

## **ELECTIONS: CONSTITUTIONAL COMPLEXITIES AND CONSEQUENCES**

General elections at the federal level in Australia are governed by a complex of constitutional and statutory provisions which, apart from determining how elections are held, also determine the balance of power between the legislature and the executive. The provisions both empower and limit both branches of government. They are explained and expounded at election times, and then forgotten until the next election comes around. Their history and rationale are not well understood. This occasional note may partly fill the gap.

The Constitution provides for senators to have fixed terms of six years, with half of the places of the state senators turning over after elections every three years. The terms of the senators end on 30 June six years after they began (sections 7, 13). (The territory senators, whose places are created and governed by legislation, also have contiguous terms, but extending from the polling day of one general election to the polling day of the next.) The House of Representatives has a maximum term of three years, but may be dissolved, in effect by the government, at any time (section 28).

This combination of fixed and non-fixed maximum terms is a result of the framers of the Constitution drawing on republican models characterised by fixed terms and continuous legislatures (principally the United States and Switzerland) for the Senate, and on the British tradition of a dissolvable legislature for the House. The latter goes back to the constitutional situation of the parliament being only an advisory body to the monarch and existing only at the monarch's pleasure. The combination of two different models was basically the result of a compromise between two schools of thought at the constitutional conventions. The attempt by the framers to reconcile these two contrary models led to some very strange results.

Elections for the Senate may be held at any time within one year before the Senate places turn over (section 13). This provides flexibility so that Senate and House elections may be synchronised despite the House being dissolvable at any time. The possibility of states holding Senate elections at different times, however, is left open by the provision that the state governors issue the writs for Senate elections (section 12). This places Senate elections ultimately under state control and removes them from control by the central government, with some consequences, as will be seen.

The House of Representatives lasts for three years from its first meeting (section 28), so that the life of the House is tied not to the time when it was elected but to the time when it meets after an election. This also reflects the British tradition. It has the consequence that if all

Houses continued for their full term and were allowed to expire before a general election, the electoral cycle would be continually stretched and each election would be later than the previous one. The expectation was, again following the British tradition, that Houses would end their life by early dissolutions and elections would be held usually at the time chosen by the government. This expectation has been fulfilled, in that only one House has been allowed to expire, that of 1907-10.

An early dissolution and election of the House, unless it occurs within one year of the Senate places turning over, results in the Senate and House elections being desynchronised and occurring at different times. This happened from 1963 to 1974, after Prime Minister Menzies held an early election for the House at a politically convenient time, and the elections were not brought back together for some years. The conventional wisdom now is that separate Senate elections result in poor Senate results for governments and should be avoided if governments wish not to have unfriendly Senates. This imposes a restraint on prime ministers in calling early elections, a restraint not really foreseen by the framers. They envisaged early House elections when governments lost support of the House, something which has not occurred for over sixty years, and would occur only if a government did not win a clear majority in an election in the first place.

The issue of writs for Senate elections by state governors imposes another restraint on prime ministers. When a prime minister chooses the election date, the Governor-General has to write to the state governors, who act on the advice of their state governments, to ask them to issue the writs for the Senate elections for the same polling date. An attempt by a prime minister to manipulate the electoral cycle, for example, by delaying a Senate election or holding it before a House election, could be foiled by unfriendly state governments declining to cooperate in the issue of the writs.

The Constitution was amended by referendum in 1907 to change the date for the beginning of senators' terms from 1 January to 1 July, on the basis that the first half of the year was a more convenient time for general elections. The intention of this amendment has been defeated by prime ministers choosing to go to elections in the second half of the year, which is now regarded as the normal and most favourable time for federal elections. This also has had an unfortunate consequence, as will be seen.

In relation to the timetable for elections, the Constitution prescribes only the outer boundaries of the process. Writs for a general election must be issued within ten days after the dissolution or expiration of the House (section 32). At the end of the whole electoral process, the Parliament must be summoned by the Governor-General to meet within 30 days of the date fixed for the return of the writs (section 5). The first provision ensures that the government cannot dissolve the House and then delay the process of its replacement, and the second provision ensures that the government cannot unduly delay the first meeting after a general election, so that, for example, a government which has lost its majority in the election

cannot remain in office by delaying the first meeting. The whole election process in between these boundaries is left to legislation, to provide flexibility. The Commonwealth Electoral Act fills in the process with a series of minimum and maximum boundaries. The significant provisions are for a minimum of 33 days and a maximum 68 days from the dissolution of the House to polling day, and a maximum for the return of writs of 100 days after their issue, with an absolute maximum of 140 days for the whole electoral process before the newly elected House meets.

A provision which supposedly further strengthens the legislature against the executive, also adopted from Britain, is the prescription that Parliament must be in session at least once every year (section 6). This would not have been necessary if the framers had not kept the ancient power of the crown to prorogue Parliament, ie., terminate its sittings until it is summoned to meet again (section 5). This provides the executive government with a potentially great power to dispense with an inconvenient Parliament, at least temporarily.

The combination of a fixed term Senate and a variable election cycle for the House means that there is normally some time between the first meeting of a Parliament after a general election and the half of the state senators then elected beginning their terms and taking office. Some such delay is a feature of all fixed term systems. Thus, the President, the whole House and one-third of the Senate elected early in November in the United States do not take office until early in January the following year, resulting in a transitional period. The corresponding period in Australia has been greatly expanded by the framers' compounding of the two models and the frustrated intention of the 1907 amendment. This results in the Senate places not turning over for up to eight months after the elections.

Apart from any other effect, this increases the chances of conflict between the two Houses, in reality between the Senate and the government, with Australia's rigidly disciplined political parties. A government may have to wait for up to eight months before being able to work with a Senate subject to election at the same time as the government itself was elected.

The framers provided for conflict between the Houses by the double dissolution provisions in section 57 of the Constitution, whereby a dissolution and re-election of the whole of both Houses overrides the fixed term of the Senate. The provision in section 13 for resetting the fixed term after a double dissolution, by backdating senators' terms to the previous 1 July, creates more problems and another possibility for Senate and House elections to be out of synchronisation. This occurred after the double dissolution of 1951, with separate Senate and House elections in 1953 and 1954, respectively, until they were brought together in 1955. There is a theoretical possibility of a double dissolution occurring before the senators elected at the previous Senate election have taken their places. A government could resort to a double dissolution in the eight month period when it is still attempting to legislate with a Senate the composition of which dates back to the election before last. This has never

occurred. If it did happen, it could result in a set of senators duly elected never taking office, perhaps the most bizarre outcome of all.

Most, but not all, of these problems could be overcome by a constitutional amendment to provide for a fixed term for both Houses of the Parliament. Such a proposal has gained support from time to time, and was contained in a bill passed by the Senate in 1982. An essential element of that proposal is that a House would be dissolved early only if it could not support a government, and the House then elected would last only till the end of the fixed electoral cycle, so that Senate and House elections would be brought back together at the next election.

Most versions of this proposal, however, would not solve what is perhaps the most serious problem with elections in the Australian system. Because the House of Representatives is dissolved, or expires, for an election, during the election process the country is without a complete Parliament, so that no legislation can be passed. This leaves the country in the hands of the executive government over an election period. It is in stark contrast with republican systems like the United States, where the legislative places turn over at a fixed time and the newly elected office holders then begin their terms, so that the country is never without a legislature. That arrangement makes the legislature much stronger in relation to the executive. A dissolvable and prorogable legislature is inherently in a much weaker position. The British model results in an extremely strong executive and a relatively weak legislature, and in Australia is only partly ameliorated by the republican elements of the Constitution relating to the Senate.