

The Role of the Senate*

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The first step towards an assessment of the role of the Senate in Australia's Constitution and system of government is an appreciation of the intention of the framers of the Constitution who ordained it.

The intention of the framers

The purpose of the Senate was to ensure, by securing equal representation of the states, regardless of their population, in one house of the Commonwealth Parliament, that the legislative majority would be geographically distributed across the Commonwealth. In other words, it would be impossible to form a majority in the legislature out of the representatives of only one or two states. Without that equal representation in one house, the legislative majority could consist of the representatives of only two states, indeed, of only two cities, Sydney and Melbourne, and this would lead to neglect and alienation of the outlying parts of the country.

This rationale of the Senate is illustrated by two statements by framers of the Constitution, one conservative and one radical democrat:

... it is accepted as a fundamental rule of the Federation that the law shall not be altered without the consent of the majority of the people, and also of a majority of the States, both speaking by their representatives ...¹

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... the great principle which is an essential, I think, to Federation—that the two Houses should represent the people truly, and should have co-ordinate powers. They should represent the people in two groups. One should represent the people grouped as a whole, and the other should represent them as grouped in the states. Of course majorities must rule, for there would be no possible good government without majorities ruling, but I do not think the majority in South Australia should be governed by the majority in Victoria, or in New South Wales ... If we wish to defend and perpetuate the doctrine of the rule of majorities, we must guard against the possibility of this occurring.²

This concept of a geographically distributed majority was also embodied in the provision for alterations to the Constitution: an alteration cannot pass unless agreed to by a majority of voters in a majority of states as well as an overall majority.

This rationale explains why the Senate was given powers in relation to proposed laws virtually equal to those of the House of Representatives. The Senate must assent to every law to ensure that it has the support of the geographically distributed majority. Section 57 of the Constitution, however, provides that, in cases of deadlock between the houses as described in that section, following a general election for both houses, if the deadlock persists, a proposed law in dispute can be passed by a joint sitting of the two houses. In other words, the simple majority represented in the House of Representatives can in those limited circumstances override the geographically distributed majority in the Senate, provided that the simple majority is not too narrow.

Common misconceptions

There are several common misconceptions about this constitutional arrangement, which confuse constitutional discussion in Australia, and it is necessary to dispose of them.

Because the framers used the shorthand expression ‘States’ House’ in relation to the Senate, it is assumed that they intended that senators vote in state blocs and according to the effect of proposed measures on the interests of particular states. Because senators have never voted in this way, it is assumed that the Senate has not achieved its original purpose. The framers’ concept of a geographically distributed majority, however, did not entail any such strange behaviour on the part of senators. That concept is perfectly consistent with the formation of a legislative majority across all states and a legislative minority also formed across all states; the point is that it is not possible for the majority to come from only the two cities of the two biggest states.

A related misconception is that Australia was intended to have a system of government basically similar to that of the United Kingdom. This misconception is embodied in the frequently heard statement that we have a ‘Westminster system’. On

¹ Sir Samuel Griffith, quoted by Sir Richard Baker, *Official Records of the Debates of the Australasian Federal Convention* (hereafter *Debates*), 23 March 1897, p. 28. The convention debates are online at www.aph.gov.au/senate/pubs/index.htm.

² *Debates*, Dr John Cockburn, 30 March 1897, p. 340.

the contrary, the framers of the Constitution explicitly and deliberately departed from the British model. As one of them said:

Why, in this constitution which we are now considering, we have departed at the very start from every line of the British Constitution ... We are to have two houses of parliament each chosen by the same electors ... We are to have, instead of a highly centralised government such as they have in Great Britain, a division of powers.³

These non-British elements were combined with the British system of the executive government consisting of a cabinet formed out of the party having a majority of the House of Representatives. The total system, however, was unlike any other.

Related to the 'Westminster' misconception is what might be called 'the 1911 myth'. On the assumption that the Australian framers simply copied the British constitution, it is said that, if only they had drawn up the Constitution after 1911, they would have followed the British Parliament, which effectively deprived the House of Lords of its legislative powers in that year. On the contrary, the framers explicitly stated that the Senate was to be quite different from the House of Lords, which was regarded as effectively powerless by convention even in the 1890s: the Lords were then referred to as approaching 'a mere gilded ceremony'.⁴

Has the intention been achieved?

When the intention of the framers in devising the Senate is properly understood, it is readily seen that the intention has been fulfilled. It has not been possible for a majority in the legislature to be formed out of one or two states; governments have not been able to rely on the votes of Sydney and Melbourne alone.

This is demonstrated by the contrary case of Canada, where the absence of an Australian-type Senate and only one elected house has allowed governments to be formed largely on the votes of Toronto and Montreal. This has led to the extreme alienation of the outlying provinces from the central government and consequent political difficulties in that country.

The geographically distributed majority continues to work even where voters in the various states vote for the same political parties, because no political party can afford to neglect any state.

This feature of Australia's constitutional design is like the operating systems software on a computer: the user is largely unaware of it as he or she employs the applications software to perform various tasks, but without it the system does not work. The applications software in the Senate is proportional representation.

³ *Debates*, Sir Richard Baker, 17 September 1897, p. 789.

⁴ *ibid.*, p. 784.

Proportional representation

The use of proportional representation for Senate elections since 1948 has ensured that, as well as producing a geographically distributed majority, the Senate produces what might be called an ideologically distributed majority. Proportional representation ensures that the legislative majority more accurately reflects the division of views and opinions in the country and the voting pattern of the electors. In particular, it awards seats in the Senate to political parties nearly in proportion to their share of electors' votes.

The single-member constituency system used to elect the House of Representatives seeks to ensure that a party majority is produced representing a plurality (not necessarily a majority) of the electors. Governments are formed in that house by the party which receives more seats and, it is hoped, more votes, than any other party. That majority party, however, usually does not represent a majority of the electors; normally, a majority of seats is won with forty-odd per cent of the electors' votes, that is, a plurality of votes. In some cases a majority is achieved even without a plurality of votes; in other words, the majority party receives fewer votes than another party. This system also awards representatives only to major parties, and electors who vote for other parties go unrepresented.

These features are illustrated by various federal elections, but the 1998 election illustrates all of them. In that election, only the Liberal/National parties and the Labor party won seats in the House of Representatives, although they achieved only about 40 per cent of the votes each, and about 20 per cent of the electors who voted for other parties were not represented (one independent was elected). Moreover, the winning coalition, the Liberal/National parties, won fewer votes than the 'losers', the Labor Party, the 'winners' gaining 39.5 per cent and the 'losers' 40.1 per cent.

This situation of the 'winners' achieving fewer votes than the 'losers' is quite common: since 1949 the winning party has received fewer first preference votes than the other major party in three elections, 1954, 1987 and 1998. Preferential voting does not overcome this problem. In five elections since 1949 the winning party has had fewer votes than the losing party after the distribution of preferences, in 1954, 1961, 1969, 1990 and 1998.

The system of proportional representation in the Senate ensures that parties win seats very nearly in proportion to their share of votes. A party cannot gain a majority with a minority of votes. Thus, in the 1998 Senate election the major parties gained about 40 per cent of the seats each, while the electors who voted for other parties shared out the remaining seats. (The actual percentages of votes are different for the two houses, because some electors vote for different parties in the two houses.)

This situation makes the claim by governments to possess a 'mandate' meaningless. In accordance with the intention of the framers, the two houses provide two different reflections of the electors' voting patterns. Equal representation of states in the Senate ensures that a law does not pass unless it is supported by majorities in a majority of states. Proportional representation in the Senate ensures that a law does not pass unless it has the support of the chosen representatives of a majority of voters, thereby enhancing the performance of the framers' intention.

Accountability

Governments are supposed to be accountable to parliament, and through parliament to the electorate; that is, governments are supposed to give account of their conduct of public administration so that the electorate can pass judgement on their performance.

Under the cabinet system, however, governments normally control lower houses through disciplined party majorities. Lower houses are not able to hold governments accountable, because governments simply use their majority to limit debate and inquiry in relation to their activities. Indeed, governments use their lower house majorities to suppress and limit accountability. They thereby seek to conceal their mistakes and misdeeds and prevent the electorate passing an informed judgement.

In this situation, upper houses not controlled by the government of the day are the only avenue for accountability to parliament.

The Senate, by inquiring into the activities of government, often through committees, regularly compels government to account for its activities when it would not otherwise do so.

The Senate has adopted a range of accountability mechanisms:

- A committee scrutinises delegated legislation, laws made by the executive government, with independent advice and in accordance with criteria related to civil liberties and proper legislative principle. In some other jurisdictions delegated legislation has escaped parliamentary scrutiny and governments can virtually make laws by decree. In conjunction with the establishment of the committee, the Senate developed laws to ensure that delegated legislation may be vetoed by either house.
- A comprehensive standing committee system allows regular inquiries into, and the hearing of public evidence on, matters of public concern, including proposed legislation.
- The Scrutiny of Bills Committee looks at all proposed laws, using the criteria applied to delegated legislation.
- If ministers fail to answer questions on notice (questions submitted by senators in writing) within 30 days, they may be required to explain that failure in the Senate.
- Orders for production of documents require governments to produce information on matters of public concern. (For example, the Senate requires all government departments to place on the Internet lists of their files, as guidance to people making freedom of information requests.)
- Legislation is frequently amended in the Senate to include provisions for the appropriate disclosure of information (in this category is the Freedom of Information Act itself, which was extensively amended in the Senate).

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- Procedures allow the regular referral of bills to committees, so that any bill may be the subject of a public inquiry with opportunity for public comment. (The current government initially resisted the reference of the GST legislation to committees, even though, as was pointed out, such a complex legislative change merited close scrutiny and public comment.)
 - Standing committees have the power to examine the annual reports of departments and agencies to determine the adequacy of the reports, and to inquire into the operations of particular departments and agencies at any time.
 - Twice-yearly estimates hearings provide opportunities for senators to inquire into any operations of government departments and agencies, with the ability to have follow-up hearings on particular matters.
 - Deadlines for the receipt of government bills prevent governments introducing large numbers of bills at the end of a period of sittings with the demand that they be passed during that period of sittings. These deadlines attempt to remedy the ‘end-of-session rush’ and ‘sausage-machine legislation’.
 - Governments are required to explain any delay in bringing into effect Acts of Parliament duly passed by the two houses.
 - Taxation legislation is amended to ensure that it is not backdated to vague pronouncements by ministers (retrospectivity is accepted if the backdating is to a clear statement of government legislative intent).
 - Other measures, for example, require governments to respond within a limited time to parliamentary committee reports or to explain a failure to do so, and place time limits on answers at question time, so that ministers cannot give 20-minute speeches when they are supposed to be answering questions.

The significant point is that most of these measures were opposed by the government of the day and were put in place only because the Senate is not under the control of the government.

Recent examples of the Senate forcing governments to be accountable are provided by the procedure of requiring the production of documents. But for this procedure, the public would not have discovered the facts about the importation of magnetic resonance imaging machines involving possible fraudulent and excessive claims on the Commonwealth, and nor would the basis and actual results of the government’s policy for determining grants to public and private schools have been discovered.

Upper houses have only one hold over governments, their ability to withhold assent from government legislation. This is the only reason for governments complying with accountability measures: as a last resort, an upper house with legislative powers may decline to pass government legislation until an accountability obligation is discharged. An upper house without legislative powers could simply be ignored by a government assured of the passage of its legislation. A reviewing house without power over

legislation would be ineffective. This is why the framers gave the Senate full legislative powers.

This does not mean that the Senate rejects many laws proposed by the government; many government bills are amended to make them more acceptable, and many are framed so as to secure passage by the Senate.

The future

So long as the electors continue to deny any party a majority in the Senate, the Senate will be able to continue to ensure that legislation is not passed without the support of a majority of electors, as nearly as that support can be ascertained, and to hold governments accountable for their conduct of public affairs.

There are certainly areas in which the Senate's performance could improve. Although the committee system provides a valuable opportunity for the public to participate in the legislative process, legislating is an over-hasty process and could be made more deliberate. The Australian houses pass more bills in less time than their counterparts in comparable countries. The scrutiny of legislation through committees is not given sufficient time to work, and interested members of the public are set unreasonable deadlines. A more consistent and systematic approach to requiring ministers and government departments to account for their activities would also be valuable; at present the accountability mechanisms operate very patchily.

The performance of the Senate, and any house of a parliament, is ultimately in the hands of the electors. There may well be room for improvement in the civic-mindedness and attention to public affairs of the members of the public, but here as elsewhere they need information to make judgements. Public interest groups should monitor the performance of houses of parliaments in looking at legislation and holding governments accountable. Then, informed by the resulting information, enough electors might use their votes to bring about better parliaments.