Government was thrown out of office. In 1996 the Coalition won 44 percent of the Senate vote and 20 of the 40 seats; Labor won 36.2 percent and 14 seats. That left six for “others”. In 2013 the Coalition won 37.7 percent of the vote and 17 seats and Labor won 30.1 percent of the vote and 13 seats. That left ten for “others”, three Greens, three Palmer United Party, Leyonhjelm, Muir, Day and Xenophon.

I referred above to the blacksmith from Ballarat and the sawmill operator from central Gippsland. There I was referring to John Madigan (elected in 2010, defeating the Liberal incumbent, Senator Julian McGauran) and Ricky Muir (elected in 2013, defeating the Liberal incumbent, Senator Helen Kroger). I have met Madigan and was most impressed by him. I have not met Muir but, no doubt, I shall. They are the Senators who are disparaged because, it has been alleged, they enjoyed so little electoral support. When radical reform comes they would be out of their seats and replaced by suitable party machine appointees from the Liberal Party who would be lawyers, accountants or merchant bankers living in Kew, Brighton, Malvern or Toorak – unless, of course, Labor takes one of the seats in which case the new Senator would

be yet another trade union official.

Let me stress again that our Constitution commands we have a candidate-based electoral system. And what were the votes for Ricky Muir and Helen Kroger? Here they are: 17,083 for Muir and 1,456 for Kroger. Who is to say that Kroger has been unfairly done out of her seat? I think the reality is that both Kroger and Muir engaged in preference harvesting – but Muir beat Kroger at that game. I am not offended. I do admit a threshold of three percent would cut Muir out – since the Australian Motoring Enthusiast Party received only 0.51 percent of the formal vote in Victoria which was 0.0354 percent of a quota. Those statistics cut no ice with me.

The reality is that Victoria has become the weak link for the federal Liberal Party. This is true for both the Senate and the House of Representatives. In 1975, the Fraser-led Coalition defeated the Whitlam-led Labor Party in a landslide, while in 2013 the Abbott-led Coalition had the weakest win of the three. John Howard's 1996 victory comes in the middle. (For those interested in percentages, 36 Labor seats in 1975 constituted 28 percent of 127, 49 seats in 1996 constituted 33 percent while 55 seats in 2013 is 37 percent.)

What is striking is that in 1975 there was no State giving Labor a majority of seats in the House of Representatives. In 1996 there was one, the smallest State, Tasmania. By contrast, in 2013, Victoria did give Labor a majority. The Labor and Greens total in 2013 is 20 seats – or 54 percent of the Victorian seats. The four seats won by Labor in 2013 but not won in 1996 are Ballarat, Bendigo, Chisholm and McEwen. Melbourne is now Green where it was Labor in 1996. It is true that the Liberals in 2013 did re-gain three seats (Corangamite, Deakin and La Trobe) which Labor had won in August 2010 but these were blue-ribbon Liberal back in the days when Victoria was the jewel in the crown of the Liberal Party. (The reason why there are 14 Victorian Liberal seats now compared with 19 in 1996 is that the Liberals in 2013 failed to win Ballarat, Bendigo, Chisholm, Indi and McEwen.)

The reality of Victoria in 2013 is stark for the Liberal Party. Back in November 2007 (an election the Liberals lost nationally), they were able to get three Victorian Senators elected, Mitch Fifield, Helen Kroger and Scott Ryan. Then, in September 2013 (an election they won nationally), they were not able to get the three elected. Only in Victoria did the Liberals suffer such a humiliation, one which was unimaginable back in the days when Menzies, Fraser and Howard were winning elections. There is a simple explanation. In 2013 the Liberals received only 40 percent of the Victorian vote which was 2.8 quotas. On the votes they did receive, they did not deserve to get three Senators elected.

In each election since (and including 2014), the Coalition's Senate vote has declined – from 45.1 percent in 2004 to 39.9 percent in 2007, to 38.6 percent in 2010 and, finally, to a mere 37.7 per cent in 2013. As a consequence of their 2004 vote they actually won a Senate majority in the 41st Parliament, John Howard's last term. They were not asking for sympathy then. Their clear over-representation was their right! As a consequence of their 2007 vote they had 37 Senators in the Rudd Parliament (from 1 July 2008) so they had 48.7 percent of the seats for 39.9 percent of the votes. As a consequence of their 2010 vote they had/have 44.7 percent of the seats for 38.6 percent of the votes – 34 Senators out of 76 in the Gillard Parliament. As a consequence of their 2013 vote they will have, from 1 July 2014, just 43.4 percent of the seats for their miserable 37.7 percent of the vote – 33 Senators out of 76.

Consequently their over-representation has diminished slightly, from 8.8 percent in the Rudd Parliament, to 6.1 percent in the Gillard Parliament, to 5.7 percent in the Abbott Parliament. However, they remain, as always, over-represented.

The re-run early in April 2014 of the periodical election of Senators in Western Australia (in effect, a by-election) will be the tenth Senate by-election. Earlier cases were in 1908 (one seat in South Australia), 1963 (one seat in Queensland), 1966 (one seat in each of New South Wales and Queensland and two seats in each of Victoria and Western Australia), 1969 (one seat each in Victoria and South Australia) and 1972 (one seat in Queensland).

These elections all stemmed from the need to fill a casual vacancy. The 2014 event is the first case in which a re-run of a periodical election of Senators in any State has been required.

Note

* This paper is abridged. The full version with relevant tables is available at: <http://samuelgriffith.org.au/docs/vol25/vol25chap6-unabridged.pdf>

References

Malcolm Mackerras, 2004, "Prime Ministers and Reform of the Senate", *Upholding the Australian Constitution*, Volume 16, Proceedings of the Sixteenth Conference of the Samuel Griffith Society: 17-50.

Malcolm Mackerras, 2006, "Howard's Strategy for Senate Control", A paper prepared for the Conference, *John Howard's Decade*, held at the Australian National University, Canberra, on Friday 3 March and Saturday 4 March 2006, 38.

The Parliament of the Commonwealth of Australia, 2009, *Advisory Report on the Commonwealth Electoral (Above-the-Line Voting) Amendment Bill 2008*, Joint Standing Committee on Electoral Matters, Canberra, June 2009, 25.