Submission of the

University of New South Wales
Council for Civil Liberties

in response to the

Prime Minister's Discussion Paper

Resolving Deadlocks:
A Discussion Paper on Section 57 of the Australian Constitution

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1. Executive Summary

It is important to acknowledge from the outset that the Discussion Paper *Resolving Deadlocks*[1] ('the Discussion Paper') is really about the constitutional power of the Senate to refuse to pass legislation in the form desired by the government of the day.

Seen in terms of the constitutional separation of powers, this is a power struggle between the Executive, which controls the House of Representatives,[2] and a 'hostile' Senate, in which the government does not hold a majority.

The Constitution grants equal power to the House of Representatives and the Senate.[3] As a consequence, the Constitution also envisages, and provides for the resolution of, conflict between the two Houses: section 57. Section 57 allows for a **joint sitting** of Parliament to resolve legislative deadlock. But before a joint sitting may be held, both Houses must be dissolved and the People given the opportunity to resolve the impasse by passing their judgment on *all* Members and Senators at the ballot box. This is a unique and remarkable feature of Australian democracy.[4]

Section 57 ensures that the People have a direct voice in the resolution of parliamentary deadlock. The alternatives proposed in the Discussion Paper would silence that popular voice.

The alternatives make it easier for a government to call a joint sitting *without* consulting the People. These proposals also seek to undermine and circumvent the democratically-elected Senate and turn it into a rubberstamp for government legislation. This is little more than a power grab on the part of the Executive.

The University of New South Wales Council for Civil Liberties ('UNSWCCL') believes that Australians should jealously guard the requirement of a double dissolution as a prerequisite to a joint sitting of Parliament. This is because section 57 is a carefully-crafted constitutional check on Legislative (and Executive) power that is integral to the Australian understanding of democracy.

As the only developed nation without the protection of a Bill of Rights of some form, this check on government power is essential to the protection of the civil liberties of all Australians.

UNSWCCL recommends that the options for constitutional change proposed by the Prime Minister's Discussion Paper <u>not</u> be put to referendum. These changes would grant governments the power to rule unchecked by the People or the Senate, upsetting the delicate system of constitutional checks and balances which define Australian democracy and safeguard our liberty.

[1] Department of Prime Minister and Cabinet, *Resolving Deadlocks: A Discussion Paper on Section 57 of the Australian Constitution* (2003) Commonwealth of Australia, Chapter 6.
[2] as per the doctrine of responsible government. This is why the terms "House of Representatives" and "Government" are used loosely and interchangeably in this submission.
[3] *Constitution*, s 53: "the Senate shall have equal power with the House of Representatives", with the exception of appropriation and taxation bills.
[4] John Quick & Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (1901, 1976 reprint) [266], 687-688.

2. The Senate

2.1 introduction

Before examining section 57 and the proposed alternatives, it is important to review the constitutional significance and role of the Australian Senate.

One of the striking features of the Discussion Paper is its hostility towards the Senate.[5] It fails to acknowledge the important constitutional role of the Upper House or to provide a balanced discussion about the benefits of the Senate.

Perhaps this is to be expected, given that the Discussion Paper has been written in a partisan manner by a government which has had some of its legislative programme frustrated by the Senate.

The Senate plays an important role as a check on the government of the day and as a house of review. The recent controversial ASIO and anti-terrorism legislation was heavily debated in the Senate and in the public arena. It was the period of Senate review that gave Australians an opportunity to comment on the proposed Bills and eventually led the Senate to modify these Bills.

UNSWCCL believes that the Senate is a *positive* democratic force, not a negative force as the Discussion Paper portrays it.

2.2 the Senate democratically represents federal interests

Perhaps the anti-Senate flavour of the Discussion Paper reflects the tensions at the heart of our unique form of government. These tensions arise from the balance between national and federal interests in Parliament, and from the imperfect separation of the Executive and Legislative branches in our Constitution.[6]

The Senate, like the House of Representatives, is democratically elected. The "sap of popular election [runs] in its veins".[7] The House reflects the *national* will of the People, while the Senate reflects the *federal* will of the People.[8] These two concepts – a *nation* of citizens and a *federation* of States – lie concurrently at the heart of the Australian Commonwealth. According to the Constitution, which apportions equal power to both Houses,[9] neither House is more or less democratically legitimate than the other.

For these reasons, the Discussion Paper is incorrect to suggest that the Senate does not reflect the will of the People[10] and that the power of the Senate to block government legislation is "contrary to the principle of democracy".[11]

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[5] the Senate is described variously as undemocratic (32), a hindrance to good and efficient governance (32), representative of minority interests (6), disrespectful of a government's mandate (32), illegitimately controlling the political agenda (6), vetoing the will of the people (46), performing in a manner inconsistent with its intended role (34) and functioning contrary to the principle of responsible government (34).

[6] the separation of Executive & Legislature is discussed in more detail below: see "responsible government and the Senate" on page 5.

[7] Goldwin Smith quoted in Quick & Garran, n 4, [266], 688.

[8] our Constitution adopts this national/federal dichotomy from the US, where it is famously explained by the 18th Century American statesman James Madison, 4th President of the United States and often described as the 'Father of the Constitution', in *The Federalist (No 39).*

[9] *Constitution*, s 53. This legislative equality is subject only to the limitations listed in s 53 concerning appropriation and taxation Bills.

[10] Discussion Paper, n 1, 8 & 46.

2.3 Senate majorities and Senate minorities

The core complaint in the Discussion Paper is that a *perceived* minority of Senators can "veto" legislation of the government, which is *perceived* as the majority. This is expressed by the following overstatement:

> *"…the minority has assumed a permanent & absolute veto over the majority."* [12]

First, it is inaccurate to describe this veto as "permanent and absolute", given that the composition of the Senate is far from permanent. After any half-Senate or double dissolution election, a re-constituted Senate might be more willing to pass legislation which its predecessor would not.

Second, the Discussion Paper confuses "majority" with "government". In the House of Representatives, where the government holds the majority of seats, it is accurate to equate these interests. In the Senate, where governments do not always command the majority of seats, the two interests do not always coincide. The assumption that a Senate majority is somehow illegitimate because it does not accord with government interests is unsound. A Senate majority is both as democratically[13] and constitutionally[14] valid as a House majority.

Third, it is also unsound to assume that a Senate majority always reflects a numerical minority of the electorate. An analysis of the underlying popular vote[15] demonstrates that when the ALP, Democrats, One Nation and Senator Harradine form a Senate majority, they represent 51% of first preference votes: that is a popular *majority* of Australian voters. Similarly, when the Coalition, Greens, One Nation and Senator Harradine vote together, they represent 50.6% of all first preference votes.

Of course, the Senate is designed to reflect *federal* rather than *national* interests and a Senate majority can legitimately reflect a minority of the overall electorate. For example, when the ALP combines with the Greens and Democrats,[16] their one-seat Senate majority reflects only 47.2% of first preference votes. Similarly, when the Coalition combines with the Democrats to form a *five*-seat majority, they reflect only 47.5% of first preference votes. This also demonstrates that the possibility of a Senate majority reflecting a popular minority works in *favour* of a government.

In summary, it is simply wrong to suggest that in the Senate a minority holds the majority to ransom.

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[11] Discussion Paper, n 1, 32.
[12] Discussion Paper, n 1, 6 & 46.
[13] because the Senate is elected by the People
[14] because the Constitution (s 53) gives each House equal power: see n 3 above .
[15] these figures are based on the combined *first preference* figures for the half-Senate elections in 1998 and 2001, as issued by the Australian Electoral Commission. As such they reflect the state of the Senate as it is currently constituted. The combinations of voting blocks used in this example might not occur in reality, but they demonstrate the point that a Senate majority can mean many things. See the Appendix to this submission for more information.
[16] note: Senator Lees is included as a Democrat for the purposes of this exercise.

2.4 the Senate is not a rubberstamp

The Discussion Paper assumes that the Senate is obliged to pass legislation in a form desired by the government. This assumption is constitutionally unsound and completely overlooks the role of the Senate as a house of review and a check on Executive and Legislative power.

The fact that the Framers provided a constitutional mechanism to resolve legislative deadlock[17] demonstrates that they envisaged that the two houses of Parliament would not always "work in harmony, but may at times come into deadly conflict".[18] It also demonstrates that the Framers never intended the Senate to be a mere rubberstamp for legislation passed by the government-controlled House of Representatives.

The Senate is the constitutional and legislative equal of the House.[19] The Discussion Paper advocates the usurpation of that balance by making it easier for the Executive to exploit the numerical superiority of the House in a joint sitting of Parliament.[20] The Discussion Paper, in effect, supports the foreign notion that the Senate should be a rubberstamp to a government's legislative programme.

2.5 responsible government and the Senate

Because the two Houses of Parliament are equals, the Senate has the power to initiate, block or modify most Bills.[21] The Discussion Paper, however, characterises this constitutional fact as the Senate "function[ing] in a manner which is…contrary to the principle of responsible government".[22] This tension arises from the imperfect separation of the Executive and Legislative branches in our Constitution.

As a consequence of Westminster-style responsible government, the Executive and Legislative arms of government *overlap* in our Constitution.[23] Responsible government means that government Ministers must sit in,[24] and are responsible to,[25] the Parliament. It also means that a government must hold the confidence of the Lower House, but not necessarily the Upper House.

While the unelected British House of Lords might feel obliged to avoid legislative deadlock, any analogy with the democratically elected,[26] federal[27] and equally powerful[28] Australian Senate is obviously flawed. The Senate reflects the fact that Australia is a

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[17] *Constitution*, s 57.
[18] Quick & Garran, n 4, [266], 687.
[19] *Constitution*, s 53. See n 3 above.
[20] this is discussed in more detail below: see "Double Dissolution, the People & joint sittings" on page 7.
[21] *Constitution*, s 53. See n 3 above.
[22] Discussion Paper, n 1, 34.
[23] *Victorian Stevedoring and General Contracting Co Pty Ltd & Meakes v Dignan* (1931) 46 CLR 73. See also L. Zines, *The High Court and the Constitution* (1997, 4th edition) 154-170.
[24] *Constitution*, s 64.
[25] there has been an increasing willingness among successive governments to ignore the important convention that Ministers are responsible to Parliament. The most recent example was the complete failure of Minister Reith to be held accountable to the Parliament. "The Committee finds that Mr Reith deceived the Australian people during the 2001 Federal Election campaign concerning the state of the evidence for the claim that children had been thrown overboard from SIEV 4": Senate Committee for an inquiry into a certain maritime incident, *Report* (23 October 2002) xxiv <http://www.aph.gov.au/senate/committee/maritime_incident_ctte/report/contents.htm>.
[26] *Constitution*, s 7: "directly chosen by the people'.
[27] 'federal' in the sense of representative of the federation of the States.
[28] *Constitution*, s 53. See n 3 above.

federation and that the States meet as equals in its chamber. In our constitutional arrangements, the Senate acts as a *check* on responsible government and is not beholden to this doctrine.

Responsible government is one aspect of British constitutionalism adopted by the Framers, and so is Parliamentary Sovereignty. Subject to the Constitution, in any dispute between the branches of government, the Parliament is supreme.[29] This is because, in the strictest sense, the People do not elect a government, but rather the People elect a Parliament from which a government is formed. The proposals in the Discussion Paper, which seek to give the Executive greater control over Parliament, run contrary to this important constitutional doctrine.

2.6 'good governance' and the Senate

The Discussion Paper endorses Prime Minister Sir Robert Menzies' comment that "good governance, secure administration"[30] are made impossible by the Senate's power to block Bills. This is a refrain often heard by governments that do not control the Senate. It is an inevitable expression of the frustration of an Executive that does not control both Houses of Parliament.

But 'good governance' does not equate to a government getting its way all the time. Governments are not elected to rule unchecked; they rule subject to the Constitution. Neither are constitutional checks and balances about effectiveness or efficiency. Instead, they are designed to guard against tyranny.

The Framers knew this, and that is why the Senate was given equal legislative power to the government-controlled House of Representatives.

2.7 government mandates and the Senate

The Discussion Paper insists that "minor parties…have a responsibility to respect the basic mandate of a government's stated agenda".[31] In a democracy, this is an absurd proposition and a simple example will suffice to illustrate this.

This proposition would oblige a Greens senator, democratically elected upon a pro-Kyoto Protocol platform, to vote *for* any government legislation that increased Australia's greenhouse gas emissions, thereby betraying their democratic constituencies.

Mutatis mutandis, this proposition would see National Party senators positively obliged to vote *for* the recognition of same-sex relationships in Federal law under a federal Labour government.

It should be remembered that *everyone* elected to Parliament has a mandate – not just a government. Besides, governments may be elected on a platform, but the Bills, or certain aspects of Bills, that come before the Senate during a government's three-year term are not always a part of that platform.

[29] "the Parliament is sovereign over the Executive": *Victoria v Commonwealth & Hayden* ('AAP case') (1975) 135 CLR 338, 406 (Jacobs J).
[30] quoted in Discussion Paper, n 1, 25.
[31] Discussion Paper, n 1, 29.

3. Double Dissolution, the People & joint sittings

3.1 introduction

Section 57 is an extremely powerful constitutional weapon, which the Framers have placed in the hands of the Executive. It is designed to resolve deadlock between the Houses; and, by implication, to resolve the situation where a government's legislative programme is frustrated by the Senate.

The resolution mechanism is a joint sitting of both Houses of Parliament. But because the numbers in the Lower House will overwhelm the smaller number of Senators in any joint sitting, a very important democratic safety valve must be deployed before a joint sitting occurs: a double dissolution.

The dissolution of *both* Houses of Parliament forces *all* Members and Senators to submit to the judgment of the People. This is a unique and remarkable feature of Australian democracy and Australian constitutionalism. It is not appropriate for Parliament to resolve an internal deadlock between the equally powerful Houses without first going to the People. The Framers knew this and that is why they drafted section 57.

The proposals in the Discussion Paper would take the power to determine the outcome of a joint sitting out of the hands of the People and deliver it to the Executive. Option 1 does this absolutely – removing the People from the process of resolution completely. Option 2 is also an illegitimate use of a joint sitting because it denies the People their right to pass judgment on the *entire* Senate before a joint sitting.

3.2 section 57 is not unworkable

Incumbent governments have lost power in three out of a total of six double dissolution elections since Federation.[32] The Discussion Paper portrays this as a failure of section 57; as an example of section 57's 'unworkability'.[33]

UNSWCCL believes that this, rather, demonstrates the **strength** of section 57.

Section 57 provides a mechanism for the People to have a say about the Bills that triggered the double dissolution. What could be more democratic?

Section 57 is a cleverly crafted mechanism allowing the People to deliver their verdict on contentious legislation. That such a mechanism exists – a mechanism that puts a government claiming a mandate to proof by election – is a credit to the Framers of our Constitution. As a bulwark of Australian democracy, section 57 is far from 'unworkable'.

Section 57 can only be described as 'unworkable' by governments who have their legislative programme frustrated by the Senate and who fear the judgment of the People.[34] The Discussion Paper acknowledges that "it is a major risk for any government to call a double dissolution election".[35] In fact, historically, a government has a 50-50 chance of losing office.

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[32] Discussion Paper, n 1, 25.
[33] Discussion Paper, n 1, 25.
[34] this is also reflected in the array of past proposals to 'reform' s 57: see Discussion Paper, n 1, Chapter 7.
[35] Discussion Paper, n 1, 32.

Perhaps governments think that section 57 is 'unworkable' because it cannot guarantee that the People will return them to office with a majority in both Houses. But Section 57 is not meant to guarantee that a government's legislation gets through Parliament, it is meant to ensure that the People are the ultimate arbiters in the resolution of legislative deadlock.

Section 57 is not 'unworkable' or weak, but rather strong and democratic.

3.3 section 57 gives the Executive enormous power over the Senate

The Framers have, in section 57, provided a powerful tool with which to resolve legislative deadlock. A tool that was, at the time of its devising, unique in the world: the power to dissolve the house of review.[36] This tool is placed in the hands of the Executive, because only the government may call a double dissolution election. This is a powerful threat that a government can wield against an obstructionist Senate. Most other Upper Houses are not vulnerable to government-initiated dissolution.

It is extraordinary that the Discussion Paper advocates that the Executive be given even *more* power than this.

3.4 conclusion

UNSWCCL submits that, despite the premise of the Discussion Paper, there is nothing in fact wrong with section 57. Instead, the problem lies with governments that believe they should be able to govern unchecked by Parliament (in the form of a 'hostile' Senate) or the People (in the form of a double dissolution election).

If a government wants its controversial legislation through it already has several options: compromise and negotiate with the Senate; or take the legislation to the People by dissolving the Parliament. Double dissolution exposes both government and the Senate to the judgment of the People. As a prerequisite for a joint sitting, the double dissolution is a democratic innovation of the Framers that should be jealously guarded by all Australians.

[36] Quick & Garran, n 4, [266], 687-688.

4. Specific Comments on the Options

4.1 introduction

These proposals seek to centralise Executive and Legislative power in the House of Representatives. This is done by using the overwhelming numbers of the government-controlled House.[37] In fact, in the Parliament as constituted after the 2001 election, the incumbent government has an *absolute* majority at any joint sitting.[38]

Section 57 currently requires a double dissolution election before a joint sitting may be called, this ensures that the People have a say in the outcome. These proposals attempt to introduce a mechanism for calling a joint sitting without involving the People at all.

The Framers of section 57 were true democrats, believing that the People should be consulted before a joint sitting could be called. The authors of the Discussion Paper, who wish to give governments the power to call joint sittings without consulting the People, would do well to develop an affinity for the democratic spirit with which the Framers infused section 57.

The bottom line is that this is a power grab by the Executive. The government, by definition, already controls the House of Representatives. When it is faced with a 'hostile' Senate, the government wants the power to call a joint sitting of Parliament *without* involving the People. The whole point is to circumvent and undermine the important constitutional check of a democratically-elected Senate.

4.2 further comments on Option 1

Option 1 recommends a joint sitting without an election. UNSWCCL believes that this proposal reduces the role of the Senate to a procedural hurdle – a rubberstamp.

The system of proportional representation introduced in 1948 means that it is difficult for a single political party to gain a majority in the Senate. This is acknowledged in the Discussion Paper but it is viewed as a negative or problematic aspect of the Australian parliamentary system.

From the time that the Australian Constitution was drafted, it was acknowledged that a system of checks and balances was necessary to ensure the government was not able to abuse its power in the House of Representatives. The judicial system plays an important role in this system of checks and balances, but it does not have the power to protect abuse of the rights of groups or individuals where they are threatened by government legislation, such as the ASIO Bill.[39] Only the democratically-elected Senate has that power.

In fact UNSWCCL is deeply disturbed by the suggestion in the Discussion Paper that joint sittings could be used to push through matters of 'national security'.[40] If a government had the power to call a joint sitting at whim, thereby overwhelming the Senate with its sheer numbers in the House, UNSWCCL is concerned that a government

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[37] In the Parliament as constituted after the 2001 election, there are 150 Members of the House of Representatives and 80 Senators.

[38] 119 of the 230 members of Parliament, representing 58.3% of all members.

[39] *ASIO Legislation Amendment (Terrorism) Bill 2002 [No.2]*

[40] Discussion Paper, n 1, 32 & 40.

could ride roughshod over the civil liberties of Australians in the name of national security or the war on terror.

Option 1 removes this power from the Senate and does not require the government to amend a Bill that the Senate has twice (or even three times as also proposed) rejected. Acknowledging that, historically, a government has the requisite numbers to pass an absolute majority resolution in a joint sitting of Parliament,[41] to allow this to occur after the Bill had been rejected twice by the Senate entirely removes the role of the Senate as a check on the government's power. It also removes the ability of the various opinions of the Australian public to be heard and to count through the Senate committee process, or through the requirement of a double dissolution and an election as currently provided by section 57.

To argue that this option is justified because it saves time and expense is flawed because it uses measures that are not appropriate and do not acknowledge the fundamental role of the process of review conducted by the Senate.

As previously stated, the Senate simply becomes a procedural hurdle.

4.3 further comments on Option 2

The Discussion Paper itself outlines additional problems with using a general election, rather than a double dissolution, as a trigger to convene a joint sitting of Parliament.[42] We will not repeat those problems in this submission.

Option 2 acknowledges a key pitfall in Option 1, being the lack of accountability of the government to the Australian public in respect of a particular Bill, and provides that an election must be held before the Governor-General can convene a joint sitting to consider a Bill which has been previously rejected twice. Nevertheless, it should be noted that Option 2 is clearly not the preferred option in the Discussion Paper.

UNSWCCL considers the requirement that a Bill not be put to the Senate after an election of the House of Representatives only, or the House of Representatives and a half-Senate election, again fails to acknowledge the role of the Senate as a check on government power.

Further, it makes no sense to allow a joint sitting after a House-only or House & half-Senate election. This is because deadlock occurs between the entire House and the entire Senate. If a joint sitting to resolve deadlock is to occur, then the entire House and the entire Senate should be held accountable to the People at a double dissolution election. Nothing else makes sense. The Framers understood that and that is why section 57 requires a dissolution of both Houses.

[41] in fact the Coalition government elected in 2001 has a four seat majority. See n 38 above.
[42] Discussion Paper, n 1, 42-3.

5. Appendix: The Senate and the Popular Vote

This appendix explains the method used to demonstrate that Senate majorities can both reflect majorities *and* minorities of the popular vote.[43] The method is not intended to be statistically rigorous, but only to give an approximate analysis of voting patterns. The margin of error is unlikely to be so significant as to alter the conclusions drawn from this analysis.

This analysis is based on *first preference* voting figures published by the Australian Electoral Commission (AEC). The first preference votes for the past two half-Senate elections were combined in order to reflect the Senate as it is presently constituted, from July 2002.

Group	1998 Totals			2001 Totals		
	votes	%	#	Votes	%	#
LNP	4,225,736	37.7	17	4,838,322	41.6	20
ALP	4,182,963	37.3	17	3,990,997	34.3	14
DEM	947,940	8.5	4	843,130	7.3	4
GRN	244,165	2.2	-	574,543	4.9	2
HAN	1,007,439	9.0	1	644,364	5.5	-
HAR	24,254	0.2	1	0	0.0	-
FORMAL	11,211,903			11,627,805		

Group	COMBINED TOTALS		
	Votes	%	#
LNP	9,064,058	39.7	37
ALP	8,173,960	35.8	31
DEM	1,791,070	7.8	8
GRN	818,708	3.6	2
HAN	1,651,803	7.2	1
HAR	24,254	0.1	1
FORMAL	22,839,708	94.2	80

All figures are available from the AEC's website: http://www.aec.gov.au/.

The figures for the Liberal Party, National Party and Country Liberal Party are combined into one block ('LNP'). The figures for the Australian Greens and Greens (WA) are likewise combined ('GRN').

It should be noted that no figures are available for Senator Harradine ('HAR') in the 2001 election, because he was not up for re-election in that year. Senator Lees, who now sits as an independent Senator, is included in the figures for the Australian Democrats ('DEM'). One Nation ('HAN') has only one Senator.

Because the figures for the two elections are combined, each elector who voted in both elections is counted twice. Following the AEC standard, informal votes are ignored when calculating percentages.

[43] see "Senate majorities and Senate minorities" on page 4 above.

With these figures it is statistically possible to construct Senate majorities and examine their underlying popular vote, based on first preference votes. The combinations of voting blocks used to construct these Senate majorities might not occur in reality, but they serve only to demonstrate the point that Senate a majority can mean many things.

The following five scenarios show how the underlying vote corresponds to different combinations of Senate majorities:

scenario	combination	votes	%	#	majority
C1	**LNP+GRN+HAN+HAR**	11,558,823	50.6	41	+1
C2	**LNP+DEM**	10,855,128	47.5	45	+5
C3	**ALP+DEM+GRN**	10,783,738	47.2	41	+1
C4	**ALP+DEM+HAR+HAN**	11,641,087	51.0	41	+1
C5	**LNP+ALP**	17,238,018	75.5	68	+28

It can be seen from the five scenarios above, that Senate majorities can represent *both* underlying popular majorities and minorities. Scenarios C1 and C4 represent popular majorities. The Senate majorities in C2 and C3 do not reflect underlying popular majorities. This is starkly illustrated by the *five*-seat majority of C2, which still represents less than half of the popular vote but which nevertheless delivers the governing Coalition a majority in the Senate.

It is also worth noting that with 75.5% of first preference votes, the Coalition and ALP control 85% of Senate seats.