



Research Paper
No. 29 1999–2000

Rules for Representation: Parliament and the Design of the Australian Electoral System



ISSN 1328-7478

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Published by the Department of the Parliamentary Library, 2000

Rules for Representation: Parliament and the Design of the Australian Electoral System

The Vision in Hindsight: Parliament and the Constitution: Paper No. 5

Vision in Hindsight

Vision in Hindsight is a Department of the Parliamentary Library (DPL) project for the Centenary of Federation.

The Vision in Hindsight: Parliament and the Constitution will be a collection of essays each of which tells the story of how Parliament has fashioned and reworked the intentions of those who crafted the Constitution. The unifying theme is the importance of identifying Parliament's central role in the development of the Constitution. In the first stage, essays are being commissioned and will be published, as IRS Research Papers, of which this paper is the fifth.

Stage two will involve the selection of eight to ten of the papers for inclusion in the final volume, to be launched in conjunction with a seminar, in November 2001.

A Steering Committee comprising Professor Geoffrey Lindell (Chair), the Hon. Peter Durack, the Hon. John Bannon and Dr John Uhr assists DPL with the management of the project.



Centenary of Federation 1901-2001

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Major Issues

This paper reviews the near-century of Parliamentary development of the Commonwealth electoral system: the 'rules for representation' devised by Parliament regulating the requirements of representation for the Senate and House of Representatives and the electoral process more generally. One of the few constants in this story is the frequency of change, as successive Parliaments have tinkered with electoral law and policy to accommodate changing priorities. Not surprisingly, the Australian solution is a fascinating compromise of democratic ideals and partisan deals.

Is there a perfect electoral system? Political science suggests that there is no 'one best model' of democratic government or of electoral system. But the fact that the Australian system 'works' is no ground for complacency. This review of the parliamentary history shows the value, even when they have lost the immediate battles, of those who have searched for a more effective electoral system.

What type of electoral system is best for Australia? The system we have is not necessarily the system we have to have or need to have. What sort of rules for electoral competition would promote greater campaign honesty and fair competition among the participating political organisations? Current arrangements reflect the interests of the parties and players now dominating public events. But what sort of rules for representation would provide for effective parliamentary representation for a wider range of voters and community interests; and what protections, if any, should we take against the possible adverse effects of widespread representation on orderly and responsible decision-making expected of effective parliamentary government?

As the centenary of Federation approaches, it is timely to open up the electoral system to fresh investigation. The Australian electoral system has evolved through many policy phases with many different points of emphasis. The current system reflects a workable compromise, blending many of the preferred elements favoured by the parliamentary interests whose hands have shaped electoral law and policy. Today's arrangements are the result of political decisions made by earlier generations of parliamentary leaders. There is a danger that these arrangements can easily become dated, falling behind changing community priorities.

What action can Parliament take to retain the relevance of electoral mechanisms?

Parliament already knows that voters are increasingly disenchanted with many aspects of the system of government. While the electorate still values the parliamentary system, voters tend to distrust politicians. Australian voters are compelled to vote and it is an open question exactly what proportion would really bother to vote if not compelled to do so. Reports suggest that many voters feel that their elected representatives are too distant from the community, preoccupied with managing the system, not listening to those they claim to represent.

Can we come up with a better electoral system that might help restore public trust to politics and elections? As the centenary of Federation approaches, what can we learn from the vision of the founders about core principles of parliamentary representation? And what can we learn about future priorities from the almost one hundred years of tinkering with electoral practices?

Elections do not come cheap and the electorate has a right to know that the system in place provides 'value for money' in translating the voters' voice into an effective system of representative government. At the time of Federation, the framers of the Constitution left many of the operational details of the electoral system to the good judgment of the first Parliament, trusting 'the class of 1901' to get to work and devise an electoral system that would carry out the intentions of the Constitution and provide Australia with ground rules for parliamentary representation. The system had to be robust enough to allow the emerging world of partisan politics to engage constructively with the formal parliamentary institutions established under the Constitution.

The 'class of 1901' were far from novices when it came to devising rules for representation. Drawing on their colonial experience, as well as on the optimism of the spirit of the new nation, they laid the foundations for Australia's characteristic electoral system, which over time featured the elements now regarded internationally as distinctively Australian: compulsory enrolment and voting, preferential voting, proportional representation (PR) for the Senate, an independent and professional Electoral Commission, public registration and funding of political parties. One theme from this history is that the electoral system was written by established political parties in Parliament and so favours political parties. But some have questioned whether this has come about at the cost of weakening the place of conscience and independent judgment in Parliament.

Parliament has been at the forefront in calling for the promotion of 'active citizenship' as a model for Australian citizens. The parliamentary history of the development of the electoral system illustrates the important place of voting as a core element in active citizenship. This is so even if we think that better arrangements could have been devised. The history unearthed here is a good case-study of Parliament's capacity to build on the framers' vision of a Federated Commonwealth and to flesh out the constitutional framework of responsible parliamentary government. The energy is admirable even if the performance has its faulty moments. Parliament's construction is ours to renovate.

Introduction

This paper traces the pattern of Parliamentary involvement in the development of the Australian electoral system, against the background of the centenary of Federation and the general role of Parliament in giving effect to the Federation framework of national governance. The theme is that the most influential Parliamentary contribution came during the hard legislative work of the first Commonwealth Parliament, when the Barton Government's highest hopes for innovative 'rules for representation' succumbed to emerging Parliamentary realities and the preference for the tried and tested rules of party convenience. The general scheme established under the original Franchise Act and the Electoral Act remained in place for the first two decades of Federation, subject to a regular procession of machinery modifications.

This paper reviews the three reform waves which have transformed the original system: the first around the consolidation and amendment in 1918 and the early 1920s of all electoral legislation, introducing preferential voting; the second around the 1948 enlargement of the size of Parliament and the introduction of PR in the Senate; and the third around the mid-1980s further expansion of Parliament and the introduction of new supports for party voting and party financing.

One conclusion emerging from this review is that while Parliament has often been very busy revising the electoral system, until recently very little of this activity has involved Parliamentary committees. While elected representatives and their parties have been assiduous in modifying the rules for representation, Parliament has been slow to use its institutional mechanisms of policy and legislative review to manage its contribution to electoral development. The evidence suggests that Parliament has been active as the *instrument* rather the *architect* of electoral development. The source of many of the policies flowing into electoral legislation can be traced to many influential parliamentarians, but not very often to formal Parliamentary institutions such as committee inquiries. An important exception emerged in the 1980s, when Parliament took on greater institutional responsibility through the establishment of a specialist joint committee which has emerged as an important historical innovation.

The dominant pattern, though, is that Parliament has acted as a deliberative forum where electoral options were *finalised* rather than *originated*. Individuals and particularly the political parties have fed ideas and arrangements into the Parliament, usually through the medium of the serving government of the day. Despite this fragmented profile, Parliamentary debate for the most part has been active and wide-ranging, indicating the

potential for greater Parliamentary initiative. Over recent years, that potential has begun to display itself in the form of a specialist joint committee on electoral matters. Parliament is now moving along the scale of policy possibilities from the instrumental to the architectural end, with interesting new responsibilities emerging as overseer of the Commonwealth electoral bureaucracy and pace-setter of electoral law and policy.

Electoral Perspectives

This paper reviews the role of Parliament in the development of the Australian electoral system. Analysts of the Australian electoral system have documented many of its distinctive features: early adoption of uniform adult franchise; compulsory enrolment and voting; preferential voting; PR in the Senate; public funding of political parties; and the important contribution of an independent electoral agency—the evolution from the Chief Electoral Officer of 1902 through the Australian Electoral Office of 1973–74 through to the Australian Electoral Commission of 1983–84.

This paper examines the distinctive contribution Parliament as a core institution of government has made to this system. As used here, 'the electoral system' refers to the rules relating to the organisation of elections, including the changing rules for voter-eligibility and the changing mechanisms regulating the electorate's choice of parliamentary representatives. Much of the existing commentary tends to focus on either the formal Constitutional provisions, including the investigation of possible options for Constitutional reform, or on the 'rules of the game' of electoral competition, with particular reference to the detailed electoral mechanisms for registering votes and determining seats.

Electoral analysts have typically focused on the changing composition of law and regulation as these have reflected changing preoccupations of the political parties holding executive government.¹ This paper attempts to put the development of electoral lawmaking in the context of the wider story of the Parliamentary contribution to the development of the electoral system. Although the law is the formal focus of attention in most studies of the development of the electoral system, political parties have been an important underlying focus of attention. The story as it is usually told relates to the ways that different parties when they hold executive office reshape the electoral system to promote their understanding of electoral justice.² Very few existing studies move beyond this focus on the political parties in executive government to pay much attention to the institutional interests of the Commonwealth Parliament, as revealed in the wider balance of party deliberations evident in Parliamentary debate over electoral matters.³

While Australian developments in electoral practice attract international attention, there remain many gaps in the scholarly investigation of Australian law and policy on elections. The role of Parliament in contributing to the Australian electoral system is perhaps the most outstanding gap. As the situation stands, international attention is directed to the Australian approach to electoral fairness through a combination of preferential and

proportional voting, both subject to the distinctive Australian requirement of compulsory voting.⁴ But more needs to be known about the policy and purpose behind these distinctive Australian practices and about the role of Parliament in finding the balance among many competing options. As a recent review notes:

A conspicuous absence in the realm of academic scholarship about electoral matters ... is any sustained or comprehensive analysis of electoral law and its history, policies, purposes, theoretical bases and even black-letter instantiations.⁵

The conventional approach is to reduce electoral law and policy to the self-interest of the political parties dominating Parliament. Although the role of the political parties as key stakeholders in the electoral system has received prominent attention, it is important to note that 'parties rarely obtain voting methods entirely appropriate to their needs'.⁶ Parliament is more than the sum of the interests of the political parties represented in it. Just as the political parties represented in the early Commonwealth Parliaments had to adopt standing orders consistent with the long-term interests of Parliament as an institution of national governance, so too those original parties had to adopt electoral laws compatible with the wider institutional role of Parliament in Australian national governance.

Partisan interests converge at some points and diverge at others, so that 'the will of Parliament' exists, if and when it does exist, as an institutional interest distinct in many respects from the immediate partisan interests of many of the elected representatives. Parliamentary authority emerges through the give and take of political compromise over competing interests. In this sense, Commonwealth electoral legislation has been characterised as 'carefully weighed pieces of legislation' reflecting 'a wider theory of politics' than the short-term interests of the competing parties.⁷ To use the rather grand language of Minister Glynn when introducing the 1918 electoral bill:

... it is our duty not to allow party or personal interests to touch too much the consideration of electoral methods, and to make, as far as political temperaments and motives may permit, Democracy effective for government.⁸

The Constitutional Background

Analysts have identified a number of features of the political system which have helped shape the electoral pattern along the lines of a remarkably stable and uniform two-party system: responsible parliamentary government with its reliance on officially recognised governments and oppositions; the early adoption of simple majority voting which discouraged small parties; and the choice of state-wide electorates at the Senate level which encouraged large and well-organised political operations.⁹

As suggested, one important limitation of the existing Australian literature is that it has not explored the larger policy role which Parliament as an institution of national governance has played in framing the overall shape of the Australian electoral system consistent with

the Constitution. In comparative terms, Australia has a remarkably stable system of party competition.¹⁰ There have been many detailed changes to the electoral system, but the pattern of change has tended to reinforce the existence of two main political groupings competing for government (usually recognised as 'Labor' and 'anti-Labor' in the political science literature). This stability is reflected in the sustained interest in the 'two-party preferred vote' as the salient divide in electorate opinion. With the advent of PR in the Senate from the 1949 elections, minor parties have emerged, but mainly as supplements rather than as challengers to the major parties. Each of the major parties can win government with a share of preferences from the minor parties; and each of the major parties can govern in Parliament with the support of the minor parties in the Senate.¹¹

What is of immediate interest here is the range of legislative options open to the Commonwealth Parliament in the early years of Federation. The remarkable stability referred to by so many of Australia's electoral analysts derives in large part from the terms of the Constitutional settlement and from the choices made during the first Parliament. But the Constitution provides only the most general of frameworks for an Australian electoral system. There are many different ways in which Parliament might devise rules for representation which comply with the general requirements of the Constitution. Not all of the details can be covered here and not all of the debates and other Parliamentary contributions can be fully documented. The aim is to identify the basic framework of Parliamentary representation and related electoral system which has emerged through the deliberate efforts of the Commonwealth Parliament to round out the Constitution.

Australia has long been regarded internationally as a laboratory for democratic political innovation.¹² The secret ballot was originally known as 'the Australian ballot' at its introduction in the decade of the 1850s, at the time of adult, (i.e. 21 years) male suffrage in most of the self-governing Australian colonies. Electoral reform was one prominent area of democratic experiment where Australian innovations caught the attention of such champions of representative democracy as John Stuart Mill, who drew on the Australian interest in PR to argue the case for parliamentary reform in the United Kingdom¹³. In the years leading to Federation, the Australian colonies were at the front of international experiments in electoral reform: for example, in 1892 the Queensland electoral system was reformed to include optional preferential voting, then known as contingent voting. In 1894, South Australia abolished restrictions against women's suffrage and introduced the universal adult franchise: Western Australia followed in 1899. And in 1896, Tasmania adopted a form of PR (for its two main urban populations) known as the Hare-Clark system which survived until 1901, to be revived more broadly and permanently in 1906.¹⁴

Not that every colony was at the leading edge of electoral reform: at the time of Federation the three eastern seaboard States had manhood suffrage, yet there were important qualifications, particularly in relation to the rights of Aboriginal Australians. Even white Australians enjoyed different rights from colony to colony: Queensland, Western Australia and Tasmania, 'still retained plural voting with a property qualification'.¹⁵ This diversity on the eve of Federation in parliamentary and electoral arrangements acted as a spur to the

influential group of Australian theorists of representation. Australia boasted a remarkable crop of theorists of representation whose many written commentaries on the ideals of representation provided the Australian political community with a stimulus to further reform, should there be political will. Reid and Forrest give an extensive exposition of the practical relevance of such idealists as Professor Nanson, Andrew Inglis Clark, Catherine Helen Spence and the Ashworth brothers, while also noting 'the evasiveness and prevarication of elected politicians in the application of ideas'.¹⁶

During the Constitutional Conventions of the 1890s, the pursuit of a Federated Commonwealth with a national Parliament was not accompanied at the political level by widespread effort to entrench any particular vision of electoral justice.¹⁷ The constitutional framers had an early sense of what they did *not* want included in the Constitution but the decade of deliberation showed that they were less certain about what, if any, rules for representation should be entrenched in the Constitution. For instance, it took little debate to overturn the original 1891 draft provisions for indirect election of Senators by State Parliaments, modelled on the then-existing United States practice. But it took the rest of the decade to come to agreement on the lean and spare provisions relating to the new Commonwealth's electoral system.¹⁸ When it came to identifying a model of detailed provisions of the electoral system, the framers sensed the advantages of leaving well enough alone. Given that their own electoral arrangements varied so much among the participating colonies, the easiest decision was to leave the details of a national system to Parliament to determine after Federation.

An exception that proves the rule of avoiding Constitutional entrenchment relates to women's suffrage. The South Australian Legislative Assembly formally advised the 1897 Sydney meeting of the Constitutional Convention of the importance of entrenching adult franchise in the Constitution. Representing this view, Holder argued that 'the principle of adult suffrage was making way, and presently it would prevail'. Holder's attempt to entrench this provision was defeated 32 to 13.¹⁹ The majority view among the Constitutional framers was that the Commonwealth Parliament was the appropriate body to determine the franchise qualifications for Commonwealth elections.

But the other side of this reluctance to entrench adult suffrage was a backdoor entrenchment of male suffrage found in the s. 128 provision relating to Constitutional amendment. This section dealing with Constitutional referendums contains the standard formulation that voting arrangements at Constitutional referendums shall be 'in such manner as the Parliament prescribes'. But it goes on to state that until Parliament establishes uniform qualifications for voters at Commonwealth elections and referendums, 'only one half the electors voting for or against the proposed law shall be counted in any State in which adult suffrage prevails'. Only the two States of South Australia and Western Australia had adult suffrage at this time. What has been described as the 'historical oddity' of this electoral provision reflects the determination of the framers to protect the competitive disadvantage of the four States without female suffrage by preventing the two States with adult suffrage from exercising disproportionate influence in national

referendum votes.²⁰ Although this paragraph still stands, it has been overtaken by the uniform franchise provisions in the 1902 electoral legislation.

The Constitutional Framework

The framers accepted that the initial election for the Commonwealth Parliament would be held on the basis of State laws. The implication was that each State group of Senators and Members would initially reflect the distinctive electoral mechanism of their State of origin. Each State devised its own procedures to elect the original class of Commonwealth legislators. Most States organised their House of Representatives elections around separate divisions and used the plurality system of first-past-the-post voting. But it is important to note that the two States of South Australia and Tasmania elected their Members for the House of Representatives as well as the Senate on the basis of the State as one large multi-member electorate, with South Australia using a form of 'block voting' and Tasmania using the Hare-Clark system of PR.²¹ Thus the original Commonwealth Parliament itself reflected not simply the diversity of the new nation but also the diversity of several different electoral systems.

The first Commonwealth Parliament had the responsibility of devising a national electoral system for subsequent general elections. For their guidance, they had their knowledge of their State systems, their understanding of the purposes of the relevant Constitutional provisions, and their interest in the ideals of electoral justice circulating in the specialist literature on ideals of representation. The only effective limits to their legal competence were the provisions of the Constitution. The Constitution's electoral provisions can be divided into two sets: a first set dealing with the core content as it emerged through the Constitutional bargaining of the 1890s, and alterable only through Constitutional referendum; and a second set dealing with provisions which were to take effect 'until the Parliament otherwise provides': —to cite the phrase repeatedly used in the Constitution.²² Most provisions relating to the electoral system fall into the second set, which has prompted this comment from Reid and Forrest:

The architects of the Constitution placed great faith in the capacity of the elected Senators and Members to design statute law for a system of representative self-government, notwithstanding that they would be legislating in their own interest.²³

The elected representatives in the first Parliament would have appreciated the federal character of the Constitution's arrangement of electoral provisions, which illustrate the larger spirit of federalism evident in the Constitution as a whole.²⁴ The order of presentation of the electoral provisions in the Constitution begins with the Senate, reflecting the basic federal design of the Australian Constitution. But the substance of the initial provisions also shows the underlying importance of the House of Representatives, as for example in s. 8 and s. 16, in that the qualification of electors for Senate elections, and of Senators, is defined in terms of the provisions applicable to Members of the House

of Representatives. But this link between the Senate and the House of Representatives itself opens up another important link, this time from the Commonwealth to the States, thus completing the federal layering which is so prominent in the Constitution generally. Until such time as Parliament legislates for nationally uniform standards, qualifications for voters and elected members are held to be those relevant to electors and members of 'the more numerous House' in each State Parliament (s. 30 and esp. s. 31).

The core provisions as they relate to electors are minimal. Consistent with the general thrust of the Constitution's electoral provisions, these provisions simply establish the outer limits of unconstitutional practice. For example, each elector is to vote only once for their State Senators and their local member (ss. 8, 30). This was designed, according to Senator O'Connor when introducing the original franchise bill, to 'take the sting out of the property vote in a great many of the States'.²⁵ The core provisions as they relate to elected representatives are similarly spare. The most important provision is that Senators and Members are to be 'directly chosen by the people' (ss. 7, 24). The precise manner of choosing elected representatives is left to Parliament, although the Constitution does stipulate that the method for electing Senators 'shall be uniform for all the States' (s. 9). In relation to elected Members of the House of Representatives, the Constitution stipulates that:

'The number of such Members shall be, as nearly as practicable, twice the number of the Senators' and the number in each State shall be 'in proportion to the respective numbers of their people' (s. 24)

The overall requirement for the relative size between the two houses (frequently called the 'nexus' provision) means, as reported by Quick and Garran, that the 'number of representatives depends on the number of Senators' which may, should Parliament so choose, increase as the population increases.²⁶ This Constitutional provision protects the power of the Senate relative to the House, in that any enlargement of the House requires an initial enlargement of the Senate. However, this stipulation for relative parity does not necessarily mean that both houses are equal in all respects: the Constitutional provisions relating to a joint sitting following a double dissolution is premised on the relative numerical superiority of the House of Representatives.

The provision that House representation shall be in proportion to State population is very important to subsequent development of the Australian electoral system. The 1891 draft of the Constitution contained a provision modelled on the US Constitution holding that there should be one elected member for at most 30 000 persons. That precise figure was deleted from the Constitution and in its place was substituted a provisional mechanism for determining the allocation of Members among the States, dealt with in the next section when discussing the alterable provisions of the Constitution.

A final stipulation relating to the qualifications of elected Members are the requirements contained in sections 44 and 45 of the Constitution. Section 44 states the five grounds of ineligibility for elected representatives; by virtue of:

- (i) another allegiance
- (ii) criminal punishment
- (iii) bankruptcy
- (iv) holding an office of profit under the Crown, and
- (v) conflict of financial interest with the Commonwealth.

Section 45 clarifies that the seat of an elected representative shall become vacant in the event of any of these circumstances.

It goes on to add another circumstance: in the case of persons who are paid 'for services rendered in the Parliament to any person or State'. It is an open question how or to what extent this latter provision might cut across the obligations that elected representatives owe to their political parties or financial supporters.²⁷

Finally, in this list of Constitutional stipulations, we see another sign of the federal character of this original framework. Federalism is evident in relation to the issuing of election writs. Although the Governor-General may dissolve Parliament, the Constitution reserves to the 'Governor-General in Council' the right to issue writs for general elections (s. 32). The Speaker may issue writs for by-elections for House seats (s. 33) and the relevant State Governors may issue writs for Senate elections and casual vacancies (ss. 12, 21). This Constitutional role for State Governors illustrates the degree to which in relation to Senate vacancies 'executive control remains constitutionally vested in the States'.²⁸

Options Facing the First Parliament

The Constitution provides that Senators are chosen by the people of each State 'voting, until the Parliament otherwise provides, as one electorate' (s. 7). Thus the first Parliament could have legislated for the election of Senators on the basis of a divisional structure within each State, similar to the system adopted for the House of Representatives. Or instead, they could have used the Senate model for the House and legislated for each state to elect its House members from one or a number of large multi-member electorates—given that section 24 simply regulates the allocation of members among the States and leaves it to Parliament to choose between single and multi-member electorates.

In relation to the Senate, the constitutional commentators Quick and Garran record their view that the original understanding of the framers was that Parliament would retain this initial preference for State-wide electorates. It is true that section 7 recognises the special right of the Queensland Parliament to divide the State into separate divisions for Senate elections, but Quick and Garran state that the distinguishing feature of Senate

representation was meant to be its adherence to 'corporate representation' as distinct from the 'principle of locality' found in the divisional organisation of the House of Representatives.²⁹ One important policy reason supporting this preference for single multi-member electorates was to provide support for minorities within each State, with the option of using some form of preferential or PR to enhance the representation of minorities. In the words of Quick and Garran: 'Provision could thus be made for the introduction of some system of preferential or alternative voting and the representation of minorities'.³⁰ Quick and Garran identify another policy behind the preference for State-wide electorates in terms of their compatibility with the cultivation of liberality of views as distinct from sectionalism among the elected representatives. In their opinion, the policy is:

Calculated to promote the selection of the best men whose services are available—men of broad views, established reputations, and extended experience, such as should be elected members of the Senate.³¹

Turning now to the House of Representatives, s. 26 provides an interim allocation of members among the States. Section 29 recognises that State law will initially determine the divisional distribution of House seats within each State but it also states that in the absence of either State or Commonwealth law 'each State shall be one electorate'. It was open to the first Parliament to write this original provision into electoral law. The understanding at the time was in favour of single-member electorates and most of the discussion among the framers had been over the 'ratio of representation' regulating the allocation of seats among the six States. Section 24 states that the number of House members in each State 'shall be in proportion to the respective numbers of their people' but leaves it to Parliament to determine who or what institution should so determine this allocation. One vital implication is that Parliament will require access to what section 24 terms 'the latest statistics of the Commonwealth'. Statistics are, to quote Quick and Garran, 'at the root of the representative system'.³²

One final set of Constitutional provisions stands out as open to revision by the Commonwealth Parliament. The qualifications of Senators and Members are identical, and it was open to the first Parliament to replace the interim Constitutional provisions with more permanent provisions reflecting an evolving sense of national uniformity. The Constitution simply requires that elected representatives meet three tests: one of age (21 years old), one of residency (three years in Australia) and one of citizenship (subject of the Queen) (ss. 16, 34). As we shall see, the first Parliament in effect confirmed these three qualifications.

High Hopes and Emerging Realities

Perhaps the most extensive debate over the electoral system ever recorded in the life of the Commonwealth Parliament was that during the first Parliament. It is important to take

account of the lost causes as well as the eventual outcomes, because over successive Parliaments adherents of many of the lost causes returned later down the legislative track. Among the major casualties of the Parliamentary debate over the original legislative proposals were preferential voting for the House and PR for the Senate—both of which featured in the Barton Government's original electoral bill. Over subsequent decades, both became the focus of repeated warnings by elected representatives who drew upon proportional and preferential ideals to make their case that the electoral system was failing to represent the broadest interests of the Australian community.

Another important casualty of the original electoral settlement was the voting rights of Indigenous Australians. The Barton Government framed its original Franchise bill to protect existing Indigenous voting rights where they existed at State level (e.g. South Australia) and to extend that right nationally in relation to Commonwealth elections. This liberal provision was deleted as the bill proceeded through Parliament. This deletion was consistent with the general thrust of the Constitution which failed to protect the rights of Indigenous Australians. For example, section 24 regulates the allocation of House members among the States 'in proportion to their respective numbers of their people'. Section 25 states that 'all persons of any race' who are disqualified from voting by a State 'shall not be counted' for the purposes of determining the allocation of House numbers. Some commentators see this as 'a mild deterrent to discrimination on racial grounds by the States'.³³ But the generally discriminatory nature of the Constitution is again evident in section 127 which was one of the provisions altered by the 1967 referendum. As section 127 originally stood until that 1967 change, the national census was to exclude the counting of 'aboriginal natives'.³⁴

The passage of the original Electoral and Franchise legislation is characteristic of Parliament's general contribution to the development of the electoral system. The Parliamentary record reveals that the Barton ministry looked to the experience of State electoral administrations to point the way forward. Typical is a report of July 1901 prepared for Minister Lyne by the early team of Commonwealth electoral officers in the Department of Home Affairs.³⁵ This report was prepared by the first Commonwealth Electoral Officer, George Lewis, and the State electoral officers for the new Commonwealth. Their aim was to devise a scheme of electoral administration which:

Will secure uniformity of action together with harmony in administration, and, at the same time admit of an elasticity which will accord with the peculiar conditions obtaining in remote parts of the several States.³⁶

The Report draws on various State practices, such as South Australian and Tasmanian voter registration schemes, and South Australian and Victorian arrangements for postal voting. Lewis and his colleagues advised Minister Lyne that they had given 'the Hare-Spence and other systems' of voting 'our fullest consideration' but their only recommendation in this area was that preferential voting be used wherever single-member electorates were adopted, drawing on the Queensland model of 'contingent voting' but with the recommendation of making it compulsory rather than optional.³⁷ Together with many

other practical recommendations, this advice went to Minister Lyne, reflecting the Barton ministry's reliance on pre-Parliamentary administrative homework. Another administrative report illustrating similar reliance on the electoral expertise of public servants is the Tasmanian report on the 'Hare-Clark System of Voting' prepared for the Senate by the two Tasmanian public officials: the Tasmanian Statistician and the State Returning Officer.³⁸ This report contains important practical detail on the operation of PR at State level and provided Commonwealth parliamentarians with expert advice on the benefits of this electoral system to the electorate, or what they cleverly termed 'the represented—the Hamlet of all matters regarding representation'.³⁹

The debate over the two related bills drew upon this sort of professional analysis and was very extensive, raising quite fundamental issues of responsible parliamentary government. O'Connor stated the importance of the issue when he reported that the electoral package was designed with 'the purpose of bringing the Constitution of Australia into operation'.⁴⁰ The legislation was also something of a nightmare to manage, given the range of issues which it provoked and the number of parliamentarians determined to contribute to the debate. The Government initially introduced both bills in the House of Representatives in 1901 but early in 1902 reintroduced both bills in the Senate where they received their first substantial examination. The result was that the Government faced a considerable burden in managing the bills through the legislative uncertainties of the first Parliament where, in the absence of a developed party structure, each member participating in the legislative process felt comfortable in opening up new avenues of amendment. The very fact that the Labor party made schemes of representation a conscience issue only added to the uncertainty of the outcome of this protracted process.⁴¹ The bills survived the process but with substantial amendment, including the deletion of the Government's preferred schemes for optional preferential voting at House and Senate elections and PR for the Senate, and for voting rights for Indigenous Australians. Parliament inserted first-past-the-post through a 'block system' which survived up until the switch to preferential voting for the House in 1918 and the Senate in 1919.⁴²

We can begin with the franchise provision. The Commonwealth Franchise Act 1902 established universal adult franchise, granting women the vote in NSW, Victoria and Queensland and Tasmania. Prominent among the disenfranchised were Aboriginal Australians, and aboriginal inhabitants of Asia, Africa, and the Pacific Islands unless already enrolled at State level.⁴³ The 1902 Franchise bill as introduced provided that, subject only to a six month residency requirement, 'all adult persons ... who are natural born or naturalised subjects of the King' shall be entitled to vote. Minister O'Connor recognised that one option facing the Parliament was simply to adopt the varying State provisions on voter eligibility. But to the Government this was 'an absolutely mistaken view of our duty as representing the people of the Commonwealth' which was to establish a uniform franchise. The two extensions singled out by O'Connor were guarantees of votes for women and Aboriginals. The premise was the same, as is revealed in the Minister's words: 'I can see no reason in the world why we should continue to impose laws which

have to be obeyed ... without giving them some voice in the election of members who make those laws'. Further, he added:

It would be a great mistake from every point of view to have any portion of the community in such a position that, while it had to obey the laws, it would have no right to vote in the election of those who had to make the laws.⁴⁴

As historians have well documented, the extension of legislative protections to women voters stopped short of protecting the rights of Aboriginal women.⁴⁵ The Barton ministry understood the importance of overcoming racial discrimination, as is evident from O'Connor's insistence that the aboriginal issue was one which he said should be treated 'not only fairly, but with some generosity'.⁴⁶ But O'Connor's advocacy failed to sway his parliamentary colleagues who amended the Government's bill to deny the franchise to aboriginal natives 'of Australia, Asia, Africa, or the Islands of the Pacific' unless protected by State electoral law under s. 41. By a large majority, 'Australian natives' were excluded from the franchise.⁴⁷

We look next at the larger electoral bill. The Commonwealth Electoral Act 1902 was designed as an Act 'to regulate Parliamentary Elections'. It established the single-member Divisional basis of the House of Representatives with a tolerance across Divisions of a 20 per cent variation in numbers of electors compared to the norm or quota, to be determined by a Commonwealth electoral officer for each State (ss. 12, 16). The law established the three basic criteria for Divisional composition: community of interest; means of communications; and physical features (plus the existing boundaries of Divisions where such existed). These calculations were made the primary responsibility of State electoral commissioners but were subject to a vote of positive approval by both houses of Parliament (s. 21).⁴⁸ The Senate was successful in fighting for its right to participate in the Parliamentary authorisation of distribution of House seats. The bill originally gave the House the sole authority to approve distributions. This became an early test of the ability of the Senate to defend its rights to manage electoral system, which the Senate won.

There was also a significant but unsuccessful push led by Senator Downer to secure multi-member electorates in the House.⁴⁹ The rejection of this proposed scheme has been identified as the origins of the 'expensive luxury' of Australia's frequent redistributions of lower house seats, as population movements regularly upset the parity of representation among states and divisions.⁵⁰ The 1902 Act established the long practice of authorising governments, whenever they see fit, to appoint distribution commissioners in each State. Their task was to report to Parliament on proposed distribution of Divisions within each State. Parliament's role was to consider such reports and either accept or reject them, with no option for parliamentary amendment or modification. According to Labor Prime Minister Whitlam:

The stark deficiency of the Act related to its failure to make regular redistributions a mandatory feature of Australian government.⁵¹

The electoral law included many important administrative details. The legislation provided for a number of important facilities to make voting easier for voters. For instance, postal voting was recognised for voters more than five miles from a polling place on polling day (Part X). The legislation established the basis of a public service bureaucracy to administer the electoral system. The Act established a Chief Electoral Officer 'who shall under the Minister be responsible for the execution of this Act' (section 5) together with Commonwealth Electoral Officers for each State, Divisional Returning Officers for each division, and Electoral Registrars to manage the enrolment process. Among the duties of the electoral officers was the administration of the provisions relating to the limitation of electoral expenses (Part XIV). The legislation also established the High Court as the Court of Disputed Returns (Part XVI).

Reviews and Revisions

The balance between parliamentary and public service review of early electoral developments is nicely captured in two reports from 1904, the first year of the second Parliament and the first year after the inaugural test of the electoral provisions at the 1903 general elections. Chief Electoral Officer George Lewis submitted a report 'on the practical side of the Electoral Act' to the Secretary of the Department of Home Affairs.⁵² This Report is a frank account of the challenge of the administration of the 1903 elections with many recommendations for government on machinery improvements to assist the voting practices and the speedy counting of the results.

On the other side of the inquiry ledger is the Report of the first House of Representatives Select Committee on Electoral Act administration, chaired by Littleton Groom, later Minister for Home Affairs.⁵³ This Report from the parliamentary committee supplements the public service report with a focus on public complaints about administrative incompetence. The Report is emphatic about the importance of separating electoral administration from 'party politics', (e.g. para 6). The committee saw merit in, but came to no unanimous conclusion about, a system of electoral administration 'under the control of a Commissioner, who should be free from Ministerial influence'.⁵⁴ The Report also canvassed the possible place of voting machines (para 18). Of importance is the Report's recognition that postal voting 'is open to serious abuse' in that undue influence might be brought to bear 'to destroy the free and secret exercise of the franchise'.⁵⁵

Over the next decade there appears to have been little activity by Parliamentary committees reviewing either the policy or the administration of the electoral system. There were, however, frequent stirrings of interest by individual parliamentarians and the regular debates over the procession of machinery amendments to the Electoral Act illustrate the continuing contribution that non-government parliamentarians were making to the evolving electoral system. One of the most important legislative refinements was the 1911 set of amendments to the Electoral Act which marked the arrival of the newly consolidated party system at the national level. This Act extended the system of compulsory returns by

candidates in relation to electoral expenditure to campaign expenditure by 'political organisations' and 'newspaper proprietors' (s. 34), and abolished postal voting, substituting early voting system and absentee voting in its place.⁵⁶

Not all news was good news. The most significant external review of electoral administration was the 1914–1915 Royal Commission established under the Cook government. In January 1914, Prime Minister Joseph Cook set up a Royal Commission into the May 1913 general election when Labor lost office, with a brief to recommend the 'improvement of the electoral law and administration'.⁵⁷ The Royal Commission reported in July 1915 to the successor Fisher Government. One pressing finding was that former Labor Minister for Home Affairs King O'Malley had used his ministerial influence to interfere 'in a most undignified manner with the officers in the Darwin Division, for which he was a candidate' (para 4). O'Malley had directed election officials not to employ a list of 'known partisans' which emerged to be 'only those he thought were opposed to him in politics'. Minister O'Malley's action 'amounted to a serious dictation which almost resulted in a complete breakdown of the electoral machinery for the State of Tasmania' (page 4).

Parts of the Report read like a catalogue of corruption designed to support the larger argument being made by the commissioners about the continuing importance of non-partisan professionalism in electoral administration (see, e.g. para 33). The powers of the Chief Electoral Officer should be redefined to prevent ministerial intervention in electoral practice and the status of the office 'should be placed on a par with Heads of other Departments with regard to salary' (para 8). The Royal Commission recommended in favour of compulsory voting 'as a natural corollary of compulsory enrolment' (para 31) and also in favour of *preferential* voting for the House of Representatives and a system of *proportional* representation for the Senate (paras 11–12). The common premise was the importance of 'many shades of political opinion' and 'distinct broad tones of thought' among elected representatives. The commission also recommended the return of postal voting, which by then had become a perennial staple of partisan controversy: opposed by Labor and supported by non-Labor (para 13).

The Change to Compulsion

The Commonwealth government began its journey down the path of compulsion in 1911 when the Fisher Labor government introduced legislation for 'a system of compulsory enrolment' (s. 7) which was feared by its opponents to be a precursor to compulsory voting.⁵⁸ The leading provision in the bill was the abolition of postal voting which had never found much support among Labor. Senator Pearce, who introduced 'this rather big alteration in our electoral law', justified the compulsory requirement by quoting from advice received from 'the electoral officers' about the policy to abolish postal voting and to substitute a more extensive system of absentee voting creating an administrative need for a complete roll of eligible voters. The advice recorded as a fact that 20 per cent of urban electors changed their place of residence annually. Pearce quoted extensively from what

he termed 'purely the official view' of the administrative benefits of the change, as seen by Commonwealth electoral officers. Pearce drew inspiration from the compulsion found in relation to schooling and medical vaccination to argue that voting was a duty and not a voluntary privilege.

The first step towards compulsory voting was taken by the Fisher Labor government in 1915 through the Compulsory Voting Act, which legislated for compulsory voting at the constitutional referendums proposed (but never held) for later that year. The legislation was specifically limited to referendums held in 1915 (s. 3). The legislation was inspired in part by the 1914 decision of the Queensland Liberal government under Premier Denham which had brought in compulsory enrolment and voting.⁵⁹ The Fisher Government defended this turn to compulsion as being in line with 'compulsory training, compulsory education, compulsory early closing, and compulsory enrolment'.⁶⁰ Justifying the provision in terms of shared civic responsibilities, the Fisher Government claimed that voluntary voting gave rise to the possibility of minority rule, through the electoral participation of a minority of eligible voters. The Government claimed that the legislation was designed 'to impress upon the people of Australia a sense of their responsibility as to the Government of this country, and to make plain to them the fact that, whatever may be their views, they can have no excuse for shirking that responsibility'.⁶¹ The Opposition was just as direct:

The idea of compelling persons to give a judgment, which may affect important decisions, on matters which they have not studied, and in which they take so little interest that, if let alone, they would not record their judgment, seems to me repugnant to common sense.⁶²

The Opposition called for an extension of the provision to voting at general elections, which it would only support if the Government agreed to return postal voting. The compromise was that compulsion would extend only to constitutional referendums planned for the year of 1915, which in any event were never held.

It took nearly a decade to revise and extend this provision to general elections. On the heels of declining voter turnout after the end of World War One, the Bruce-Page Government finally introduced compulsory voting with the 1924 amendments to the Electoral Act.⁶³ This Act include the crisp injunction that: 'It shall be the duty of every elector to record his vote at each election' (section 2). It is worth noting that even the most vocal of critics of compulsory voting who tend to see it as 'the most insidious feature of Australian electoral systems' do acknowledge that there 'is no evidence that it has given an advantage to any party'.⁶⁴

Preferential Voting

The march towards preferential voting, or the 'contingent' or 'alternative' vote as it was variously called, was more openly heralded. Cook had included a policy in favour of preferential voting in his 1914 election statement and by 1917 he was joined by the former Labor leader Billy Hughes. The emerging components of the later Country Party were prominent among the promoters of preferential voting, as an easy way of sharing the non-Labor vote without risking defeat at three-cornered elections.⁶⁵ A national system of preferential voting arrived with the 1918 consolidation of the various electoral laws. The second reading speech by Glynn, the Minister for Home Affairs, was a rhetorical match for O'Connor's original presentation of the 1902 bill. Glynn was the last of the pre-Federation era and was able to link the consolidating legislation to the hopes of the Constitutional framers who had inspired Parliament to do 'something to make Democracy a reality as well as a name'—particularly by recognising the 'legitimate obligation of the State' to control electoral expenses and conduct.⁶⁶ In addition to consolidating a patchwork of existing legislation, the bill introduced preferential voting for the House of Representatives, modelled substantially on Victorian practice. The stated purpose of preferential voting was 'to secure majority representation' in single-member seats by giving more effective voice to 'neutral or non-party opinion' to ensure that the seat is won on the basis of 'an absolute majority of operative votes'.⁶⁷ Section 124 of the Act stipulated the new voting procedure for House of Representatives elections as it related to 'first-preference' votes and second or lower preference votes, called 'contingent votes'. The purpose was to move the system from one with a simple-majority to one with a mechanism for recording an absolute-majority. This Act also restored postal voting.⁶⁸

There were three leading criticisms of compulsory aspects of the bill: first, why not make it optional preferential? Second, why not extend the contingent vote to Senate elections? Third, why not introduce a form of PR for Senate elections? The Government's answers were that, first, the Victorian model was compulsory, not optional; second, Minister Glynn aired the possibility of a form of party-list voting as suitable to Senate elections; third, Minister Glynn noted that it was not government policy, and had not been recommended in any of the reports from Commonwealth electoral officers, although his treatment suggested that it might well have been his own personal preference.

It took another year to extend the provisions to Senate elections. The 1919 amendments to the Electoral Act introduced a new form of preferential voting for the Senate.⁶⁹ The Senate form of preferential voting differed from that in the House in being a form of 'preferential block majority'. This was not designed to bring about anything resembling a PR of parties according to their electoral support. As commentators have observed: 'In practice this new system perpetuated the unfairness of the old first-past-the-post system and there was a gross disproportion between the representation of the parties in the Senate and the votes they had obtained at elections'.⁷⁰

Proportional Representation

Although there were many important machinery changes made between the Wars, the next great wave of electoral reform was associated with the post-War plans of the Chifley Government to enlarge the Parliament and finally to act on the long-held call for the introduction of a form of PR into the Senate, based on the single transferable vote (STV) system.⁷¹ The size of Parliament had remained virtually unaltered from 1901 to 1949, the House with 75 Members and the Senate with 36 Senators. The Northern Territory had indeed been provided with one non-voting member since 1922 and this modest level of representation was intended to be extended to the Australian Capital Territory from the 1949 election. But apart from these minor modifications, the size of Parliament remained unaltered since 1901. One implication of this unchanged number of elected representatives was that the average size of House electorates rose from just over 12 000 electors in 1901 to just over 63 000 electors at the 1946 election.⁷²

Accounts of the enlargement and of the introduction of PR usually acknowledge that too little is known to be certain about the motivations for this phase of electoral reform. The bare facts are well known: in 1948 the Chifley Government initiated amendments to the Electoral Act to alter the existing method of counting the Senate vote which had traditionally rewarded the majority party with a disproportionately large share of Senate seats. Labor itself had a Senate majority of 33 to three after the 1946 election. The standard account, given by Opposition leader Menzies at the time, was that Labor feared that it would lose the 1949 election (and probably most of its contested Senate seats) and so devised this change to consolidate its parliamentary power base in the Senate to frustrate the expected Menzies Government.⁷³

This account is true as far as it goes. But a fresh review of the historical record shows that the 1948 decision was really the final stage in a frequently-deferred plan of parliamentary reform that goes back to Federation.⁷⁴ Even before Federation, many prominent constitutional framers had expected the first Parliament to legislate for PR for the Senate. Sure enough, the Barton Government included Senate PR in the original Electoral Act, but this had been rejected in the Senate on the plausible ground that it would undermine the established conventions of strong party government. However, over time even the partisans of strong party government came round to see the merits of the original plan. At many stages between the first Parliament and 1948, advocates of PR moved for its adoption for Senate elections, with many party leaders joining the ranks of parliamentary reform: conservative leaders such as Cook, Page, Bruce, McEwen, and Menzies; and even Labor leaders such as Scullin, Curtin and Chifley.⁷⁵

The starting point for understanding the decision of the Chifley Government to adopt PR for the Senate is to appreciate its interest in increasing the *size* as distinct from altering the *composition* of Parliament. The talk of the time was the need to enlarge the size of the 75 member House of Representatives which had not been changed since the election for the first Commonwealth Parliament in 1901. Nor of course had the size of the Senate which

remained at 36 with six Senators per State. After winning the 1946 election, the Labor government began to intensify internal discussions over how best to enlarge the House of Representatives from 75 to 121 (or 123 counting the territory Members) which can be traced back to cabinet interest from at least the 1942 Labor party conference. One new stimulus was the anticipation of a redistribution of House of Representatives electorates following the 1947 census.

For Constitutional reasons, any enlargement of the House requires an enlargement of the Senate: section 24 of the Constitution requires that the number of House Members 'shall be, as nearly as practicable, twice the number of Senators'. The Chifley Government had no option but to include an enlargement of the Senate. The timing of this revision of the *size* of the Senate thus had little to do with any deep-seated interest in enlarging or otherwise altering the *composition* of the Senate. The driving force was the interest in smaller, more stable and hence more secure seats for the Labor backbench in the House of Representatives. As party discussions took place after 1946, two factors emerged to turn the attention of the parliamentary Labor party towards the introduction of PR in the Senate.

First, there was a lingering sense of dissatisfaction with the traditional Senate electoral system that produced huge majorities in turn to whichever political party built up House of Representatives majorities. This 'block vote' system was included in the original Electoral Act of 1902 and was revised to include preferential voting from 1919. The practical result of this system was the so-called 'windscreen-wiper effect' which delivered almost all contested Senate seats in each state to whatever political party achieved a majority. Senate majorities oscillated wildly between the two major political parties (Labor and successive non-Labor coalitions), both of which could expect to take their turn as the majority party in the Senate. The first two Senate elections after the establishment of the 1902 Electoral Act saw a relatively even 'two third: one third' distribution of Senate seats. But once the political parties became consolidated the system began to deliver disproportionate victories to whichever political party was riding high with the passing electoral majority: Labor won all of the 18 seats on offer at the 1910 election; non-Labor won all on offer at the 1918 and 1925 and 1934 elections; and Labor won all Senate seats at the 1943 election and 15 of the 18 on offer at the 1946 election.

According to Crisp, the adoption of PR was in large part 'a desperate effort to avoid the grotesque results of two previous systems of election to the Senate ...', meaning the block vote as modified through the adoption of preferential voting from 1919.⁷⁶ The choice of PR was far from surprising because it was not a new idea, having been frequently advocated as a way of repairing the defects of the traditional 'winner-takes-all' electoral system. Prominent advocates of PR included such pioneering women parliamentarians as Edith Cowen, who used her State election in 1921 to call for electoral reform to promote wider community representation.⁷⁷ More typical of mainstream reform was the meeting organised by the Victorian Proportional Representation Society in Melbourne in October 1943 which resulted in a letter to prime minister Curtin reporting their resolution about the

urgent need to reform the electoral system to include PR, for the House of Representatives no less than the Senate. Given this widening public interest in electoral reform, it soon became apparent that an enlarged but otherwise unchanged Senate would pose risks to the public credibility of Parliament, particularly at a time when public funds were being spent to renovate old Parliament House to accommodate the many new Members. As the Senate Clerk at the time recorded, any increase in the size of the Senate made all parliamentarians realise:

That to continue a system which might result in a Senate of 60 members all belonging to one party would make a farce of Parliamentary government'.⁷⁸

But there was an important second factor: the closer the Labor party got to the end of its three year parliamentary term the more fearful it became that with the changing electoral tide against Labor, it would soon be Menzies' turn to dominate both chambers. Even if Chifley was confident of retaining office, many in the caucus feared that their time was up.⁷⁹ It was at this point that Labor discussions took an ever-keener interest in the dual merits of PR: as the revival of a long-discussed option to bring party balance to the Senate that would be in the long-term interests of both major party blocs, and as a newly-discussed option to provide Labor with a short-term parliamentary power-base through the one-off transitional arrangements to the larger Senate which would benefit Labor given its existing domination of Senate numbers. Labor had won 15 of the 18 Senate seats at the 1946 election and before the 1949 election had 33 to the Opposition's three Senate seats. Thus Labor had a near monopoly of long-term sitting Senators and faced the prospect of winning half of the enlarged group (seven from each state as a one-off transitional arrangement) of 42 newly elected Senators under the reformed electoral system, promising to give it a very healthy majority for many years.

The alternative was to stick with the traditional system and risk losing this large swag of Senate seats to the incoming Menzies Government. At the 1949 general election, Labor emerged in a minority position in the enlarged 121 member House, with 47 to Menzies' 74 seats but won a victory in the Senate with 34 seats to the Government's 26. Labor lost office but the Senate gamble worked.

The 1948 Parliamentary Debate

Despite Calwell's involvement in developing the basic policy, it was Attorney-General Evatt who introduced the 1948 legislation in the House. Predictably, Evatt explained the reformed system of Senate representation as 'one most likely to enhance the status of the Senate'. According to Evatt, the direct aim was to ensure that 'the majority group will get the majority of seats and no more', a policy on representation long advocated by the Country party, and recommended by the 1929 Royal Commission on the Constitution.⁸⁰ Not that the Government really knew all the likely effects of these reforms, which were not designed to encourage minor parties but to redress the imbalance between the major

parties. Senator McKenna, the Government's leader in the Senate, emphasised 'the greatest blessing any country can have is a strong government—one that is strong enough in numbers to take hold of the reins of government and really rule'.⁸¹

Opposition Leader Menzies clearly identified Labor's partisan strategy in which a Labor majority in the Senate was an insurance policy against the probability that they would lose office at the next election, as in fact happened. Menzies also foreshadowed the possibility of a government using the barely-tested procedures for double dissolutions to attempt to restore majority representation in both houses, which is exactly what he did in 1951. For Menzies, the existence of the constitutional provision for double dissolutions and subsequent joint sittings was proof enough of the subordinate place of the Senate in Australian government. The 'will of the people' must trump the representation of minority groups in the Senate; and it is the people's House which 'makes and unmakes governments'.⁸²

Consistent with this, the Opposition moved to delay the adoption of PR until after a referendum seeking to abolish the s. 24 'nexus' provision. If carried, such a referendum would have meant that the House could then be enlarged without any increase to the size of the Senate. The Government defeated this Opposition move, arguing that this proposed change would jeopardise the interests of the smaller states, whose representation would suffer disproportionately, and be a body blow to the future of the Senate. There were those who clearly identified the costs of re-legitimizing the Senate. One sobering voice raised in warning about the long-term consequences was future conservative prime minister Holt, who identified the reformed representation as 'a profound constitutional change'. Holt foresaw the emergence of 'a powerful opposition in the Senate' with 'a very much stronger voice' which might compete against the dominant party in the House.⁸³ One important effect of the introduction of PR was 'to modify the two-party system in Australia' by placing the leadership of the major parties on notice of the potential for breakaway or protest parties.⁸⁴ Both major parties have experienced this effect: the Labor off-shoot Democratic Labor Party found a home in the Senate from the mid-1950s as did the Liberal off-shoot Australian Democrats from the late-1970s.

Agenda Setting for Electoral Reform

The most significant institutional driver for reform in the 1950s was the Report of the Joint Select Committee on Constitutional Review, established by the Menzies Government in 1956 and reporting initially in 1958 and more comprehensively in 1959.⁸⁵ Part two of the Report dealt in considerable depth with 'Commonwealth Legislative Machinery', covering options relating to the number of elected representatives, their terms, casual vacancies, electoral divisions, and census assessments of population numbers. Among the recommendations were those in support of:

- the breaking of the Constitutional nexus between the two houses

- the option for variation among the States in the size of their Senate representation
- the term of Senators being equal to two terms of the House of Representatives at the time of their election
- party-parity in the filling of Senate casual vacancies
- each House division to represent a maximum of 80 000 persons, with a tolerable variation of 10 per cent, and
- the repeal of s. 127 with its exclusion of Aboriginal Australians from the census count.

Although the committee's recommendations were not debated by Parliament and not taken up by the Menzies Government, they became the mainstay of electoral reformers over the next decade.⁸⁶ A number became the basis of referendum proposals. Two of the successful measures were the 1967 repeal of section 127 excluding Aboriginals from the census, and the 1977 rules on party-parity in the filling of Senate casual vacancies. Two of the unsuccessful referendum proposals were the 1967 attempt to break the nexus between the two houses, and the 1974 attempt to amend the s. 128 referendum provisions to replace the requirement for a majority of States, (i.e. four) with a requirement for half the States, (i.e. three).

The situation of Indigenous Australians deserves special attention, as it was during this period that Parliament moved to correct the wrongs that had stood since the passage of the original electoral legislation. An early sign of that exclusion of Indigenous Australians can be seen in the first Representation Act of 1905 which established the procedure for ascertaining the number of House Members based on the census of population. The Act adopted the scheme for the quota as outlined in the Constitution: total population divided by twice the number of Senators, with the allocation of Members for each State determined by dividing the State population by the quota (s. 10). This Act established 'Enumeration Day' as occurring every fifth year on the anniversary of census day (s. 3). The Act explicitly implemented the exclusion from the census count of any persons excluded under ss. 25 and 127 of the Constitution (s. 4).

It took nearly sixty years for Parliament to return with a commitment to a new settlement for Indigenous voters. Aboriginal voters had their rights restored through a slow progression of Parliamentary refinements of electoral law. For example, by 1949 Aboriginal Australians could vote at Commonwealth elections either if they were eligible to vote under the law of the State where they resided (possible by then in New South Wales, Victoria, Tasmania and South Australia) or if they were or had been members of the Australian Defence Forces.⁸⁷ The most significant evidence of a Commonwealth Parliamentary contribution reform of Aboriginal voting rights is the October 1961 *Report of the House of Representatives Select Committee on Voting Rights of Aborigines*.⁸⁸ This committee recommended a scheme of voluntary enrolment for Aboriginals followed by compulsory voting once enrolled. The committee's impact can be seen in Parliament's

passage of the 1962 amendments to the Electoral Act implementing these recommendations which stands out as one of the very few bipartisan electoral measures.⁸⁹ But it was not until 1984 that Indigenous Australians were compelled to enrol and vote at Commonwealth elections and referendums in common with other Australian citizens.

The Whitlam Years

Parliamentary debate over electoral reform gathered pace in the early 1960s, with reformers drawing on the 1959 Report's recommendations, which were adopted as Labor policy in 1961.⁹⁰ Although these debates failed to change many electoral provisions, they sharpened the differences between government and opposition and prepared Parliament for the intensification of public scrutiny into electoral law and practice experienced in the early 1970s.

Part of the background to the Whitlam Government's close interest in electoral reform was the widespread belief in the Labor party that the electoral system had robbed Labor of victory at several general elections. To quote Gough Whitlam, in 1954, 1961 and 1969 the Labor Opposition effectively won a majority of the two-party preferred vote but was denied electoral victory.⁹¹ The problem is that the single-member electoral system for the House of Representatives rewards parties on the basis of their winning number of seats as distinct from their proportion of votes. Only in the case of the Senate is there a fair allocation of seats on the basis of votes won, although of course even in this case the distribution of seats is on a State by State basis. Consistent with the constitutional protection of federal principles, the Senate system of equal State representation is designed to represent seats on the basis of a party's State rather than national share of electoral support.⁹² Labor had long hoped to be able to reform or even abolish the Senate (this abolitionist policy was itself finally abolished at the 1979 party conference in Hobart) but as this hope began to fade, Labor strategists turned to reforming the House of Representatives electoral system to reduce its traditional anti-Labor biases. An important expression of this new focus was Fred Daly's 1971 bill which consolidated the momentum of the 1960s and set the scene for Daly's more influential electoral reform bill of 1973.⁹³

The Whitlam Government (1972–1975) spent considerable energy in devising plans for electoral reform, conscious of 'the Australian tradition for experimentation in electoral laws'.⁹⁴ The Parliament responded positively to a number of elements included in the 1973 Labor bill to amend the Electoral Act: particularly the reduction of the voting age from 21 to 18 years (which took effect at the May 1974 general election) and the administrative modernisation of the Commonwealth Electoral Office. But many other elements were subject to repeated rejection, with only a few securing a place on the pages of the statute book by the time of the fall of the Whitlam Government.⁹⁵

Characteristic of the mode of parliamentary engagement are the events of 1974 when the Government tested to the limits the capacity of Parliament and voters to embrace quite

fundamental reform of the electoral system. May 1974 saw the double dissolution election occasioned in part by the Senate's refusal to pass the 1973 Constitution Alteration (Simultaneous Elections) Bill and the Senate's rejection of three electoral measures: a bill to amend the Commonwealth Electoral Act reducing the divisional enrolment deviation to 10 per cent from 20 per cent and abolishing special treatment for sparsely populated electorates; a bill to give Territories Senate representation; and the Representation Bill.⁹⁶ In unusual circumstances where the Government had not obtained the concurrence of the Senate for a referendum, the Whitlam Government used its constitutional authority to proceed to hold a referendum at the same time as the May elections. Three of the four referendum questions related to constitutional reform of the electoral system: the first was designed to ensure that Senate elections were held simultaneously with those for the lower house; the second to grant Territory voters the right to participate in referendums and to reduce the majority required for a successful referendum from four to three States; the third to ensure that parliamentarians at State as well as federal level are 'chosen directly and democratically by the people'. The Government was returned to office but all referendum questions were lost.⁹⁷

After the May election, the Government again passed the disputed legislative package including the three electoral measures through the House of Representatives, only to see them again rejected by the Senate. The Government then arranged for a rare 'joint sitting' of the two houses of Parliament for August, when the six bills were finally passed.⁹⁸ 1974 was not yet over: In November the Government introduced yet another electoral bill which included proposals for optional preferential voting (designed in part to reduce the incidence of informal voting in Senate elections). Commenting on Labor's long criticism of the way that preferential voting has enhanced the prospects of the non-Labor parties, Professor Rydon writes: 'There can be no doubt that the system has adversely affected the ALP'.⁹⁹ This measure did not survive the parliamentary battleground of 1975 where even some of the Government's 1974 successes came under renewed opposition. For instance, the legal basis for Territory representation in the Senate was twice challenged in the High Court in 1975: 'surviving the first challenge by one vote, the second by three'.¹⁰⁰ Territory Senators were first elected at the December 1975 election.

Overall, the Whitlam Government introduced some 16 electoral bills which were either blocked in the Senate or allowed to lapse in the face of Opposition lack of support. The November 1974 bill included many other measures that were finally to receive parliamentary support a decade later: measures such as party identification on ballot papers; registration of political parties; and a long list of party-management changes, including limits on campaign expenditure and public disclosure of party funding that were to come into law under the Hawke government.¹⁰¹

The Last Great Reform Wave

The last great wave of electoral reform was associated with the 1983 election of the Hawke government and the establishment of the Joint Select Committee on Electoral Reform, chaired by Dr Klugman.¹⁰² From 1983 to 1987 the Select Committee maintained its role as architect of the new policy framework. Since the 1987 election, the role has changed to that of overseer and the name has changed to Joint Standing Committee on Electoral Matters. The original terms of reference for this committee were comprehensive and the early reports from the committee provide a public record of the emergence of the new reform agenda. Prominent among these changes were three sets of reforms which defined the new electoral framework established during the 1980s: an increase in the size of Parliament which took effect in 1984 with the enlargement of the Senate from 10 to 12 Senators per State, and enlargement of the House of Representatives from 123 to 148 Members; legal recognition and public funding of political parties; and establishment of a non-partisan 'electoral bureaucracy' known as the Australian Electoral Commission, under the non-ministerial direction of three commissioners.¹⁰³ As an illustration of the remarkable effectiveness of the Klugman committee, one need only note the committee's *First Report* of September 1983 which included recommendations for public funding of political parties — a scheme which was generally adopted by Parliament in that same year in amendments to the electoral law.

The first set of reforms related to the enlargement of Parliament which remained largely unaltered since the enlargement of 1949. The main alteration had been the 1974 adoption of two Senators for each of the two mainland Territories and the slow growth of House seats for the ACT. The 1984 legislation increased the size of the Senate from 64 to 76 and the House from 123 to 148 Members. This increase in the size of the Senate had the effect, as have all Senate increases, of reducing the size of the quota required for election to the Senate and thereby making election to the Senate easier for minor parties and Independents. The increase in the number of House seats is also associated with increased reliance on preferences to determine the results in House of Representatives elections.¹⁰⁴ The corresponding protection taken out by Labor and other major parties was to alter the number of half-Senate vacancies from five to six, i.e. from an odd number to an even number, perhaps in the hope of splitting the available vacancies evenly between the two major party blocs. This strategy might have held sway in former times, but for the decline in the share of the Senate vote won by the major blocs, which created a larger opening for the minor parties.¹⁰⁵

The second set of reforms included the acknowledgment of party affiliations on official ballot papers for both houses, backed up by a new system of official registration of political parties and their candidates; provision on Senate ballot papers for an option to record one vote registering support for a political party's list of preferences, justified in terms of combating the high incidence of informal voting at senate elections (initially recording around 10 per cent of the vote in 1949 and frequently returning to that high figure); and establishment of a system of public funding for political parties winning more

than four per cent of first-preference votes to reimburse them for approved electoral expenses, inspired by the introduction of a similar scheme by the New South Wales Labor government in 1981. The December 1984 general election was the first instance of a publicly-funded Commonwealth election and with it a 'widespread legalism' of electoral regulation and controls designed to protect the integrity of the nearly \$8 million spent from the public purse.¹⁰⁶

The third set of reforms relates to the electoral bureaucracy and to the emerging role of the joint parliamentary committee as the architect and overseer of the electoral system. Both the bureaucratic and the parliamentary bodies are new in type and their overlapping responsibility foreshadows an important new phase in the Australian development of electoral policy and practice. Parliament gave away its power to the new Commission to determine House of Representatives electoral boundaries, which conferred significant electoral authority on appointed officials without the traditional Parliamentary override.¹⁰⁷ The history of House of Representatives redistribution procedures attracted the attention of the new Joint Electoral Committee, which ushered in these changes which saw Parliament legislate away its power to amend redistribution proposals—as had happened in 1912, 1936 and 1968.¹⁰⁸ The Fraser Government in 1977 had altered the redistribution process by granting greater power to the Chief Electoral Officer to determine twelve months into the life of each Parliament whether population changes required any redistribution in any State's allocation of House of Representatives seats. The 1984 reforms to the redistribution process took the power away from Parliament, conferring considerable discretion on the Australian Election Commissioner who appoints State Redistribution Committees. The process of redistribution is now mandatory every ten years, or earlier if (as is typically the case) more than one-third of State divisions or one-fifth of divisions nationally deviate from the enrolment quota by more than 10 per cent.

We can conclude this section with a brief account of the frustrations experienced by the Labor government later in its term, when the High Court struck down one of its most adventurous attempts to reform electoral practice. The Labor government introduced the *Political Broadcasts and Political Disclosures Act* in 1991 which amended the Broadcasting Act to prohibit any 'political advertisement' during an election or referendum period. The amendments also required broadcasters to make available free time to parties and groups approved by the Australian Broadcasting Tribunal, subject to criteria set out in the new legislation. The general principle was similar to that underlying the 1983 introduction of public funding for political parties: free airtime would be granted proportionate to a party's share of first-preference votes at the last general election, with a general power of discretion granted to the Authority to provide access to otherwise ineligible parties.

In the 1992 Australian Capital Television case, the High Court ruled that this legislation infringed a Constitutional right to unfettered political communication that was implied in the Constitutional system of representative government.¹⁰⁹ This case was one of the classic 'implied rights' cases and is relevant here because it raised important questions about the

nature of parliamentary representation and about what constitutes a free and fair election. The Government had argued that the purpose of the legislation was to deter corruption in the electoral process, and to assist the circulation of relevant political information so that electors could make informed choices at election time. The Constitution states that elected representatives must be 'directly chosen by the people' and so the Government contended that the amendments enhanced the integrity of the process of electoral choice. The argument advanced by the Government, and generally supported by the minority,¹¹⁰ was that Parliament had authority under the Constitution to legislate to protect the public interest at risk during election time.

Conclusion

One enduring indicator of Parliamentary interest in electoral developments is the use of Constitutional referendums to try to make fundamental changes to electoral law. It is notable that the first national Constitutional referendum of 12 December 1906 dealt with the electoral system. The Constitutional Alteration Act of 1906 successfully altered the provisions of the Constitution relating to the timetables for House and Senate elections and the term of office of incoming Senators.¹¹¹ And the most recent referendum on a republican head of state has been designed as a compromise between monarchists and direct-election republicans, with much of the community debate focused on the advantages and disadvantages of an elected Presidency. Many direct-election republicans have targeted a strong sentiment of popular distrust of Parliament as well as of politicians generally, and have built up hopes that a popularly-elected President can hold Parliament in check in ways that have thus far eluded the rules for representation.¹¹²

Between the first and most recent referendum, there has been considerable Parliamentary interest in using referendums to entrench features of the electoral system in the Constitution. The constitutional provisions relating to the electoral system have been the subject of eleven referendums. Only three have been successful: the first was in 1906 to alter the starting date by six months but not the term of Senators; the second and third were in 1977 relating to the filling of Senate casual vacancies and rights of territory voters to vote at referendums. The eight unsuccessful referendum proposals come mainly from Labor, the exceptions being two from the coalition: one in 1967 to break the nexus between the size of the two houses, and another in 1977 to provide for simultaneous elections of both houses, which won a national majority and a majority in three States.¹¹³ The Labor losses are: three in 1974 relating to simultaneous elections; democratic elections; the referendum majority of three rather than four States; one in 1984 again on simultaneous elections; and two in 1988 on fixed parliamentary terms and fair elections (i.e. one vote one value).¹¹⁴ Also relevant is the long list of constitutional alteration bills that have not passed Parliament and not been put to referendum. This is the case particularly in the Senate after the introduction of PR, where non-government parties have introduced many constitutional alteration bills, including many dealing with the electoral system.¹¹⁵

But it is also possible that this preoccupation with Constitutional alteration of the Australian electoral system might be a thing of the past. Consider the single most valuable source on the history of Commonwealth electoral law, which is the *First Report* of the 1983 Select Committee on Electoral Reform.¹¹⁶ The very fact that a Parliamentary Committee has emerged as the custodian of the history of the development of electoral practice is an encouraging sign of Parliament's willingness to take greater responsibility for the electoral system. The story reviewed in this paper is one of the slow replacement of traditional Ministerial responsibility by a new form of Parliamentary responsibility for electoral law and policy. The current standing committee on electoral matters has the opportunity to draw together the many strands of Parliamentary involvement in Commonwealth electoral arrangements and to devise new institutional forms for the expression of a fresh Parliamentary contribution to the national electoral system as we approach the centenary of Federation. In many ways, this opportunity should remind us of the original opportunity seized nearly 100 years ago by the first Commonwealth Parliament to develop rules for representation true to the spirit of Federation.

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