

SHOULD EQUAL REPRESENTATION OF THE STATES BE RETAINED IN THE COMMONWEALTH SENATE?

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I INTRODUCTION

The *Australian Constitution* was written in vastly different circumstances to those which exist in contemporary Australian society, yet some of the key dilemmas which faced the framers of the *Constitution* remain to this day.¹ One such issue is the conflicting objects of democratic majoritarian rule and equal State representation in the Commonwealth Senate.² Section 7 of the *Constitution* ('section 7') relevantly provides that 'equal representation of the several Original States shall be maintained' in the Senate. An examination of the historical genesis of section 7's equal State representation requirement, from the perspective of the framers of the *Constitution*, reveals that the requirement was adopted both to protect State rights by ensuring a geographically distributed legislative majority, and also as a practical compromise to ensure that smaller States would accede to a federal union. From a contemporary perspective there are compelling arguments that equal State representation is undemocratic as it creates inequality of vote values, and that the historical rationale for equality of membership centred on protecting State rights is irrelevant as the Senate has largely become a partisan house.³ Despite these objections, there are several principled reasons why section 7 should be retained in its present form on the basis that the merits of equal geographical distribution of Senate power outweighs the negative aspects of the system.

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¹ See David Wood, 'The Senate, Federalism and Democracy' (1989) 17(2) *Melbourne University Law Review* 292, 293; Murray Gleeson, 'The Shape of Representative Democracy' (2001) 27(1) *Monash University Law Review* 1, 5; Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17 *Federal Law Review* 164, 172–173.

² Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17 *Federal Law Review* 164, 173.

³ See Scott Bennett, 'The Australian Senate' (Research Paper No 6, Parliamentary Library, Commonwealth, 2004) 23; John Uhr, 'The Australian Senate' (Conference Paper, Ottawa: Institute for Research on Public Policy and Forum of Federations, 18 November 2008) 6–7.

II THE HISTORICAL RATIONALE FOR EQUAL STATE MEMBERSHIP IN THE SENATE

Section 7 received a great deal of debate and detailed consideration in its drafting. Indeed, it is ‘well known that the design of the Senate repeatedly gave rise to the most protracted disputes during the 1890s Conventions in which the Constitution was framed.’⁴ Accordingly, to ascertain why the framers of the *Constitution* gave states equal Senate membership through section 7 it is necessary to review the two dominant reasons for its adoption during the 1890s Convention debates.

The first reason was that equal State Senate membership was seen as being necessary to protect State rights.⁵ It was argued that if the Senate had proportional State membership, rather than equal representation, ‘the interests of the smaller States would be absolutely in the hands of the larger States’.⁶ Andrew Thynne, a Queensland delegate, contended that an Australian federation without a Constitutional requirement for equal State Senate membership would be ‘insecure and unsteady, and without those guards against the tyrannic exercise of the power of temporary majorities which are necessary [for] peaceful government’.⁷ A dominant perspective amongst many delegates from the smaller colonies was that equal membership would ensure that ‘the rights of minorities are guarded in the new constitution against hasty, corrupt, or dishonest action on a part of any section, no matter how large it may be.’⁸ This view that the Senate would function not only as a house of review,⁹ but also more broadly as a protector of the rights of geographical minorities throughout the country was arguably the core reason why section 7 was written to require equal State membership in the Senate.¹⁰ The framers were fundamentally concerned with creating a

⁴ John Uhr, ‘Why We Chose Proportional Representation’ in Marian Sawer and Sarah Miskin (eds), ‘Representation and Institutional Change: 50 Years of Proportional Representation in the Senate’ (Papers on Parliament No 34, Department of the Senate, Parliament of Australia, 1999) 21, citing *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 26 March 1897, 163 (William Lyne).

⁵ See *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 24 March 1897, 79 (Simon Fraser); *Official Record of the Debates of the National Australasian Convention*, Melbourne, 20 January 1898, 1 (Patrick Glynn).

⁶ *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 24 March 1897, 51–52 (Richard O’Connor).

⁷ *Official Record of the Debates of the National Australasian Convention*, Sydney, 6 March 1891, 106 (Andrew Thynne).

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ See Scott Brenton, ‘State-based Representation and National Policymaking: The Evolution of the Australian Senate and the Federation’ (2015) 21(2) *Journal of Legislative Studies* 270, 271; John Uhr, ‘Explicating the Australian Senate’ (2002) 8(3) *Journal of Legislative Studies* 3, 4.

functional federation with a strong representative government;¹¹ ultimately it can be said that they reached the conclusion that the equal representation of state communities was more important than equal representation of individuals from different states in attaining this goal.¹²

The second dominant reason for section 7's equal membership requirement was succinctly expressed by the then Premier of Victoria, Sir George Turner:

Although, the larger States might fairly claim to have larger representation in both Houses, seeing that what we must keep before us is the welding of the colonies into one whole, we must be prepared to make some sacrifices. The larger colonies must be prepared to give to their smaller neighbours equal representation in the Senate body.¹³

This view was also underpinned by a concern that a failure to provide equal membership to States would produce 'a continual sense of injustice'¹⁴ and 'neglect'¹⁵ in smaller States which of itself would leave a constitutional 'germ of unrest which would probably develop into something much more serious.'¹⁶ This demonstrates that framers from the larger colonies also arguably agreed to equal State representation in the Senate based upon the pragmatic conclusion that smaller colonies would never have handed over much of their powers to a federal government unless they were equally represented in at least one chamber of the federal parliament.¹⁷

Accordingly, there were two main reasons why section 7 was written by the *Constitution's* framers to require equal State membership in the Senate. The first was a principled reason

¹¹ See especially *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 24 March 1897, 63 (Sir Edward Braddon).

¹² James Stellios, 'Using Federalism to Protect Political Communication: Implications from Federal Representative Government' (2007) 31 *Melbourne University Law Review* 239, 256, citing Nicholas Aroney, 'Federal Representation and the Framers of the Australian Constitution' in Gabriël Moens (ed), *Constitutional and International Law Perspectives* (University of Queensland Press, 2000) 13, 15, 17, 40. See also Nicholas Aroney, 'Representative Democracy Eclipsed? The Langer, Muldowney and McGinty Decisions' (1996) 19 *University of Queensland Law Journal* 75, 100-1; Nicholas Aroney, 'A Commonwealth of Commonwealths: Late Nineteenth-Century Conceptions of Federalism and Their Impact on Australian Federation, 1890-1901' (2002) 23 *Journal of Legal History* 253, 266, 273; Nicholas Aroney, 'Imagining a Federal Commonwealth: Australian Conceptions of Federalism, 1890-1901' (2002) 30 *Federal Law Review* 265.

¹³ *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 24 March 1897, 39 (Sir George Turner).

¹⁴ *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 24 March 1897, 51-52 (Richard O'Connor).

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ See especially *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 24 March 1897, 49 (Richard O'Connor); *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 24 March 1897, 63 (Sir Edward Braddon).

centred on the idea that equal membership was necessary to protect state rights by ensuring the equal geographical distribution of legislative power. The framers viewed this goal of decentralising and equally distributing legislative power across the nation as being of greater importance to a functional federalist system than pure vote equality between voters in different States. The second historical reason was that equal representation was ultimately ‘the price that had to be paid for federal union’¹⁸ to ensure that the smaller colonies would agree to federate. In this respect, section 7 was as much a pragmatic compromise necessitated by the concerns and demands of the smaller colonies as it was a provision intended to create a system designed around the more elegant theoretical ideals of geographically equalised federalism.

III ARGUMENTS FOR PROPORTIONAL STATE REPRESENTATION IN THE SENATE

Determining whether the *Constitution* should be altered to remove equal State representation in the Senate from section 7 requires analysis of arguments against the existing system. There are two primary arguments against retaining equal representation.

First, that equal State representation is ‘extremely unjust’ to voters in the larger States,¹⁹ because it inherently subverts the ‘one vote, one value’²⁰ principle which some argue is ‘an essential principle of democracy’.²¹ By requiring an equal number of Senators from each State section 7 creates significant inequality in the effective value or ‘weight’ of citizens’ votes in different States. This has been criticised as being ‘fundamentally anti-democratic’²² and ‘unrepresentative’²³ because it can also allow representatives of a geographical minority

¹⁸ Murray Gleeson, ‘The Shape of Representative Democracy’ (2001) 27(1) *Monash University Law Review* 1, 6. See also John Uhr, ‘Explicating the Australian Senate’ (2002) 8(3) *Journal of Legislative Studies* 3, 4; John Faulkner, ‘A Labor Perspective on Senate Reform’ in Marian Sawer and Sarah Miskin (eds), ‘Representation and Institutional Change: 50 Years of Proportional Representation in the Senate’ (Papers on Parliament No 34, Department of the Senate, Parliament of Australia, 1999) 122; John Uhr, ‘Why We Chose Proportional Representation’ in Marian Sawer and Sarah Miskin (eds), ‘Representation and Institutional Change: 50 Years of Proportional Representation in the Senate’ (Papers on Parliament No 34, Department of the Senate, Parliament of Australia, 1999) 23.

¹⁹ *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 26 March 1897, 165 (William Lyne).

²⁰ David Wood, ‘The Senate, Federalism and Democracy’ (1989) 17(2) *Melbourne University Law Review* 292, 295.

²¹ Constitutional Commission, Parliament of Australia, *Final Report of the Constitutional Commission* (1988) vol 1, [4.145], quoted in *McGinty v Western Australia* (1996) 186 CLR 140, 202 (Toohey J).

²² John Uhr, ‘Why We Chose Proportional Representation’ in Marian Sawer and Sarah Miskin (eds), ‘Representation and Institutional Change: 50 Years of Proportional Representation in the Senate’ (Papers on Parliament No 34, Department of the Senate, Parliament of Australia, 1999) 40.

²³ Commonwealth, *Parliamentary Debates*, House of Representatives, 3 March 1994, 1747 (Paul Keating), quoted in Scott Bennett, ‘The Australian Senate’ (Research Paper No 6, Parliamentary Library, Commonwealth, 2004) 15. See also John Faulkner, ‘A Labor Perspective on Senate Reform’ in Marian Sawer and Sarah Miskin

to frustrate the will of a majority of Australians in the Senate. This dilemma was well-illustrated by Justice McHugh's dicta in *McGinty v Western Australia*²⁴ in which His Honour explained that section 7 creates a system where 'the Senate vote of an elector in Tasmania is ten times more valuable than the Senate vote of an elector in Victoria.'²⁵ Proponents for replacing section 7's equal State representation with proportional State membership argue that such constitutional reform would strengthen our democracy by removing the undemocratic disproportionality that is inherent in our current system.²⁶

The second argument for the amendment of section 7 is that equal State representation is no longer necessary as the Senate does not operate as 'the States' House' because Senators vote on party lines, not to protect the interests of their respective States.²⁷ Whilst both arguments for constitutional reform are compelling, there are several cogent reasons why section 7 should not be altered.

IV WHY EQUAL STATE REPRESENTATION IN THE SENATE SHOULD BE RETAINED

In practical terms, it is likely 'impossible'²⁸ to amend section 7 due to the Australian public's general historical refusal to carry referenda that alter the basic structure of the federal system or appear designed to weaken the Senate.²⁹ There are also cogent arguments to be made that there are numerous constitutional amendments that are of far greater importance to our democracy and which should be prioritised over pursuing the alteration of section 7. However, referendum practicality and other proposed constitutional amendments aside, it is conceptually valuable to examine three principled reasons why it is desirable to retain section 7's equal State representation requirement.

(eds), 'Representation and Institutional Change: 50 Years of Proportional Representation in the Senate' (Papers on Parliament No 34, Department of the Senate, Parliament of Australia, 1999) 122.

²⁴ (1996) 186 CLR 140, 237 (McHugh J) ('*McGinty*').

²⁵ *McGinty* (1996) 186 CLR 140, 237 (McHugh J).

²⁶ See John Faulkner, 'A Labor Perspective on Senate Reform' in Marian Sawer and Sarah Miskin (eds), 'Representation and Institutional Change: 50 Years of Proportional Representation in the Senate' (Papers on Parliament No 34, Department of the Senate, Parliament of Australia, 1999) 122; *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 26 March 1897, 158–159 (William Lyne). See generally *McGinty* (1996) 186 CLR 140, 274–275 (Gummow J).

²⁷ See Harry Evans, 'The Role of the Senate' (2001) 78 *Australian Law Reform Commission Reform Journal* 16, 17; Commonwealth, *Parliamentary Debates*, House of Representatives, 3 March 1994, 1747 (Paul Keating). See also *Victoria v Commonwealth* (1975) 134 CLR 81, 121–122 (Barwick CJ).

²⁸ Victor Prescott, 'The Need to Reform the Constitution of Australia' (2000) 11 *Public Law Review* 106, 112.

²⁹ See especially Scott Bennett, 'The Australian Senate' (Research Paper No 6, Parliamentary Library, Commonwealth, 2004) 19–20. See also Hannah Gobbet et al (eds), 'Parliamentary handbook of the Commonwealth of Australia, 2017: 45th Parliament' (Commonwealth Parliamentary Handbook, Parliamentary Library and Department of Parliamentary Services, 11 March 2017) 405, 409; *McGinty* (1996) 186 CLR 140, 245–246 (McHugh J).

First, ensuring equality of State representation is more important than strict equality of Senate vote values in maintaining a functional representative democracy. While equal State representation subverts the ‘one vote, one value’ equality of voting power principle, it must be recognised that pure equality of voting power is not a strict requirement for representative democracy.³⁰ In *McGinty v Western Australia*³¹ Justice McHugh opined that ‘[e]quality of voting power is not a fundamental feature of the Constitution. On the contrary, inequality of individual voting power is one of its striking features.’³² Indeed, the Australian public overwhelmingly voted no in both the 1974 and 1988 referenda proposing constitutional requirements that electorates’ sizes be proportional to population.³³ This demonstrates that ‘the Australian people do not regard one vote one value as an essential requirement of representative democracy.’³⁴ Arguably it is not strict equality of voting power, but the hybrid form of equal State representation created by section 7, which is ‘essential’ for a properly representative federal system.³⁵

Second, the equal geographical distribution of Senate representation and majoritarian power is the most equitable federal arrangement. If section 7 was altered to require population-based representation the ‘legislative majority could consist of the representatives of only two states, indeed, of only two cities, Sydney and Melbourne.’³⁶ This could significantly undermine the political stability of the Commonwealth by creating very real sense of neglect and alienation in the less populous States through lack of effective geographical representation in the Senate.³⁷ The associated argument that equal State membership is no longer relevant, on the basis that the Senate no longer fulfils this role because it operates as a partisan House, fundamentally misconceives the framers’ original intentions.³⁸ The framers intended that the

³⁰ See *Dixon v Attorney-General (British Columbia)* (1989) 59 DLR (4th) 247, 262 (McLachlin CJ), quoted in *McGinty v Western Australia* (1996) 186 CLR 140, 246–7 (McHugh J).

³¹ (1996) 186 CLR 140.

³² *Ibid* 236 (McHugh J).

³³ See Hannah Gobbet et al (eds), ‘Parliamentary handbook of the Commonwealth of Australia, 2017: 45th Parliament’ (Commonwealth Parliamentary Handbook, Parliamentary Library and Department of Parliamentary Services, 11 March 2017) 405, 409. See also *McGinty* (1996) 186 CLR 140, 245–246 (McHugh J).

³⁴ *McGinty* (1996) 186 CLR 140, 246 (McHugh J).

³⁵ Elaine Thompson, ‘The Senate and Representative Democracy’ in Sawyer, Marian and Sarah Miskin (eds), ‘Representation and Institutional Change: 50 Years of Proportional Representation in the Senate’ (Papers on Parliament No 34, Department of the Senate, Parliament of Australia, 1999) 46.

³⁶ Harry Evans, ‘The Role of the Senate’ (2001) 78 *Australian Law Reform Commission Reform Journal* 16, 16.

³⁷ Evans, above n 36, 16. See especially Scott Bennett, ‘The Australian Senate’ (Research Paper No 6, Parliamentary Library, Commonwealth, 2004) 20, citing Sir Billy Snedden, ‘Contemporary Westminster’ in George Brandis, Tom Harley and Don Markwell (eds), *Liberals face the future: Essays on Australian Liberalism* (Oxford University Press, 1984) 231.

³⁸ John Uhr, ‘The Australian Senate’ (Conference Paper, Ottawa: Institute for Research on Public Policy and Forum of Federations, 18 November 2008) 7.

States' interests would be promoted 'not through uniformity of voting but through diversity of views represented within each State body of senators'.³⁹ Judicial consideration of the purpose of the Senate predominantly supports this interpretation; Chief Justice Barwick's dicta in *Victoria v Commonwealth*⁴⁰ is perhaps the most elucidating example:

... the Senate was intended to represent the States, parts of the Commonwealth, as distinct from the House of Representatives which represents the electors throughout Australia. It is often said that the Senate has, in this respect, failed of its purpose. This may be so, due partly to the party system and to the nature of the electoral system: *but even if that assertion be true it does not detract from the constitutional position it was intended that proposed laws could be considered by the Senate from a point of view different from that which the House of Representatives may take.* The Senate is not a mere house of review: rather it is a house which may examine a proposed law from a stand-point different from that which the House of Representatives may have taken.⁴¹

Accordingly, the true purpose of section 7 was to ensure that the 'legislative majority would be geographically distributed across the Commonwealth'.⁴² The Senate still achieves this purpose by ensuring that every law assented to ensure that has the support of the geographically distributed majority.⁴³ The framers, despite the desire to protect State interests, arguably intended to create a Senate which was geographically equalised in its membership in order to create diversity of representation and associated perspectives, not substantive uniformity of Senator voting patterns based on State origin. The equalisation of the effective value of votes in different States that would be achieved by altering section 7 to require proportional representation is of less importance to the maintenance of representative federal democracy than retaining this equal geographical distribution of Senate power and perspectives.

The third reason why section 7's equal representation requirement should be retained is that the beneficial diversity of perspectives it produces extends well beyond the legislature. The equal State composition of the Senate broadens the representation of major political parties by ensuring that the parties draw into their federal caucuses a greater number of

³⁹ Ibid.

⁴⁰ (1975) 134 CLR 81.

⁴¹ Ibid 121-2 (Barwick CJ) (emphasis added).

⁴² See especially John Uhr, 'The Australian Senate' (Conference Paper, Ottawa: Institute for Research on Public Policy and Forum of Federations, 18 November 2008) 7; Harry Evans, 'The Role of the Senate' (2001) 78 *Australian Law Reform Commission Reform Journal* 16, 17; *Victoria v Commonwealth* (1975) 134 CLR 81, 121 (Barwick CJ).

⁴³ Evans, above n 36, 16.

representatives from the smaller States.⁴⁴ This makes our federal governments truly ‘representative’ as it means that ‘small states are well-represented in the party room’,⁴⁵ resulting in federal executive policy being directly shaped by a geographically diverse array of Senators which inherently carry with them perspectives shaped by their home States.⁴⁶ Equal representation in the Senate also incentivises ‘parties to campaign in every state and to formulate policies with national appeal’.⁴⁷ If the major parties did not have to compete for Senate seats drawn in equal numbers from the States, would they still be as dedicated to representing the interests of voters in smaller states and obtaining a truly national mandate to govern? Ultimately, it is naïve to suggest that they would, as it would be far more efficient to focus policy and campaigns primarily on the largest states from which the majority of Senators would be elected under a population-based system. The fact that equal State Senate membership effectively prevents political parties from neglecting voters in less populous States demonstrates the intrinsic democratic value of retaining section 7 in its current form. Amending section 7 to provide for population-based State representation would represent an abandonment of the Senate’s ‘greatest enduring public legitimacy’.⁴⁸

V CONCLUSION

The framers of the *Constitution* crafted section 7 to require equal State membership in the Senate to protect State interests, ensure an equal geographical distribution of legislative power, and also as a pragmatic compromise to ensure that federation occurred. There are several compelling arguments in favour of amending the *Constitution* to have section 7 require that States are proportionally represented in the Senate based on their population. Such arguments include that equal representation is undemocratic as it creates inherent inequality in the value of votes in different States, and that the original rationale behind equal State membership is no longer relevant as the Senate is now a partisan House. Despite these arguments equal State representation should be retained, first because strict equality of vote value is less important than equality of State representation to maintaining a functional and representative federal democracy. Second, because the equal geographical distribution of

⁴⁴ Uhr, above n 38, 7.

⁴⁵ Scott Brenton, ‘State-based Representation and National Policymaking: The Evolution of the Australian Senate and the Federation’ (2015) 21(2) *Journal of Legislative Studies* 270, 274.

⁴⁶ See especially *Victoria v Commonwealth* (1975) 134 CLR 81, 121 (Barwick CJ). See also Scott Brenton, ‘State-based Representation and National Policymaking: The Evolution of the Australian Senate and the Federation’ (2015) 21(2) *Journal of Legislative Studies* 270, 271.

⁴⁷ Brenton, above n 45, 277.

⁴⁸ Uhr, above n 38, 7, citing John Uhr, ‘Proportional Representation in the Senate: Recovering the Rationale’ (1995) 30 *Australian Journal of Political Science* 127, 127–141.

State representation is the most equitable federal system as it ensures that all legislation passed by the Commonwealth parliament has the support of a geographical decentralised majority. Third, the retention of equal representation actively incentivises the broader political inclusion of representatives from smaller states in federal governments, whilst simultaneously prompting the major parties to tailor policy and campaigns to all States' needs irrespective of their populations. The Senate composition created by section 7 should not be regarded as obsolete or anachronistic in view of our contemporary democracy, rather it should be seen as furnishing our system with an appropriate and necessary form of enduring democratic legitimacy that is befitting of a federal polity as geographically vast as the Commonwealth of Australia.