



## House of Representatives fixed terms: the barriers to implementation

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### Executive summary

- Fixed terms for the House of Representatives have long been the subject of discussion.
- Fixed terms were part of Labor's 2007 Platform and have since been promised by Prime Minister Rudd. However, two add-ons have also been raised: four-year House terms and simultaneous House and Senate elections.
- To bring about such changes the Constitution would need to be amended, an undertaking that has been very difficult to achieve. Hurdles to change have included community satisfaction with the Constitution, a desire to protect its federal nature, a lack of voter awareness of the problems, and the amendment procedure. Extreme views expressed by opponents have also been a factor, as have governments attempting to alter too much at the one time.
- For an amendment to succeed, voters need to be educated, too much should not be attempted, and it must be clear that it does not threaten either the states or the Senate.
- Fixed four-year terms seem to have much support in Australia. However, simultaneity of House and Senate elections probably does not have as much support, nor does the adjustment of Senate terms.
- A compromise that might be accepted by voters would be to make House terms fixed at three years, with nothing else attempted at this stage.

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## Introduction

As Leader of the Opposition before the 2007 election, and now as Prime Minister, Kevin Rudd promised that a constitutional referendum to introduce fixed House terms would be held on the same day as the next Commonwealth election.<sup>1</sup> The fact that Australian Prime Ministers have the power to call an election before the expiry of a Parliament has long been a matter of debate, with many observers suggesting that House of Representatives terms be fixed.

In 2003–04, the Parliamentary Library published a paper which discussed four-year terms for the House of Representatives. This included some discussion of fixed terms.<sup>2</sup> The Library has decided to re-address the issue of parliamentary terms, but focussing on the specific issue of fixed terms. The paper begins with a discussion of the issues surrounding fixed terms, examines at what might be proposed in a fixed term referendum, notes the possible complications of changing the length of House terms and introducing simultaneous elections, outlines the difficulties involved in attempting to amend the Constitution, and proposes a compromise amendment that may assist in the passage of a fixed term constitutional alteration.

## The advantages of fixed terms

There are four main advantages that are typically spoken of in regard to fixed House of Representatives terms: modernising the system, removing a prime ministerial power, the impact upon the nation, and the achieving of fairer elections.

### Modernising 'Westminster'

The Australian colonies, and the later Constitution-writers, all regarded the Prime Minister's power to nominate the date of an election as an integral part of the 'Westminster system' of government. Defenders of the power still justify it as part of the Westminster legacy. However, this aspect of that legacy is far from intact in modern Australia. The New South Wales, Victorian, South Australian and Australian Capital Territory Parliaments have modernised their systems in recent years by creating fixed terms for their assemblies. Furthermore, the new Northern Territory Chief Minister announced after the 2008 election that the Territory would introduce fixed terms, while former Tasmanian Premier, Paul Lennon, promised to introduce fixed four year terms for the House of Assembly. He stated that the next election would be on the third Saturday in 2010, though legislation has yet to be

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1. Phillip Coorey, 'No knighthood for Howard and a cold shower for us', *Sydney Morning Herald*, 28 April 2008.
  2. Scott Bennett, 'Four-Year Terms for the House of Representatives?', *Research Paper*, no. 2, Parliamentary Library, Canberra, 2003–04, pp. 17–20  
<http://www.aph.gov.au/library/pubs/rp/2003-04/04RP02.htm>, accessed on 28 July 2008.

introduced. Apart from these assembly changes, the Legislative Councils of South Australia and Western Australia have changed to fixed terms.

Attitudes have been changing on this prime ministerial power at Westminster itself. The 1998 devolution legislation that gave self-government powers to Scotland, Northern Ireland and Wales all provided for fixed terms for the local legislatures, and there have been moves to do the same for the House of Commons. The Fixed-Term Parliaments Bill was introduced in the Commons on 10 October 2007. It set a date for the next election (7 May 2009) and specified that each subsequent election would take place on the first Thursday in May in the fourth year after the previous general election. The Bill was not voted on, but was spoken of as offering a solution to the issue of election timing which appeared ‘to have worked perfectly well in relation to the devolved legislatures’.<sup>3</sup>

### Removing Prime Ministers’ ‘unfair’ advantage

Many critics have described the Prime Minister’s power to select an election date as a long-standing weakness of the Australian system of government. Why, they say, should the Prime Minister have this power? The journalist, Paul Murray, has suggested that a cricket analogy might be appropriate, likening the Australian practice to ‘ball tampering’:

If you consider a cricket ball as our political process—governed by the law of the game in shape and weight—it is improper for the bowler to lift the seam or score the surface. He must use the ball as it is for the determined number of overs.

He believed that if fixed House terms were introduced, it would mean that Prime Ministers would no longer be able to ‘push the ball out of shape’ to suit their political purposes.<sup>4</sup>

Such criticism is most often heard when a Prime Minister is under pressure to nominate an election date. Gradually over the years there have come to be more critics expressing their opposition to this prime ministerial power. It has been one constitutional issue that can unite parliamentarians, irrespective of party. In the 1980s, for example, Liberal Senator Mike Townley asserted that:

... the people of Australia are sick and tired of Prime Ministers of all persuasions ... organising elections in a most cynical way. It is time we had fixed term elections in this country and the sooner we get them the better off this country will be.<sup>5</sup>

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3. Neil Parpworth, ‘7 May 2009’, *New Law Journal*, 9 November 2007, p. 1568; see also Menzies Campbell, ‘It needs to be fixed’, *Guardian*, 8 October 2007.

4. Paul Murray, ‘Fixed terms the way to stop PM’s election fix’, *West Australian*, 6 October 2007.

5. Senator Townley, Senate, *Debates*, 2 April 1987, p. 1782.

Similarly, Labor parliamentarians Senator John Faulkner, Michael Danby MP and Laurie Ferguson MP, in a minority report to the Joint Standing Committee's report into the 1998 Commonwealth election, asserted:

Snap and early elections are called for personal and party advantage, arbitrarily, sometimes capriciously, and always on a partisan basis. If elections were held on a predetermined date it would allow for certainty, stability, and responsibility by both government and opposition, allow for sound party and independent preparation, and allow for fair political competition.<sup>6</sup>

## The impact upon the nation

Apart from the cynicism described by Townley, another issue of concern with the Prime Minister's power to name the election date, is the potential impact upon the nation as it waits for the announcement of the election date. An *Age* editorialist has described the 'stasis' that can occur while the nation waits for the Prime Minister's decision.<sup>7</sup> This can be particularly demoralising if there are divisions within the governing party, such as occurred in the Howard Government during the uncertain period in mid-2007 when there were questions over whether the Prime Minister should resign or contest the election. Media critics spoke of him leaving the country 'on tenterhooks' while he 'made up his mind', and of the uncertainty that was 'costing taxpayers' and hurting the national economy.<sup>8</sup> In October, real estate agents, business groups and some academics were reported as calling for fixed terms to end such uncertainty, with economics Professor John Quiggin of the University of Queensland stating that fixed terms would lessen the risk of 'bad policy' during election years, and would reduce the normal pre-election uncertainty.<sup>9</sup> Former Australian Democrat Senator, Andrew Murray, has summed up the advantage of such a change: 'Elections held on a pre-determined date ensure stability and responsibility by both Government and the Opposition'.<sup>10</sup>

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6. Australia, Parliament, Joint Standing Committee On Electoral Matters, *The 1998 Federal Election. Report of the Inquiry into the conduct of the 1998 Federal Election and matters related thereto*, Canberra 1999, p. 182, <http://www.aph.gov.au/house/committee/em/elect98/wholereport.pdf>, accessed on 1 September 2008.
  7. Editorial, 'One thing that really needs fixing: the election date', *Age*, 13 September 2007.
  8. 'Uncertainty over election date costing taxpayers', *Sunraysia Daily* (Mildura), 6 October 2007; Editorial, 'One thing that really needs fixing: the election date', *Age*, 13 September 2007; Editorial, 'Fixed terms can end the uncertainty', *Advertiser*, 11 October 2007.
  9. 'Woolies wants election-free December', *Sydney Morning Herald*, 5 October 2007.
  10. Andrew Murray, Australian Democrats website, [http://www.democrats.org.au/docs/ActionPlans/Electoral\\_FourYearTerms\\_2007.pdf](http://www.democrats.org.au/docs/ActionPlans/Electoral_FourYearTerms_2007.pdf), accessed 16 September 2008.

## Fairer elections

It has also been argued that a fixed term arrangement would aid Australian democracy. In particular, a fixed term regime would act as a clear reminder to voters to update their electoral roll arrangements if they had moved residence. For newer voters, there might be a rise in the proportion of young people placing their names on the roll for the first time due to the predictability of a fixed election cycle. Quoting the same *Age* editorialist, such a change to the electoral arrangements:

... would enable voters to enrol or update their details in good time, and not be caught out by the calling of an election and thus disenfranchised by new laws that will close the electoral rolls on the day writs are issued. It will take a brave leader to introduce such bold electoral reform, but it will build public trust in a functioning, modern democracy. This reform is long overdue.<sup>11</sup>

## What might be proposed in a fixed terms amendment?

A proposal for fixed terms for the House of Representatives needs to be planned carefully if it is to have any chance of being accepted by the Australian voters. The detail of the proposal that may be put to voters at the time of the next Commonwealth election is not yet known, but there would need to be consideration of several linked questions, including:

- when in the year would fixed term elections for the House of Representatives be held?
- when would the first election be held?
- were a government to lose control of the House of Representatives, should the Governor-General have the power to issue writs for an earlier election?
- if so, would this election be for the remainder of the House's scheduled life, or would a full term begin at the time of the early election?

Each of these issues will be discussed briefly below.

## When should House of Representatives fixed term elections be held?

There would be a need to ensure that House of Representatives elections were not too close to State or Territory elections. Of those with fixed dates, New South Wales, South Australia and the ACT all are forced by legislation to move their date if there is a clash with a date chosen for a House of Representatives election (see Table 1):

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11. Editorial, 'One thing that really needs fixing ...', op. cit.

Table 1: State and Territory fixed term Assembly dates

State/ Territory	Fixed Date	Date if clash with Commonwealth election	Date of next election
ACT	Third Saturday in October, fourth year after previous election	First Saturday in December	18 October 2008
SA	Third Saturday in March, fourth year after previous election	No more than 21 days after scheduled date	20 March 2010
Victoria	Last Saturday in November, fourth year after previous election	No specific arrangements	27 November 2010
NSW	Fourth Saturday in March, fourth year after previous election	May be dissolved two months early	26 March 2011

### A first quarter election?

The Joint Standing Committee on Electoral Matters has spoken of the ‘current difficulties’ associated with too long a delay between Senate elections and the commencement of the Senate term. A final quarter election—as is common—results in new Senators having to wait over six months before assuming their seats.<sup>12</sup> The Committee’s words would suggest that there would be a case for having fixed House of Representatives elections held at a time reasonably close to 1 July—the date that Senators’ terms begin. This should be possible to achieve, though there are some limits to when an election could actually be held:

- **January** and early **February** would involve campaigning at Christmas and in the longest of the school holidays, and thus can be dismissed as unsuitable. The final Saturday in February might be a possibility, however.
- The first Saturday in **March** would be a contender, but the second Saturday probably is excluded by being a public holiday in Victoria and the ACT. The first Saturday would have the advantage of being earlier than the New South Wales or South Australian elections if ever they were in the same year, and outside the range of Easter dates (22 March—25 April). Although a majority of Commonwealth elections have been held in the final quarter, four of the 10 elections since 1983 have been held in March. Three were held on one of the first two Saturdays in the month.
- **April** probably can be dismissed, due to the politicians’ preference not to campaign in Easter, or a preference not to hold an election on Easter Saturday.
- Although there have been two **May** elections, 31 May 1913 and 29 May 1954, this month would also provide difficulties. Long weekends in Queensland and the Northern Territory

12. Joint Standing Committee on Electoral Matters, *The 2004 Federal Election*, op. cit., p. 178.

on the first weekend would seem to preclude the first Saturday, while the third and fourth Saturdays would probably be too close to the deadline that must be met for the 1 July start of new Senate terms. In 2007 the final Senate writs were returned 33 days after polling day, so that the second Saturday in the month would be a strong possibility.

- **June** would not be a possibility because of the potential problem of not having completed the Senate election count before 1 July.

In conclusion, an election reasonably close to the start of Senate terms would appear to be quite feasible.

### **A final quarter election?**

A total of 24 of the 42 Commonwealth elections have been held in the final quarter of the year, and there is no doubt that Australians would become used to having fixed term elections between mid-October to early December. Two of the last four (1998, 2004) have been in October, and two have been in November (2001, 2007).

### **In which year would the first election be held?**

The 2010 election would be for a three-year Parliament, so the obvious time for the first fixed term election would be during 2013–14. Apart from not disturbing the constitutional situation concerning the 2010 election, this would ensure that the current government is not accused of trying to gain an extra year of office in some underhand way.

If 2014 were the first year, and the last Saturday in February were chosen, the election would be on 22 February 2014. If either the first or second Saturdays in March were chosen, this would see the election held on 1 or 8 March 2014. If the second Saturday in May were chosen, polling day would be on 10 May 2014.

### **Losing control of the House—could elections be held earlier than the fixed date?**

Although it is the norm that Australian governments retain control of the House of Representatives until they lose an election, such a situation cannot be guaranteed. When the Fadden coalition Government lost control of the House of Representatives in 1941, the Governor-General commissioned Labor's John Curtin to form a Government. He had noted the assurance of the two independents that they would support a Labor government. If a similar situation occurred after fixed terms had been introduced, it could be handled in this familiar, conventional fashion.

By contrast, on 10 September 1929 the Bruce-Page coalition government was defeated on the floor of the House of Representatives, and two days later Prime Minister Bruce announced that the Governor-General had granted a dissolution. An election was held one month later. The conventions that cover such an eventuality help ensure that governmental stability is maintained, though in a different fashion to the events of 1941.



An amendment that introduced fixed terms for the House of Representatives would need to provide for the events such as those of 1929, for there is always the possibility that a government can lose control of the House of Representatives, producing the danger of a parliamentary deadlock. If fixed terms were to be introduced there would be a need to provide for early elections in times of political crisis, as has been done in various states and the ACT.

### **New South Wales**

The *Constitution Act 1902* (s.24B) says that the Legislative Assembly may be dissolved before the scheduled date of an election under three circumstances: the passing of a motion of no confidence in the Government by the Legislative Assembly, if the Legislative Assembly rejects a bill which would appropriate moneys ‘for the ordinary services of the Government’, or if the Governor is confronted by circumstances not covered in the above cases which cause the Governor ‘in accordance with established constitutional conventions’ to believe that a dissolution is necessary.

### **Victoria**

The *Constitution Act 1975* (s.8A) says the Legislative Assembly may be dissolved if a motion of no confidence in ‘the Premier and the other Ministers of State for the State of Victoria’ is passed by the Assembly, and in an eight day period there is no motion of confidence in ‘the then Premier and the other Ministers of State for the State of Victoria’.

### **South Australia**

The House of Assembly may be dissolved, and a new election held, if a motion of no confidence in the Government is passed in the House of Assembly, a motion of confidence in the Government is defeated in the House of Assembly, a Bill declared by the House of Assembly to be a ‘Bill of special importance’ is rejected by the Legislative Council, or Governor is satisfied that a deadlock between the House of Assembly and the Legislative Council cannot be resolved in any other way.

### **ACT**

The *Australian Capital Territory (Self-Government) Act 1988* (s.16) says that if the Governor-General deems the ACT Legislative Assembly is ‘incapable of effectively performing its functions’, or is conducting its affairs ‘in a grossly improper manner’ the Governor-General may dissolve the Assembly. Section 48 of the *Australian Capital Territory (Self-Government) Act 1988* says that if, within 30 days after the passage of a resolution of no confidence in the Chief Minister, the Assembly has not elected a Chief Minister, and the Governor-General has not dissolved the Assembly, a general election shall be held.

## What should be the length of term after early election?

Different arrangements have been provided for the four jurisdictions that have fixed term parliaments. These give an idea of what would need to be altered were fixed House of Representatives terms to be introduced:<sup>13</sup>

- If the New South Wales Legislative Assembly is dissolved in such circumstances, the length of the new parliament is unspecified.
- If the Victorian Legislative Assembly were to be dissolved early, the subsequent Legislative Assembly would serve as close to a full four-year term as possible.
- In the case of South Australia, the general election brought about by any of the circumstances described above re-orders the year in which the next general election is held. That election will be held four calendar years after the early election.
- For the ACT, the length of the new parliament is unspecified.

## Two add-ons: four-year terms (and Senate terms) and simultaneous elections?

To this point, this paper has outlined only the issue of fixed terms as discussed publicly by various spokespeople in recent months. However, the ALP went into the 2007 election promising significantly more. Labor's National Platform (2007) stated:

Labor supports simultaneous, fixed four-year terms for the House of Representatives and the Senate.<sup>14</sup>

Since the election, Prime Minister Rudd has promised that a constitutional referendum to introduce fixed four-year House terms would be held on the same day as the next Commonwealth election.<sup>15</sup>

If there is to be a referendum, might it therefore effectively be a three-part proposal that seeks not only to establish fixed House of Representatives terms, but also to increase House terms to four years, and to introduce simultaneity of House and Senate elections? The following section briefly discusses these possible add-ons, and assesses their likely impact upon the primary proposal of fixed terms.

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13. I am grateful for the help given me by the New South Wales, Victorian and South Australian Parliamentary Libraries and the ACT Electoral Commission.

14. Australian Labor Party, National Platform and Constitution 2007, Chapter 11, 28, <http://www.alp.org.au/platform/index.php>, accessed 26 September 2008.

15. Phillip Coorey, 'No knighthood for Howard ...', op. cit.

## Four-year terms for the House of Representatives?

For many years, observers of the Commonwealth Parliament have claimed a number of specific benefits would flow from an extension of House of Representatives terms to four years:

- A long-standing claim holds that longer terms would encourage governments to introduce policies that are long-term rather than merely politically expedient. There is a view that increasing the term for the House would enable governments to enjoy the luxury of being able to take more responsible, long-term views than is possible under the existing arrangements.
- Former MP, Jim Snow (ALP), has claimed that at the electorate level the current system does little for the representative function that is so important a part of the MP's duties. Three-year terms might make local members adept at campaigning, but they do not encourage them to work in a sustained way on long-term problems: 'Members are tempted to become show ponies rather than watch dogs'.<sup>16</sup>
- The private sector has long complained that national elections disrupt their long-term planning, with deleterious effects upon the national economy. In 2000 the Australian Chamber of Commerce and Industry was lobbying for extended terms to end the 'short-termism' that it saw as weakening the Australian political system.<sup>17</sup>
- A change to four-year terms would bring the House of Representatives term into line with most State and Territory lower house terms. In Queensland there has been discussion about the possibility of changing from three to four year terms. If this occurs, the House of Representatives will be the only Australian lower house retaining the shorter term.
- Elections are expensive. The Australian Electoral Commission has reported that the 2007 election cost \$162 165 498.<sup>18</sup> Over time, a great deal would be saved by having fewer national elections. During the period 1980–2007 there were eight elections for the four-year parliaments of New South Wales, Victoria, Western Australia, South Australia and Tasmania. By contrast, the three-year parliaments of the Commonwealth and Queensland each had ten elections. The longer the period between elections, the greater the saving for the taxpayers forced to foot the election bill.

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16. J. Snow, House of Representatives, *Debates*, 17 November 1983, p. 2851.

17. Lenore Taylor, 'ACCI pushes new policies', *Australian Financial Review*, 1 April 2000.

18. Australian Electoral Commission, 'Submission to the Inquiry by the Joint Standing Committee on Electoral Matters into the 2007 Federal Election', Joint Standing Committee on Electoral Matters, Canberra, June 2008, pp. 78–79, <http://www.aph.gov.au/house/committee/em/elect07/subs/sub169.pdf>, <http://www.aph.gov.au/house/committee/em/elect07/subs/sub169.pdf>, accessed on 15 August 2008.

- It is often said that Australians dislike the frequency with which they are required to vote, something that is believed to be linked to a distaste for the tough nature of Australia's party and electoral politics. It has been claimed that fewer Commonwealth elections would reduce this attitude to some extent.
- A final, speculative, assertion, is the possibility that longer periods between elections would raise the standard of political debate. It has been wondered if such a period might 'create more opportunity for genuinely bipartisan discussion of a wider range of issues [than is normally the case]'.<sup>19</sup>

## Senate terms

However, if an increase in the House of Representatives term were to be proposed, a potentially crucial decision would relate to the length of the Senate's term, and whether the rotation of senators would be sustained.

### Eight-year terms?

The simple move would be to extend the Senate term to eight years, thus maintaining the principle of the upper house's term being double that of the House of Representatives. This would see the continuance of a system very much like the current arrangements, and might, therefore, be the easiest to sell to defenders of the Senate. There have been many politicians who have supported such a change, including former National Party leader, the Hon. Tim Fischer.<sup>20</sup> Senator the Hon. Nick Minchin (LP) has described eight-year Senate terms as 'a price worth paying for the benefits of longer [House] terms'.<sup>21</sup> It is sometimes stated that extending Senators' terms in this way would weaken party discipline, but there is no evidence from the States of New South Wales or South Australia that this would be so. Senators seeking re-election would still need party pre-selection, and an undisciplined performance would not be the way to guarantee continued party support.

The major doubt about such a change is whether voters would accept extending Senators' terms to eight years. An argument that would probably be used against increasing both Senate and House terms would be that this was another instance of politicians 'feathering their own nests'. Is an eight-year term just too long? While praising the idea of four-year House terms, twenty-five years ago the *Age* described eight years between upper house elections as 'a strange concept of democracy'. If the newspaper was correct, we might presume that many critics would still be heard were this to be put to a referendum.<sup>22</sup> Professor George Williams

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19. Australian Constitutional Convention 1982, Standing Committee "D", Fourth Report to Executive Committee, vol. 1, 27 August 1982, p. 60.

20. 'Fischer favours four-year term for MPs', *Canberra Times*, 1 September 1998.

21. Ross Peake, 'Anderson backs Lib push for 4yr terms', *Canberra Times*, 10 April 2002.

22. Editorial, 'Living with the Senate', *Age*, 8 March 1983.

of the University of New South Wales has noted the ease with which opposition to increasing MPs' terms could be drummed up:

It is hard to think of a better example of something people would love to vote 'No' to than the idea that politicians, through their own self-interest, correct or otherwise, have drafted a proposal to give them an extra year in office. That is very easy to defeat.<sup>23</sup>

Many years ago, former Senator Reg Withers (LP) took aim at two favourite targets when he described an eight-year term for Senators as being almost as good 'as being a tenured academic or a tenured public servant'.<sup>24</sup> Some would agree with him. Major parties might also reject the idea of minor party Senators holding a seat for such a length of time. This was an issue in New South Wales after the 1999 election following the election of some MLCs with very small shares of the vote.<sup>25</sup> Andrew Murray has sounded a warning about attempting such a change:

I think people, by being focused on the four years [House of Representatives term], are not sufficiently anticipating the opposition to the eight-year Senate term [that will emerge].<sup>26</sup>

#### Four-year terms?

Some have argued for identical four-year terms for both Commonwealth houses. In Western Australia the two houses have had four-year terms after the Legislative Council term of six years was reduced to a fixed term of four years. Elections are invariably held for both houses on the same day. This alteration to the upper house term was achieved easily enough through the passage of legislation, though the State's voters were not given the chance of passing judgement on the change.

In 1988 a constitutional amendment was proposed by the Hawke Government that would have set House and Senate terms at four years. The opposition to this was loud and intense:

This proposal would strip the Senate of its powers and independence. A Prime Minister would be able to sack the entire Senate whenever it disagrees with the Government or votes against bad laws ... This proposal, under the guise of a four-year term is an attack on the

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23. House of Representatives Standing Committee on Legal and Constitutional Affairs, *Inquiry into Constitutional Reform*, AGPS, Canberra, 2008, p. 25; see also Professor Greg Craven quoted 'Four-year government a "loser"', *Australian Financial Review*, 2 May 2008.

24. Senator Withers, Senate, *Debates*, 13 October 1983, p. 1549.

25. Joint Standing Committee on Electoral Matters, *The 2004 Federal Election*, op. cit., p. 178.

26. Commonwealth Parliament, Joint Standing Committee on Electoral Matters, Reference: Conduct of the 2004 federal election and matters related thereto, Official Committee Hansard, 12 August 2005, p. 92.

integrity and independence of the Senate. This integrity and independence provides the fundamental checks and balances necessary to a truly democratic Parliament.<sup>27</sup>

Were such a change to be proposed in 2010, there is no reason to doubt that it would come under a similar tough attack, not least because it would break the rotation of senators. In 1988 only 32.9 per cent supported this amendment; would the story be any different in 2010?

## Simultaneous House of Representatives and Senate elections?

The proposal that the Commonwealth Government puts to the people in 2010 may well include a provision for introducing simultaneity of House of Representatives and Senate elections. Such a change would mean that there could not be separate elections as there were for the House in 1954, 1966, 1969 and 1972, and for the Senate in 1953, 1964, 1967 and 1970.<sup>28</sup> This, it could be claimed, would help reduce the cost of elections to the taxpayer. It has been said that such a view would have great plausibility, and might help sway voters to support this change.

However, constitutional referenda campaigns are rarely so straightforward. As noted earlier, they are often seen as an opportunity for the Opposition of the day to defeat the Government on an issue that has public attention. Examples from the four efforts between 1974 and 1988 to introduce simultaneous elections—as part of other changes—illustrate this. The words below are taken from two of the official referendum documents sent to voters:

This referendum will make the Senate the rubber-stamp of a socialist, centralist Labor Government. (1974)<sup>29</sup>

The traditional independent powers and voice of the Senate would be lost. The ‘checks and balances’ provided by the Senate would be destroyed. (1974)<sup>30</sup>

... in 1977 Labor’s Senator John Button admitted that simultaneous elections reduced the power of the Senate. (1988)<sup>31</sup>

In all four cases the battle was over more than just simultaneous elections, and fixed terms were not part of the proposed changes. However, the vigour of the anti-simultaneous elections campaigners suggests that the inclusion of simultaneous elections in 2010 might well bring about the defeat of the fixed terms goal.

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27. Australian Electoral Commission, YES or NO? Referendums. Saturday 3 September 1988. The cases For and Against, Canberra, 1988, p. 9

28. The election of 1929 was brought about when the government lost control of the House of Representatives in the first year of its life, before the next Senate election could be held.

29. Referendums to be held on Saturday, 18 May 1974, Canberra, 26 March 1974, p. 5.

30. *ibid*, p. 6.

31. ‘YES or NO? ...’, *op. cit.*, p. 9.

## Why is it so difficult to amend the Constitution?

Constitutional change has proven to be a difficult and frustrating business for Commonwealth governments, with only eight of 44 proposed amendments having been accepted by voters between 1906 and 1999. The most recent amendments were the three achieved by the Fraser Coalition Government more than 30 years ago. Eight unsuccessful attempts have been made since then.

There are a number of factors which explain the relative failure of governments over the years to achieve much in the way of constitutional improvement. In listing these we can gain some sense of what a government needs to consider before fixed House of Representatives terms can become a part of Australia's constitutional arrangements. What is needed to avoid earlier mistakes? Some difficulties cannot be avoided; others can be bypassed with some care and planning. Of great importance is the need to avoid certain problems that may doom a particular proposal.

### The unavoidable hurdles

There are some unavoidable factors—official and unofficial—that appear to create difficulties for those seeking to change the Constitution.

#### The double majority

For an amendment to be ratified, the so-called 'double majority' is required. Firstly, there must be a majority of voters saying YES in a majority of the states, that is in at least four of the six. Each state vote is equal in weight. So, for example, in the 1999 referenda, the vote of New South Wales (4 146 653 enrolled voters) equalled the vote of Tasmania (327 729 voters). In addition, there must also be a nation-wide affirmative vote. Territory votes are included in the national total, but not in any state figure.

History shows that it is important that the smaller states are reassured about the likely impact of proposed changes, but this has proven to be difficult. This has been due to the often-exaggerated fears of amendment threats to the position of the states, and especially to the Senate, the states' house. In particular, it is important to keep Tasmanian voters onside. Tasmania has said YES to only 10 of the 44 referenda, largely because of fears about the impact of proposed referenda on the island state. No other state has returned fewer than 15 YES votes.

#### A federal document

Australia has a federal system of government, which seems to satisfy the Australian community. This may explain why amendments that are seen as threats to the federal system are likely to get short shrift from both the people and state politicians. Premiers have sometimes played an important part in the defeat of constitutional referenda. The opposition of Premiers Joh Bjelke-Petersen and Sir Charles Court to the 1977 *Simultaneous elections*

referendum, for example, was important in helping defeat a proposal that was said to threaten the states' house and, hence, the states themselves. Pro-state sentiment has helped defeat many referenda, so that Commonwealth governments are ill-advised to promote changes that appear likely to undermine the Australian federation. The figures in Table 2 are relevant to this:

Table 2: State YES votes

Referendum years	States voting YES (%)
1906–13	51.5
1919–37	42.9
1944–99	32.7

This table indicates that in the eleven referenda that were held before 1914, 34 of the 66 separate State votes, or 51.5 per cent, produced YES votes. In the seven between-wars referenda, the YES tally fell to 42.9 per cent of the State results. In the 24 referenda held since 1944, less than one-third of the State totals have registered YES votes. Looking at this in a different way, in the first 22 referenda (1906–46) an average of three States voted in support of the each amendment. By contrast, the second 22 (1948–99) produced an average of just 1.7 States in favour of each change. In the last eight referenda to be held (1984–99), only two of 48 State votes have been affirmative. Some see this as voter conservatism; equally, it may represent a growing voter satisfaction with the Australian political system, coupled with a growing cynicism about what are seen as the 'games' played by politicians. The message may well be that voters need to be persuaded that a change will actually improve the political system. If they cannot be so persuaded, they are very likely to reject moves by 'politicians' to change the nation's Constitution.

### Compulsory voting

On the other hand, the fact that all citizens over 18 are required to vote, means that there will be some entering the polling booth who know and care little about the proposal upon which they are to cast a vote. The evidence of the *Republic* (1999) referendum suggests that if those who had little knowledge or interest in the issue had not been required to cast a vote, the referendum may well have been approved. Such voters probably need to be confronted with an easily-comprehended, non-threatening proposal.

### The ballot paper

The *Referendum (Machinery Provisions) Act 1984* (Cwlth) provides that the ballot paper given to the voter is in an either/or format. The voter is limited to voting either 'Yes' or No'. There is no chance of expressing a range of preferences as on a House or Senate election ballot paper. The *Preamble* (1999) ballot paper, for example, stated:



A PROPOSED LAW: To alter the Constitution to insert a preamble.

DO YOU APPROVE THIS PROPOSED ALTERATION?

Had there been the opportunity to list preferences, in the *Republic* (1999) case it is possible that the pro-republic voters, who were split between an elected or an appointed head of state, may have together produced an affirmative vote for the move to a republican government. The question asked in a referendum, therefore, should not be confused by arguments over details. In the proposed 2010 case, for example, supporters of fixed House of Representatives terms may be frustrated by voter concern over what might be proposed to be done with Senate terms.

### The YES and NO cases

Each elector receives a pamphlet containing arguments in favour and arguments against the proposed constitutional amendment. This must be submitted to the voters, no later than 14 days before the polling day. The documents are written by representatives of the opposing arguments, should they seek to do so. In 1967, arguments for and against the *Parliament* alteration were written, but only a YES argument in relation to the *Aboriginals* amendment. In the referendum campaigns, the YES case usually is led by the sponsoring government. The NO case is often argued by the Opposition of the day combining its efforts with an informal group of individuals. The arguments are often less than measured, as will be illustrated later in the paper.

### How to have an amendment accepted by the voters

The previous section discussed the unavoidable aspects of attempting to achieve constitutional amendment. There are also some factors that can be important, but which can be avoided, or minimised, by a government seeking to achieve the passage of a constitutional amendment.

#### Try to make extreme views implausible

It has been said that ‘anything goes’ in battles to defeat constitutional referenda. There is no requirement for accurate arguments to be prepared, and exaggerated claims are often made, primarily by amendment opponents. In fact, a great deal of exaggeration and distortion is standard fare. The political scientist, Professor Don Aitkin, has complained that ‘the intellectual level of referendum debates is often appalling’.<sup>32</sup> In fact, there is no requirement that the arguments used must be directly relevant to the words of the proposed amendment.

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32. Don Aitkin, ‘Australia’, in David Butler and Austin Ranney (ed.), *Referendums. A Comparative Study of Practice and Theory*, American Enterprise Institute for Public Policy Research, Washington DC, 1978, p. 130.

Over the years, amendment opponents' warnings in the official documents distributed to voters have included:<sup>33</sup>

[The proposal] would wreck the State railway systems ... would bankrupt country towns ... would mean dearer freights and dearer food. (*Aviation* 1937)

... if these enormous new powers are granted, they are granted for ever to every Commonwealth Parliament ... whether that Parliament may be Labour, Liberal, Socialist, Conservative, Communist, or Fascist'. (*Marketing of primary products* 1946)

This referendum is an underhand attempt to put Canberra's bureaucratic fingers into every one of Australia's 1,000 Council Chambers ... as part of the Labor Federal Government's policy of centralist domination. (*Commonwealth grants to local government* 1974)

This proposal is just for the benefit of politicians. (*Interchange of Powers* 1984)

[this amendment] will cost us our stability, our certainty and our security. (*Republic* 1999)

Care must thus be taken to submit an amendment proposal that does not look dangerous, and which does not give a plausible opening for opponents to exaggerate its possible consequences. The Parliament's Joint Standing Committee on Electoral Matters has noted that:

... for any change to federal parliamentary terms to be implemented, there must be cooperation and a broad willingness to change from the major political parties.<sup>34</sup>

The fewer political ripples that a proposal is likely to create, the less likely it is to be defeated. The principles behind the *Aboriginals* referendum of 1967 had been accepted in the Australian community for many years, something that may well have played a part in its returning a 90.8 per cent approval vote. This is by far the largest vote achieved to date.

### Educate the voters

Time should therefore be taken over every amendment proposal, to inform as many of the voting population as possible of what it would mean for the nation. Governments have a tendency to spring proposals upon the people with little warning of what is coming. An example was the *Preamble* referendum in 1999, inserted late into the republic debate, which

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33. Alteration of Constitution. Federal Referendums. The Case FOR and AGAINST, Commonwealth Government Printer, Canberra, December 1936, p. 14; Referendums The Case FOR and AGAINST, Canberra, July 1946, p. 20; Referendums to be held on Saturday, 18 May 1974, Canberra, March 1974, p. 16; Referendums Saturday 1 December 1984 The Cases Four and Against, Canberra, October 1984, p. 12.

34. Australia, Parliament, Joint Standing Committee on Electoral Matters, The 2004 Federal Election Report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto, Canberra, September 2005, p. 180.

gave opponents the opportunity to complain in the official document that, ‘we should not be tacking these words onto our Constitution without ... much more public consultation’.<sup>35</sup> Governments have rarely been careful not to give the impression of seeking to rush amendments into the Constitution. Too often, amendment proposals are announced within a few months of their consideration by voters. Only rarely have governments been prepared to put in the effort to inform and reassure voters. Professor Aitkin has noted that the sheer amount of business that a government has to deal with does not leave much time, or possibly inclination (especially if a proposal appears doomed), for a government to campaign fully to inform voters what it is they are to vote on.<sup>36</sup> Aitkin added the point that the haste of a government hardly helps its chances of success:

Undoubtedly many electors, puzzled by the wording, bemused by the complexity of the issue, and battered from both sides by the antagonists, shrug their shoulders and vote no.<sup>37</sup>

### Don't try to do too much

In the *Parliamentary Terms* referendum of September 1988, voters were presented with proposal to introduce four-year maximum House of Representatives terms. Frustratingly for advocates of the longer term, however, the Hawke Government confused the issue by including in the proposed change a reduction of Senate terms to four years, as well as a provision for simultaneous elections. The latter of these had been defeated on three previous occasions. Voters could not pick which of the three proposals to support or reject, for, as mentioned above, they were required to vote YES or NO for the entire package. Voter opposition to changes to the Senate term, as well as to simultaneous elections, meant that less than one-third of the electorate was prepared to support the changes. The ploy of linking the four-year term proposal, that had quite a deal of bipartisan support, to matters that were extremely contentious, had not worked:

As a result of the simple being made complicated, bipartisan support was lost, the public were suspicious and the proposal failed.<sup>38</sup>

In 2010, a proposal for a fixed four-year House term, which might extend Senate terms to eight years, and which might also make House and Senate elections simultaneous, could be regarded as a typical case of a government attempting to do too much. Its chances of success would probably be slight.

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35. Yes/No Referendum '99 Your official Referendum pamphlet Canberra, n.d., p. 27.

36. Aitkin, op. cit., p. 130.

37. *ibid*, p. 131.

38. Tony Smith MP, ‘It’s time we moved to four-year parliamentary terms’, *Sunday Age*, 1 May 2005.

## Run just a single question

In addition, it might be better to propose a single constitutional change than to contaminate the atmosphere by running another question at the same time. In 1999 the *Republic* referendum gained a 45 per cent approval rating, but the *Preamble* amendment held at the same time scored only 39 per cent. It is arguable that the *Republic* question might have fared better had *Preamble* amendment not been submitted to them on the same day.

There is some danger of the 2010 election day becoming too cluttered. Apart from the election, at least three constitutional referenda have been spoken of. As well as talking about House of Representatives terms, Rudd has also spoken of a second referendum on a Commonwealth takeover of state hospitals.<sup>39</sup> In addition, the Australian Local Government Association is beginning a push to have an amendment giving constitutional recognition to local government.<sup>40</sup> If the Commonwealth Government is sympathetic to these issues, should they be put to the people on a different day from a fixed-term proposal? And whether they are held or not, there is a strong case for the Commonwealth Government running only with the single issue of fixed terms.

## Avoid elections (if possible)

In addition, Aitkin has noted the contaminating effects of holding a referendum on the same day as an election:

It seems pretty clear ... that this timing is likely to result in the referendum's failure because of the high party temperature at election times ... Australian elections are tough contests in which everything is geared to party victory.<sup>41</sup>

The successful three referenda of 1977 were examples of referenda held apart from an election. Prime Minister Rudd has spoken of the fixed-term question being held on the same day as the 2010 Commonwealth election. However, constitutional referenda can be held on days other than an election day. If there is any likelihood of the Government losing the election, or even having its parliamentary majority reduced, the Opposition would be very likely to campaign against the amendment proposal. Perhaps unfortunately, however, elections today are so expensive that constitutional referenda may always be held on election days in future.

## Don't appear to be threatening the States

The arguments against many of the attempts to alter the Constitution have tended to focus on the likely damage to be done to the states, due to an increase in Commonwealth power. This

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39. Coorey, 'No knighthood for Howard ...', op. cit.

40. 'Constitutional recognition background', *ALGA News*, 8 August 2008.

41. Aitkin, op. cit., p. 133.

has long been a feature of amendment referenda, being claimed during referenda on such proposals as those to give the Commonwealth power to legislate in relation to *Corporations* (1913), *Marketing* (1937) or *Prices* (1973).

Another type of constitutional change that also has been portrayed as seeking to weaken the States, have been the attempts to alter Senate terms so as to guarantee simultaneous elections of the two houses of the Parliament. The official NO case document in 1977 stated that simultaneous elections would submerge ‘the interests of the State Parliaments and of the people, particularly of Queensland, South Australia, Tasmania and Western Australia’. Such threat-to-the-states arguments appear to influence voting. If in 2010 a fixed-term amendment altered—or seemed to alter—the strength of the states (or the ‘states’ house’), such a proposal would probably be defeated.

### Lessen the possible impact of dissident voices

Experience has shown that it is possible for a few loud opposing voices to have a disproportionate impact upon a constitutional referendum. The *Parliament* referendum of 1967 sought to break the ‘nexus’ provision in the Constitution, which provides for the House of Representatives to be ‘as nearly as practicable’ twice the size of the Senate. Both the Coalition Government and the Labor Opposition were supportive of the amendment. However, a fight to defeat this amendment was led by two dissident Liberal Senators, plus the Democratic Labor Party. The proposal was soundly defeated. New South Wales supported the amendment, but a national NO vote of 59.7 per cent swamped that State’s effort. In the case of fixed terms, it would be quite possible for opponents to try to use political events to distort and defeat such a proposal. At the time of the sudden replacement of Morris Iemma by Nathan Rees as New South Wales Premier in September 2008, federal Liberal leader Brendan Nelson called for the overturning of the fixed terms arrangements in that state:

I am very concerned that we will have to wait 2½ years before the people in NSW get a chance to vote ... I think we need to be having a look at whether we can have an early election and what are the circumstances under which it could be called. It is deeply concerning.

Even people who are Labor supporters in ... NSW are desperately concerned about the state of governance in the state.<sup>42</sup>

Such a view could be heard during a fixed terms referendum campaign, and might well influence many voters.

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42. Patricia Karvelas, ‘Dump reform to call early poll: Nelson’, *Australian*, 8 September 2008.

## A compromise that might succeed?

### A need for simplicity

As is usually the case in Australian constitutional referenda, the major danger for those seeking to work towards a particular goal is the likelihood that opponents will so confuse and worry the electorate that the proposal is rejected. Fixed terms for the House of Representatives probably is not, of itself, a matter about which much of a scare campaign could be raised. After all, three of the States, plus the ACT, have moved to fixed lower house terms with little apparent harm to government in those jurisdictions. The potential difficulty is if the Commonwealth Government decided to attach other features that gave opponents of the Government a plausible target. This paper has suggested that such a danger would exist were eight-year Senate terms, or simultaneous House and Senate elections, included in the amendment package.

The simpler the proposed change, the more likely it is to be accepted.

### Fixed three-year House of Representatives terms as the only change?

Most of the recent discussion of House of Representatives terms has focussed on four-year fixed terms. The possibility of three-year fixed terms has not been suggested. In fact there would be a number of major advantages to be gained in proposing the shorter term.

#### Community certainty

At the very least, the change would ensure that three-year Commonwealth Parliaments became standard. Since Federation, the average length of Parliaments has been only 135.7 weeks, or about two-and-a-half years. The early elections in 1955, 1963, 1977, 1983, 1984 and 1998 illustrate how brief some parliaments have been (Table 3).

Table 3: Elapsed time between selected elections

Election	Elapsed time (weeks)
1955	80
1963	103
1977	104
1983	124
1984	91
1998	135

Source: Australian Electoral Commission

While some would undoubtedly prefer the extra stability of four-year fixed terms, at the very least guaranteed three-year terms would give much more certainty than the Australian public and the national economy have ever enjoyed. Even when an election has been delayed as long

as those of 2004 and 2007, there is always uncertainty until the Prime Minister names the date.

### Accountability

In her study of the length of lower house terms, the political scientist, Elaine Thompson, saw merit in three-year fixed terms, primarily on the grounds of their retaining ‘more accountability’, with governments being ‘sensitive to the need for re-election throughout their term, rather than just at the end’.<sup>43</sup> Former Labor Justice Minister, Michael Tate, also has expressed support for a fixed term, but thinks three years ‘is appropriate for a government to be held to account’, as does current MP the Hon Tony Abbott (LP), who has concerns about the loss of ‘democratic accountability’.<sup>44</sup> Former Liberal Treasurer Peter Costello has expressed doubts as to whether a four-year proposal would be supported by voters, whom he believed would prefer to hold governments to account more frequently than such a change would allow.<sup>45</sup>

### Policy

Sophie Mirabella MP (LP), has expressed doubts that extending state terms to four years has improved policy or the quality of government.<sup>46</sup> Her view is shared by a Western Australian journalist, who has suggested that the change to fixed four-year terms in his state have not produced any observable benefit. In any case, he claims, voters ‘need to be able to get at the bastards much more regularly when they let us down’.<sup>47</sup>

### Senate terms

The question of Senate terms cannot sensibly be avoided in any discussion of the possibility of extending House terms to four years. Although there has been much consensus about the need to lengthen lower house terms, this paper has pointed out that there is far less agreement about what should be done with the terms for the upper house. Were the three-year fixed term to be introduced for the House of Representatives, there would be no need to alter Senate terms at all. At a stroke, one major argument against change would be avoided, and the predictable cry of the ‘states’ house’ being threatened could be blunted.

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43. Elaine Thompson, ‘Tenure of Parliament’, in *Fixed-Term Parliaments*, Australasian Study of Parliament Group, Third Annual Workshop, 29–30 August 1981, Canberra, pp. 105, 110–11.

44. ‘Delegate Tate backs republic’, *Mercury*, 24 March 2008; Ross Peake, ‘Anderson backs Lib push for 4yr terms’, *Canberra Times*, 10 April 2002.

45. Phillip Coorey, ‘Vote on fixed term pledged’, *Sydney Morning Herald*, 11 October 2007.

46. Sophie Mirabella quoted in House of Representatives Standing Committee on Legal and Constitutional Affairs, *Reforming our Constitution: A roundtable discussion*, Canberra, June 2008, p. 23.

47. Paul Murray, ‘Fixed terms the way to stop PM’s election fix’, *West Australian*, 6 October 2007.

## Shelving formal simultaneity

At the time of the 1977 *Simultaneous elections* amendment attempt, the official NO case noted, accurately, that the change was unnecessary, because:

The fact is that the Government has the power now to hold the next and future Senate and House of Representatives elections on the same day if it chooses to do so.

It quoted Liberal Deputy Leader Phillip Lynch, four years before, when he pointed out that there was ‘no constitutional constraint to the holding of simultaneous elections’ for the two houses.<sup>48</sup>

Lynch was correct in his assertion. Since these words were spoken, all House of Representatives and Senate elections have been conducted simultaneously. Because of the cost to taxpayers, it would be a brave Prime Minister who chose to break this pattern. It is probably the case that it would only be an unexpected turn of events, such as a government losing control of the House at a time before a Senate election could be held, that would see a House of Representatives election being held separately.<sup>49</sup> Such was the situation in the events of 1929 referred to above. If ever this occurred, there would be pressure on the Prime Minister to bring the House and Senate elections back into line, if only to avoid the criticism that the cost of separate elections would bring. Simultaneity thus can be maintained without the Constitution appearing to be threatened.

### ‘If it ain’t broke ...’

Another reason for making no change to the length of the House’s term is that it undercuts those who doubt the need for *any* change to the constitutional arrangements. Two letters carried by the *Age* on the same day give the tone of what is sometimes heard in the wider Australian community:<sup>50</sup>

There is no great push in the electorate for four-year parliamentary terms. This agenda is being driven by politicians, for the benefit of politicians ...

Increase the term of the House of Representatives from three to four years? Given the opportunity, politicians as a class will invariably support longer parliamentary terms—because it is a means of reducing job-security risks from electors and party preselectors ...

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48. Australian Electoral Office, *Referendums to be held on Saturday, 21 May 1977*, 28 March 1977, p. 8; Mr Lynch, House of Representatives, *Debates*, 5 March 1974, p. 62.

49. S.13 of the Constitution provides for half-Senate elections to be held ‘within one year’ of the end of Senators’ terms.

50. Tom Nelson, New Town, Tasmania, and Ian Farrow, Hampton, Victoria, letters to *Age*, 11 April 2002.



We should therefore be careful about making such an important change, for it is impossible to be certain about the outcome. Political analyst Malcolm Mackerras is one of such critics who warn of the need to take care with any such change, particularly as the system has performed very well under the existing arrangements:

Throughout the 20<sup>th</sup> century, Australia had a three-year term at federal level. Was Australia really so badly governed last century? Of course not. So if it ain't broke, don't [try to] fix it.<sup>51</sup>

Many Australians could well share this view.

## Conclusion

Amending Australia's Constitution is a tricky business that is very likely to fail. Amendments seem only to be achievable if there is unity between the Government and the Opposition at the time voters enter the polling booth. Even then, there have been occasions when a few dissident voices have brought about defeat of a proposal.

In recent times many observers have expressed support for an alteration of the Constitution to introduce fixed terms for the House of Representatives. Most also speak in support of altering the maximum House term from three to four years. If that were possible to achieve with no change to the arrangements for the Senate, the alteration might be easily made. However, the message of many attempts to amend the Australian Constitution is that changes to the Senate arrangements are likely to be controversial, because of the concern of many voters to protect the place of the upper house and of the States. A reduction of Senate terms to four years would be very likely to be defeated, as would an attempt to introduce simultaneous House and Senate elections. In addition, if Senate terms were increased to eight years, it is likely that opposition would come from people concerned about the 'undemocratic' nature of the length of such terms.

This paper suggests a compromise proposal—to introduce fixed three-year House of Representatives terms. This proposal would improve the Australian political system, yet would not be seen as threatening the place of the Senate, or making Senate terms of an excessive length. There should be no attempt made to introduce simultaneity of terms for the two houses. No changes would therefore need to be made to Senate terms, and the many voices calling for more certainty in regard to the length of House of Representatives terms would at least have gained a significant increase in such certainty. For such voices, fixed terms would be seen as an improvement on the current arrangements, and such a change would be very likely to be accepted by the Australian electorate.

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51. Malcolm Mackerras, 'Keep the bastards honest oftener', *Australian*, 11 April 2002.

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