

# **The Senate and Good Government\***

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Now that the dust from the federal election of last October has settled, a new phase in the cycle of government has begun. We have a freshly elected government, even if with a reduced majority in the House of Representatives, keen to implement its program for new legislation. Some key components of this legislative program were part of the election platform of the parties now in office, and the government believes that it has the right to implement its election promises with little hindrance from the parliament. The government claims it has a mandate.

This raises, yet again, the question of what is the nature of this mandate that governments claim to acquire when they win office. In a parliamentary system with a single chamber and disciplined parties, the government, by definition, has the support of a majority of members, and the question of an electoral mandate has little meaning—if the governing party or parties want to pass a law, there is little that a parliamentary opposition can do to stop them. In these circumstances, the term ‘mandate’ becomes part of the political rhetoric about whether there was sufficient prior public discussion of a proposed law rather than whether the government should be able to pass the legislation.

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The issue is more complicated in a bicameral system since the governing parties may not control a majority in the upper house. In Australian federal politics, the issue appears very complicated indeed. We have a bicameral parliamentary system with the two chambers, the House of Representatives and the Senate, having similar powers. Both chambers are directly elected by the people but in ways that give each a claim to be more representative than the other. When the balance of power in the upper house is held by a few members none of whom belong to the largest two parties, we have the most complicated situation of all—everyone can claim to have a mandate for something. The government claims it has a mandate because it has won a majority of seats in the lower house. The opposition claims that it has a mandate to oppose the government's legislation because that is what oppositions are for, and because more voters voted against the government than voted for it. And the minor parties and independents in the Senate can claim that they were elected precisely because their supporters wanted to modify the government's legislative program.

But perhaps it is not as complicated as it seems. The issue may be simply the extent to which governments must compromise when they make new laws—from this perspective no-one has a mandate to do anything except enter into negotiations. The present situation in the Commonwealth Parliament requires governments to compromise so that a larger group than the governing party, perhaps even a body of parliamentarians representing a real majority of voters, supports a proposed measure. This means that, quite apart from any amendments that may be required, legislation is closely scrutinised, and the government of the day and its supporting bureaucracy must publicly justify every proposed law to a legislative body whose support cannot be taken for granted.

Whatever one's perspective on politics, the virtues of such a system are at least arguable. This is why the hostility of sections of the news media to the Senate and to the need for governments to compromise is puzzling to the point of being worrying. It is understandable for governments to feel frustrated by the Senate, but why should some editorial writers and columnists feel such continuing antipathy to the chamber? Partisan preferences may explain animosity to the Senate on particular issues, but persistent criticisms of the Senate must spring from something deeper, some idea about good government that is inconsistent with legislative compromise. At base, the real question is whether the Senate is an important component of good government or an obstacle to it.

Much of the editorialising in the press presumes the Senate is an impediment to good government, but the assumptions on which this judgement is made are rarely discussed. It is the purpose of this talk to unpack these assumptions and to look at the implications of a view of government which is critical of the Senate's current role. The Senate, I believe, is much too important an institution to be subjected to a constant stream of press criticism based on a view of good government that is rarely, if ever, articulated.

One of the problems with the debate over the role of the Senate is that it is not really a debate. It is not as though competing views of the role of the Senate were analysed and discussed, and their merits weighed. All too often, comments about the Senate in the news media are framed in the context of a series of assertions, the truth of which is taken for granted and rarely justified, let

alone put in the context of rival views and alternative perspectives. These comments often revolve around phrases which encapsulate the conventional wisdom on the topic, phrases which sound incontestable but which slide over all the tricky questions. I have picked the six most common of these for examination.

### **The government is elected to govern**

A good one to start with is ‘the government is elected to govern’. This sounds so obviously true that it is impossible to dispute, but it is often used in a context which smuggles in several more meanings than the ostensible one. When the Senate is considering amendments to government legislation or proposes to send a measure to a committee for scrutiny, the phrase ‘the government is elected to govern’ is used as a way of attacking the Senate’s action. The phrase becomes shorthand for the view that, the government may not always be correct, but it has the right to have its legislation passed without undue interference from Parliament. A stronger version is that the country needs a government that can take action without having to go through the paraphernalia of parliamentary scrutiny and amendment.

The plausibility of the phrase is based on a confusion over the role of executive government. Of course the government is elected to govern in the sense that, once the ministry is commissioned, the government can use the vast range of legislation on the statute book and deploy all the resources of the public service to pursue its policies. It does not mean that the government can make any new law it wants by the stroke of the Prime Minister’s pen. Governing is not the same as legislating and, while the role of government includes making proposals for legislation, the only body that can make laws is the Parliament. So, even though it is true that governments are elected to govern, it is not true that they are elected to have passed any law they fancy. In fact, the whole point of parliamentary democracy is that governments are forced to submit proposals for new legislation to a representative assembly to gain consent for them. While party discipline may ensure that this consent can be taken for granted in the lower house of parliament, this is hardly something to be celebrated unless, of course, you are the government and don’t want your legislation scrutinised by anyone who is not of your partisan persuasion.

So, the reply to the statement that ‘the government is elected to govern’ is to ask whether this means that parliament should be abolished. The response will be a startled ‘of course not’ but, from that point, the discussion should begin to move in a more substantive and fruitful direction, focussing on the merits of particular policies and the plausibility of objections to government legislation.

It must always be kept in mind that the whole point of aphorisms like ‘the government is elected to govern’ is to preempt discussion of the merits of a particular government policy by appealing to a generality which is supposed to foreclose any further discussion or make opposition to the government’s policy appear illegitimate.

## **The government has a mandate for this policy**

There is no clearer example of this than the familiar claim by a government that it has a mandate for a particular policy. The subtext of this phrase is that no-one has a right to force the government to make amendments to a piece of legislation because the policy on which the legislation is based was widely canvassed at the election which returned the current government. To oppose such legislation, the mandate approach claims, is to deny the will of people, to thwart democracy or, at the very least, to make parliamentary government unworkable. In other words, opposition to the legislation or attempts to amend it by the Senate, are illegitimate. This is not a claim about the merits of the proposed law, but an attempt to forestall any such discussion.

The idea of the mandate and its ambiguities have been well canvassed elsewhere<sup>1</sup> but there are three aspects that have special relevance to the Senate. The first is that the mandate theory is another version of ‘the government is elected to govern’ approach. Parliament is to be excluded from the process of making laws if the executive claims a mandate. As the House of Representatives is a slave to the governing parties, parliament in this context means the Senate.

The second aspect is that it implies a view of voting for the House of Representatives which is breathtaking in its scope. It presumes that, by ranking some numbers on a ballot paper to elect a local member of the House of Representatives, each voter who voted for the Coalition parties endorsed the full sweep of the Coalition election platform and, in particular, all the details of its principal policies. This is as logically flawed as it is factually incorrect. And this is without the fact that the Coalition parties won only 40 percent of the popular vote earlier this year, and that the same election that re-elected the government also elected a Senate which will be even further from partisan control by the government than the current Senate.

But this doesn’t really matter because—and this is the third aspect—the claim of mandate has little to do with logic or fact but a lot to do with bluff. It is a psychological device to challenge the opponents of the government to a form of political chicken. The government, having recently won an election, feels the self-assurance that springs from being three years away from another election and believes it has a psychological advantage over its opponents. And it is a good move for the government to think this way because, at the very least, it will help it with the bargaining in the Senate that will inevitably take place when compromises have to be made.

This being said, it is a serious mistake to treat a debating tactic or the opening move in a long series of negotiations as though it were a serious commentary on our system of parliamentary government. The idea of the mandate has only the most tenuous and indirect application to parliamentary democracy. Claims made in the name of a mandate have the same purpose as other catch phrases used by government—to put its opponents at a psychological disadvantage by pretending that the government has secured the moral high ground on a matter of principle which, coincidentally, relieves the government of having to discuss the particular merits of the

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<sup>1</sup> Hugh Emy, ‘The mandate and responsible government’ *Australian Journal of Political Science*, no. 32, 1977, pp. 65-78.

policy or legislation. Put in this way, the mandate theory of government does not seem a very attractive one.

### **House of review**

The previous two phrases deal with objections to parliamentary involvement in shaping legislation. While these are used predominantly as a way of attacking upper houses that are not under the partisan control of the government, the sentiments can also be applied to the lower house of Parliament on those rare occasions when there is a minority government.<sup>2</sup> But the next phrase to be dealt with is explicitly concerned with the role of the upper house. That phrase is, 'we should have a house of review not a house of obstruction.'

Again, there is a certain plausibility to this claim. It implies that reviewing the government's legislative policy is acceptable, but a stubborn refusal to pass legislation or an unreasonable insistence on amendments is undesirable. The problem is, what is the use of review if it doesn't include the ability to insist on change? And one person's commitment to a reasonable amendment is another's stubborn refusal to see sense. The whole point of reviewing legislation is to take control of the reviewing process away from the government of the day. Otherwise, the reviewing process is of limited use and subject to partisan control by the governing parties. This is graphically illustrated by the ineffectiveness of lower house committees in reviewing legislation.

The real point of the 'house of review' comment is to attack the power of the Senate to amend or refuse to pass government legislation. The phrase implies that any use of the power to alter the government's legislative policy is unreasonable. In effect, this is a direct attack on the role of the Senate as an equal partner in the legislative process and as the only component of parliament that can act independently of the government to scrutinise its activities. To be brutal, the only way governments are going to be persuaded to negotiate with their partisan competitors is through the use of a powerful sanction, and the Senate's veto over legislation is the most powerful sanction it possesses. If that sanction were to be removed, the Senate's review of legislation would be largely ignored and the requirement for the government to negotiate over the final form of legislation would be removed.

It should be noted that the removal of the Senate's power to block legislation would have major consequences for all its other functions. Its committee system, its scrutiny of bills, and its power to keep governments accountable for their actions would all be seriously impaired. A house of review is not a house of review unless it has teeth. To pretend that the reviewing function would continue to work effectively if it were entirely dependent on the sweet reasonableness of governments is a fantasy.

What at first glance looks like an innocuous comment is really an attack on a view of government that values strong and effective parliamentary scrutiny of legislation and the continuing review of

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<sup>2</sup> Jeremy Moon, 'Minority governments in the Australian states: from ersatz majoritarianism to minoritarianism' *Australian Journal of Political Science* no. 31, 1995, Special Issue, *Consensus Policy Making*, pp. 142-163.

government administration in general. It is a view which rests on the assumption that the executive branch of government knows best and the ministers and their advisers should not be forced to amend their legislation, irrespective of the merits of change.

### **Unrepresentative (swill)**

Closely associated with challenges to the Senate's role in scrutinising legislation, are comments which describe the Senate as unrepresentative, with or without Paul Keating's additional epithet of 'swill'. If the previous phrases attack the ability of the Senate to challenge the government's legislative program, this phrase is a direct attack on the legitimacy of the Senate.

Once again, the comment is partially correct, or rather, it is explicit about one characteristic of the Senate even though it ignores several others. The Senate is not elected under a system of representation by population where roughly equal numbers of electors are grouped into electoral districts each returning one member. Instead, each state political community returns an equal number of senators even though the largest state, New South Wales, has more than ten times the population of the smallest, Tasmania. This means that each Tasmanian senator represents about 27,000 voters compared with each New South Wales senator who represents about 324,000 voters. This, as the popular but ambiguous phrase says, is not one vote one value.

Let us put the historical explanation of the composition of the Senate on one side, ignore the place of the Senate in the federal system, and concentrate on another aspect of representation. If elections were only about electing individuals, the criticism of the Senate as being unrepresentative might have some force, but if elections are about electing party representatives, the picture changes dramatically. The coalition parties won just under 40 percent of the vote for the House of Representatives at the last election, but gained a fraction over 54 percent of the seats. This means they won a third more seats than their vote would entitle them under an electoral system that fairly represented the party vote. The Senate election in contrast, produced a result at which the Coalition parties won 42.5 percent of the seats. Even including those senators who began their terms in 1996, the composition of the new Senate gives the Coalition 46 percent of the seats, a figure which is a much more accurate reflection of the party vote for the House of Representatives at the last election than the House of Representatives result itself.

This situation is the result of the Senate's use of proportional representation for the last fifty years, and the fact that support for the largest two party groupings is spread fairly evenly across all states and territories. As a consequence, the variation in the populations of the states and territories does not prevent the Senate from representing much more accurately and more fairly the pattern of party voting across Australia. It is the House of Representatives that is unrepresentative, not the Senate. This should be the response to anyone who claims that the Senate is unrepresentative. The Senate is certainly more than representative enough to have its actions underpinned by a powerful sense of popular legitimacy.

## **Minor party senators have only a small fraction of the vote**

Because representation is a complex issue, the question of fairness can arise in a number of forms. One that has recently acquired popular currency is the issue of the popular support for minor party senators who hold the balance of power in the Senate. In some respects this is a variation of the previous criticism—that senators from the smaller states represent very many fewer electors than those from the large states, and most minor party senators are elected from outside New South Wales and Victoria. But the point has also been made that minor party and independent senators have much more limited support than do senators chosen for the large parties and that their election is heavily dependent on the transfer of preferences from other candidates, including those from the large parties.

This is true as far as it goes, but it ignores the fact that large party senators are dependent on the flow of preferences too. In fact, if one wants to quibble, minor party and independent senators have more voters who make them their first choice than half the senators elected on major party tickets, that is, anyone elected second on a large party ticket. And this is true no matter which states are compared. So, Senator Harradine had over 24,000 Tasmanian voters who voted for him as their first preference, compared with under 3,000 New South Wales voters who chose Senator Faulkner as their first choice for the Australian Labor Party, and under 1,500 who chose Senator Tierney first for the Liberal/National Party ticket.

Once arguments descend to this level of detail, it is easy to lose sight of the main point. That is, that 25 percent of the electorate voted for parties other than the largest two party groupings at the last Senate election. This component of the electorate is always under-represented, even with proportional representation.<sup>3</sup> An extreme case is that of Pauline Hanson's One Nation Party which gained nine percent of the Senate vote but only 2.5 percent of the Senate seats contested at the last election, and will hold only 1.3 percent of the seats when the new Senate meets in July 1999. Even though minor party and independent candidates collectively won more than 20 percent of the House of Representatives vote and 25 percent of the vote for the Senate, they have ended up with a solitary member in the House (0.7 percent of the seats), and less than 16 percent of the seats in the new Senate.

All this means that minor party and independent senators speak for a quarter of the electorate and that, whatever principle of representation is used, they have a right to be heard and make their opinions felt. To undermine the legitimacy of the Senate is to deny a substantial portion of the Australian electorate the only effective voice they have in Parliament.

## **Held to ransom by a few minor party senators**

The final phrase, and one that has been getting a lot of play recently, is 'the government is being held to ransom by a few minor party or independent senators.' This is a special favourite of cartoonists whose message is the great power of these senators and the mendicant position of the government in dealing with them. It is common for editorials and press commentators to make

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<sup>3</sup> Campbell Sharman, 'The Senate, small parties and the balance of power' *Politics* vol. 21, 1986, pp. 20-31.

much of the unreasonable influence that a few senators can have on government legislative policy, and the capricious nature of the power they exercise on the shape of legislation. This is an especially powerful attack on the Senate since it can be easily dramatised for television news as a few senators wielding arbitrary and unaccountable power.

The first response to such descriptions is to point out that minor party and independent senators have no power unless one of the large party groupings permits them to exercise it. There is no point in holding the balance of power unless there is a standoff between the government and the opposition. It is always possible to neutralise the power of the small parties and independents if the largest two party groupings get together. Nor is this unusual, since there are occasions when both the Coalition and Labor parties have enough in common to outvote all other parties by a large margin.

Minor party and independent senators have influence only if the two largest partisan blocks refuse to compromise. An unwillingness to compromise, especially with the opposition, is an unfortunate side effect of the parliamentary process in the House of Representatives. There, the brutal fact of having the numbers encourages the government to have an arrogant disregard for the views of the opposition. This is reciprocated by an opposition that sees no reason to compromise when its major goal is simply to embarrass the government and keep its powder dry for the next election.

This may be the kind of strategy that is induced by the present structure of the House of Representatives, but it is not the way to make the most of the circumstances to be found in the Senate. By simply opposing the government, the opposition provides the opportunity for minor party and independent senators to negotiate with the government over the shape of proposed legislation. Because the opposition makes a habit of opposing government legislation, minor parties have been able to exploit the balance of power in a way which is now a major characteristic of the way the Senate operates. The power of a Senator Harradine or a Senator Colston is no more than the power given them by the opposition. It might also be noted that, if legislation is passed with votes of minor party and independent senators, the legislation will have broader support in the community than would be the case if it were passed by the governing parties alone—remember the 25 percent of the electorate who did not vote for either the government or the opposition.

At times it appears that the hostility directed at independent and minor party senators is fiercest among backbench members of the large parties who see members of parliament just like themselves having a major impact on the shape of legislation. Representatives of the large parties are bound by the iron bands of party discipline and trade off the freedom to vote according to the merits of legislation for the comfort of endorsement by a major party, and the possibility of the rewards of executive office. The freedom of action of minor party and particularly independent senators, and their high public profile, can be a source of resentment to other backbench members. This attitude is understandable, but it should not be adopted by anyone else.

There are other points that need to be made. Governments are not bound by the form of legislation passed by the Senate, nor are they passive actors in the legislative process. They have control of the majority in the House of Representatives and they can veto any bill that passes the



Senate just as the Senate can veto any bill that passes the House. But that is less than half the story—governments have a privileged position with the initiation of legislation and have all the resources available from the public service and a well oiled publicity machine to persuade and cajole the Senate of the reasonableness of the government's case. As a result, governments can usually get most of what they want through both houses of parliament, given strong justification and the time necessary for proper scrutiny. It is only when governments are impatient or see partisan advantage in passing legislation without amendment that they become openly hostile to the actions of the Senate in forcing compromise.

This is particularly the case with the composition of current Senate that continues until June 1999. The Howard government has a particularly favourable disposition of minor party and independent senators so that there are many opportunities for the government to find a successful compromise. A colleague at the University of Western Australia and I have devised an index which shows that the present Senate is more likely to be amenable to compromise with the government than at any time since the early years of the Hawke government. That is why the government is anxious to pass the GST legislation before July 1999, and why it will be successful in achieving this goal.

Another aspect of the legislative process that is often ignored, is the major compromises that have occurred before the legislation is introduced into parliament. The views of the relevant interest groups, the competing concerns of ministers and government departments, not to mention the considerations of the cost, constitutional validity, legal effect and partisan impact of the proposed law, all have to be accommodated. The major difference between these compromises and the ones that take place in the Senate is that the negotiations in the Senate are public, while the earlier compromises have been made out of the public view. It is a case of the Senate being criticised for doing in public what the government has been doing in private.

Some might argue that all the compromising that has gone on before the legislation is introduced is proof that further compromise in the Senate is unnecessary, but this is to miss the point entirely. All the compromising that goes on in the corridors of the public service is essentially harmonising the private interests of all those groups who have the political clout to make the government listen. Even the government, whose position is supposed to be to look after the public interest, is acutely concerned with its own partisan interest and in accommodating the rival perspectives within the government itself. When a minister introduces legislation into the parliament and claims there is no need for amendment, the government is trying to be judge and jury in its own case—it has not had to justify the provisions of the bill in public before all those interests who were excluded from earlier consultation have had a chance to examine the fine print of the measure. And this is without mentioning the need to justify the legislation to the broader public.

There is no question that the scrutiny of bills that occurs in the Senate can improve their technical coherence—all kinds of unforeseen issues are raised once legislation is open to the full glare of public scrutiny—but the main virtue of the process that is so painful to the government is that it permits the views of large constituencies outside the charmed circle of the executive and its advisers to have a say in shaping legislation. When a few senators are criticised for 'holding the government to ransom' the reason for this impasse is that these few senators are voicing the

concerns of a large section of the community. They are safeguarding the public interest in the strict sense of the term—they are requiring the government to give a principled justification of the details of its legislation, and to do it in public. Whether the government amends the legislation in the light of Senate requests is a matter for the political judgement of all the parties concerned, but the process of public scrutiny and justification is a vital one if legislation is to be seen as legitimate by the public at large.

Do the critics of the current role of the Senate want this process to be abolished? There is little doubt that political responsiveness and public accountability would be lost if the Senate could be overawed by the governing parties. It would be a brave person who argued that the legislative process in the commonwealth Parliament would be strengthened if the Senate could not force governments to negotiate over legislative policy. Holding to ransom in this context simply means holding the government to account for the detail of its legislation.

### **The broader issues**

There is a common theme running through all six aphorisms just discussed. This is that executive government and the partisan majority in the House of Representatives should be trusted to get on with the job of making laws without the possibility of formal obstruction during the legislative process in parliament. Public statements of disapproval are welcome and vigorous lobbying to amend legislation is perfectly legitimate but, once the objections move from the sphere of political commentary to that of parliamentary veto, disagreement with the wishes of the government loses its legitimacy. This is a well-established opinion but it rests on some key assumptions that those who often voice the view may not have thought about. In particular, the view comes down firmly on one side of a longstanding debate about two major difficulties that have beset democratic government as we know it.

The first difficulty is the problem of the scope of government. The liberal individualist tradition which is a vital strand in our political culture treats government with suspicion. While government is necessary to achieve those goals that require collective action, too much power will enable a government to act tyrannically and follow its own preferences rather than those of the citizens it is supposed to represent. From this perspective, government needs to be kept under constant scrutiny because of the extent of the power of the state and its ability to deprive citizens of their liberty and property. That is why a constitution is required as a higher law to protect the individual rights of citizens and to force governments to follow specified rules before the actions of the government are accepted as legitimate. Quite where to draw the line between giving the government enough power to discharge the wishes of the community, but not so much power so that it will tyrannise the community, is a tricky question over which opinions will differ. But the point to note is that those in the 'let the government govern' school are drawing the line very much in favour of the government and against the interest of the community in being able to check government.

What is more, it seems to me to be particularly inappropriate to give the government of the day a free hand in making new laws. There is a strong chance that much legislation will enhance the interests of the government itself, either politically or administratively, and this is precisely the

danger that the procedures of limited government are established to prevent. To complain about the obstructive role of the Senate and to argue that its ability to block legislation should be removed, is to give the government of the day monopoly power over the shape of new laws. This is a breach of the principle of limited government and would reduce parliament to being little more than a forum for discussion rather than an active participant in the legislative process.

Too often, the consequences of reducing the Senate's power are ignored in the heat of argument over the Senate's action so that, instead of focussing on the particular issues raised by the legislation, a broad brush condemnation of the Senate is provided. This is particularly noticeable when comparing the attitudes of the major parties when they are in opposition to their position when they are in government. A miraculous transformation occurs so that a willing acceptance of the Senate's ability to check government legislation when a party is in opposition, is translated into a hostile view of the Senate's role in blocking government legislation when the same party is in government. This is the worst kind of opportunism because it attacks the legitimacy of the whole system of representative democracy purely for partisan gain.

Of course governments will justify their position by arguing, as we have seen, that they have majority support for their policies demonstrated by their majority of seats in the House of Representatives, and that to deny the government the ability to pass its legislation is undemocratic. Let us forget, for the moment, that governing majorities are usually manufactured ones and assume that a government did in fact have the support of a majority of votes at the last general election. This raises the second major problem raised by our system of representative democracy—how important are majorities and where do they fit in a system that values the rights of individuals and minorities?

The founders of the United States constitution were acutely aware of this problem. In the debate over the design of the Constitution it was pointed out that a majority is simply a faction, even if a large one. That is, a majority is only a part of the community and not the entire society, and there is no guarantee that a majority will make decisions in the interest of all. Accordingly, it should not be possible for the majority to make decisions which prejudice the interests of the community as a whole. Now this is all very well, but how do you design a system of government to ensure that this won't happen? The answer is that it is impossible, and would be undesirable even if it were possible. At some stages of the governmental process, decisions have to be made, and a rule which prescribes that a majority will prevail is a vital part of all democratic systems. But—and this is a very big but—decisions made by majorities need to be in a context of institutions so that majorities in one forum can be harmonised with the views of minorities and rival majorities. The United States is an example of a system of government that goes out of its way to circumscribe the damage that majority factions can do to the community—some would say too far. Power is dispersed among many governmental institutions which must negotiate with each other and compromise if laws are to be passed and policy implemented.

Parliamentary systems like ours, although springing from the same basic traditions as that of the United States, give much greater play to majorities. Governments are chosen on the basis of a controlling majority of seats in the lower house of parliament. This means that majorities are not just a convenient way of passing legislation but are vital to the life of the government itself. Is it any wonder that governments are obsessed with majorities? This has always been a feature of

parliamentary systems but the stress on majorities has been greatly accentuated with the rise of the disciplined mass political party in the early years of this century. Party politics has helped to dichotomise political life and, when coupled with a parliamentary system, has the power to divide every question into two parts, a majority and a minority.

This makes for a highly combative and adversarial style of politics where compromise is seen as a sign of weakness. Unfortunately, this approach does not sit well with other components of our political system. The federal system and the tradition of strong upper houses, not to mention the courts and our entrenched constitutions, all work on the assumption that government action requires a process of weighing up a number of arguments and harmonising a variety of views. In this respect, the Australian tradition has more in common with that of the United States than it does with the United Kingdom. Power is dispersed among a number of institutions, agreement between which is necessary before policy is settled and action taken. This tradition has been labelled ‘consensus democracy’ by the American political scientist Arend Lijphart,<sup>4</sup> in contrast to majoritarian democracy where power is concentrated in a single institution, the parliamentary executive, which can take action on its own in the name of the majority.

The problem for Australia is that majoritarian and consensus democracy coexist in the same governmental system.<sup>5</sup> This is not just a practical problem that makes it difficult for a government to get its legislation through the Senate; it also represents a clash between two competing views of what good government is about. For the majoritarians, it doesn’t matter that there are significant minorities opposed to a measure, all that is necessary for legitimate action is that the government has the numbers in the legislature. For those who support consensus democracy, majority support in a single forum is not enough. Good government requires that there is an institutional structure that compels governments to gain the support of more than a simple partisan majority, especially when, on most occasions, the majority that is supposed to legitimate government action is usually only a large minority and a transient one at that.

This is the reason why a clash between the government and the Senate is more than a simple case of disagreeing over the details of legislation. It is a clash of views over what legitimates government action. Unfortunately, the rash of editorials and newspaper commentary attacking the Senate never spell out their majoritarian assumptions. The authors hide behind one or more of the conventional wisdoms I have mentioned in this talk. In part this may be because they have not been forced to articulate their views of good government, but it is also a reflection of the fact that a majoritarian view of democracy is not particularly attractive once its features are spelled out. It presumes an all-powerful central executive in Canberra with no formal checks on the ability of the government to enforce existing laws or pass new ones. Not many Australians would relish this.

This is why, to my mind, talk of reforming the Senate to remove its potential to force governments to compromise is mind boggling, and could be ignored if it were not taken seriously

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<sup>4</sup> Arend Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-one Countries*, New Haven, Yale University Press, 1984.

<sup>5</sup> Campbell Sharman, ‘Australia as a compound republic’ *Politics* vol. 25, 1990, pp. 1-5.

by sections of the news media. Here we have an institution that is working in precisely the way most of us want our legislature to operate, the only disgruntled players being the government of the day and those interest groups who believe they can do better lobbying the government than persuading minor parties in the Senate. It is the last institution that needs reform, and I hope that there is enough vocal support for its activities to ensure that no government would be rash enough to try to change it.

This talk is intended to show that the strongest support the Senate has is the powerful example of the good work it can do in making legislation more responsive to the range of views in the community. And, given the quality of the attacks on the Senate's role, it may be a case of the Senate not needing to worry too much when all its critics have in their armoury is a bundle of clichés. Still, changes to the structure of government have been made for less cause, and for those who value good government, the price of maintaining the Senate's current role may be a more vigorous public defence. Let that, as the government would say, be our mandate.



**Question** — I have a question about the Democrats and the position they take in elections and the positions they take when they actually perform their role. The Democrats say that they're there to keep the so-called bastards honest. Yet it seems to me that the Democrats really are running a party that has an ideological position and policies that it wants to push, which aren't necessarily in line with keeping the bastards honest. No more so than often the Greens or other parties. So my question is, do you think that brings the Senate into disrepute when the one party that claims to keep the bastards honest, in fact often doesn't. For example, I would like to see the Democrats say, well we'll agree to a third of the sale of Telstra on the condition you have a fixed term of government—you put a referendum up, which gives more honesty and transparency to the Government's timetable. Or a demand that we will agree to some GST reform, on the condition that prior to an election, budget figures are released so we don't have a whole election campaign based on incorrect figures, which just leads to complete dishonesty in an election campaign.

**Professor Sharman** — I'm old enough to remember the days when the Democrats didn't want to be a political party like other political parties. But time, habits and the need to get elected on a regular basis has made the Democrats a party like any other party except possibly the Greens. I think the role of minor parties in the Senate is a bit like elections themselves; that is, what happens *because* of them is more important than what happens *at* them. I agree that there all kinds of things that, if you wanted to take parties at their word or you wanted to force governments to be more responsive or more accountable, you would hope that Senators and parties would do. But I'm not really justifying the particular role or position of any party or any senator. My point is that it's very important to have them there, and that the logic of their position and the structure of the Senate will guarantee that outcomes are very much more likely to be in the public interest with them there, than with them not there, whatever their stated intent.

**Question** — I'm just wondering how much you might be able to tell us about the processes that have involved actors both within and outside the Parliament in arriving at the compromise just last night on the health insurance legislation. Because it seems to me that that perhaps is a good case study in the way the parliamentary system operates at the moment, with the outside pressure groups and the composition of the Parliament that you've described.

**Professor Sharman** — There is definitely a good honours thesis in that. One of the things I try and tell my students, and why we changed our name from the Department of Politics to Department of Political Science, was to make sure that we had a reasonable case for disclaiming any knowledge about how things actually went on in any practical case. In general, I know what happened, but I have no more practical knowledge about the detail than anyone else who hasn't read the paper properly. I should say it's a good question, it's a good example of the way the system works, but I don't know the details.

**Question** — That was a strong defence of the Senate. Would you be prepared to translate that to the Senate of 1975?

**Professor Sharman** — The short answer is, yes. Perhaps I should expand on that. The interesting thing about the Senate in any institutional change—and you can see this occurring in the upper house in Western Australia—is the move from a situation where a senate or an upper house doesn't have a sense of legitimacy to a situation where it does. The Senate, for a variety of reasons say before 1949, was seen as very inferior bodies, full of party hacks; you only have to look at the extent of the *Hansard*. There was very little the Senate felt much assurance in doing. Then, because of proportional representation and various other fortuitous events, the Senate gradually realised that it not only had constitutional power, but the political authority to make changes. First it amended legislation, then it got round to setting up a committee system, and knocking back the odd piece of legislation. This was occurring in the late 60s.

So my view of 1975—quite apart from talking about the merits of it—is the logical point that the Senate finally, as an institution, came to the realisation that it had an awful lot of power and that, on occasion, it could exercise it. So quite apart from the merits, the Senate's feeling is that it knows it can do this, and that it has done it. There was enough fun and games after 1975 to make the Senate think twice about doing it again. I'll not say it may never occur, but it was a learning curve, it was adolescence, if you like, and it has been a mature body since then.

Western Australia's upper house is still very much in the 'I'm not sure how much I should knock back' phase. It's only had proportional representation for a couple of elections or so, it only just has a committee system, and it's beginning to decide what it can do and how far it can push the government. Most upper houses are very apprehensive about offending governments. They fear the commentary they get in the press. I think to look at the Senate as though it is a group of prancing people who are just waiting to strike down government legislation is probably inaccurate. I think minor parties and the independents are aware that they have some credit, they have political capital which they can use, but they can use it with great care, and they can't go using it up all the time.

So what I'm basically saying is that it seems to me the Senate in 1975 was a one-off, but it represents the coming of age of the Senate, and the public recognition that they actually had a parliament with two chambers that were powerful.

**Question** — I would have thought that a possibility, constitutionally, would be for a government to be elected that had a majority in both houses. From listening to you, I wonder if that's something that you'd prefer to prevent.

**Professor Sharman** — You're spot on. My preference temperamentally is basically for minority governments and hostile upper houses. Although, I've realised since I looked at the Tasmanian example, that is a dangerous combination for upper houses—perhaps I'll come back to that.

If there is a genuine majority vote in both houses, then I would say that people are silly, but that's fine, that's their choice, and as long as they have the choice of voting for differential majorities in the next election—that the Government doesn't change the system so that they lose their choice about the future—that's fine. But I must admit I would like a system as we have now, by accident more than by design, a system where it's very unlikely that a government is going to get a majority in both houses. And I would resist a campaign, very strongly, against any attempt to fiddle with the Senate's electoral system to ensure that governments could easily get majorities.

You're right—if the governing party has fifty percent of the vote in each state and territory, they would have a majority, but they're not likely to do that. If they did that I'd say, OK, well, something has changed in the water, but that's fine.

Another interesting example is Tasmania. If you have a political system which is very responsive in the lower house, as happened with the Greens in Tasmania, the upper house then loses a fair proportion of its power and public support, because people say, we've seen all the public compromising that occurred in the lower house, why do we need to go through the process again in the upper house? And in Tasmania it was a little complicated because the upper house is a little different. I've come to the conclusion that probably minority governments in the lower house in Tasmania contributed to the weakening of parliamentary representation in Tasmania. I should say that the Tasmanians still have a pretty good system, it's just not as responsive as it was.

**Question** — In relation to 1975, would you by any chance favour an amendment to the Constitution which would make the Senate bound to consider a budget, or an appropriation bill at least, within a certain time, and a further constitutional amendment which, if it rejected an appropriation bill twice, meant that it had to go to the people at the same time as the lower house?

**Professor Sharman** — The short answer is no. I don't see the possibility of deadlock as being a bad thing. I think if the houses disagree, that's fine. Nothing gets passed, money runs out and after a while people will start complaining about this. Unfortunately the money, I understand, is not likely to run out as it should. I like the US system where the House of Representatives and the Senate may disagree over the budget and for a week or two public servants may not be paid. They have credit notes and people do not starve on the streets; provisions are made. But I like

that because, first of all it concentrates the minds of the two houses, and secondly it points out that they provide the authority for public expenditure. There is a nice, clear link between the two.

In our system it's all pretty vague, complicated and diffuse. They know the money eventually comes from the Parliament, but quite how is fairly obscure. So the short answer is that I wouldn't like to see anything which made life easier for the Government to pass its financial legislation, no.

**Question** — You expressed the view that you thought that the GST would pass the Parliament by 30 June [1999]. I'm just curious as to what led you to that conclusion.

**Professor Sharman** — Well, no-one gains if it doesn't. Really the GST is a race to compromise with the government. Senators Harradine and Colston want to compromise with the government, on their terms. The Democrats would like to compromise with the government, on their terms. The Greens would like to compromise with the government on their terms. And they know that if they don't compromise, the other lot will, so it's a classic case of game theory. The government wants to compromise; everyone wants to compromise. What we're seeing now is the opening phases of a long, but inevitable, process which will end in a compromise, and the GST will be passed.

Now, you can't say that in the press, because it takes all the excitement away from it. But, that's what will happen.

**Question** — My understanding was that the Senate was originally intended to be a house representing the states. Now, I don't think it in any way does represent the states, but in fact it provides a forum for, as you were saying, the minor parties to exercise power in the legislative process. Would you agree that the role of the Senate has changed to that from what it was intended to be by the framers of the Constitution?

**Professor Sharman** — Well, one of the nice things is that no one knows actually what the framers intended. It is true they were very apprehensive about the disproportionate power of the voters in New South Wales and Victoria, with cause, and to that extent the Senate is still discharging its function. It over-represents the smaller states. As a West Australian, whenever that question has come up for referendum, the people in the smaller states value the Senate because it does over-represent their views, and keeps the less-reasonable people in New South Wales and Victoria suitably checked.

The Senate is also a state's house in different kinds of ways; the difference in the way senators are chosen means you tend to get party notables from within the state. But since parties have strong party discipline, the Senate really doesn't work on a state block voting basis. To somehow make this the basis for criticising the role of the Senate however, I think is mistaken. I think the Senate, right from the word go, had two roles; one was the price the smaller states and those interested in states' rights required, for the formation of federation, and the other one was that everyone was used to strong upper houses, even Queenslanders. And it was taken for granted that you needed a strong bicameral system. The Senate was unusual, and it has been right from its inception, in that it has been directly elected. So the Senate, I would argue, is the epitome of the



most Australian institution of government we have. It was the first directly elected upper house with a broad franchise in a parliamentary system. That's another reason it should be regarded as a heritage item. The House of Representatives is just your standard, British-style parliamentary lower house. There are dozens of them—Canada's got one, New Zealand's got one, all the states have got them. But the Senate and the state upper houses that are now directly elected are very unusual and provide that essential flavour and punch in the legislative process which is distinctly Australian and worth keeping.

**Question** — I should preface this by saying that I work for the House of Representatives. Most people dismiss the House of Representatives on the basis of party discipline. Do you have anything positive to say about the House of Representatives as a legislature?

**Professor Sharman** — I think the short answer is yes. I think we need a House of Representatives and I've overdrawn the contrast between the two. I think there are a lot of things that could be done to make the legislative process more effective and the lives more pleasant for the members of the House. We have a parliamentary internship scheme for our honours students, in which we encourage them to talk to MPs and they become involved in the Australian legislature. It is very clear from their research that, upper or lower house, but particularly lower house MPs, do not see their time spent in Parliament as being pleasant or particularly valuable. The thing they get most pleasure from is dealing with their constituency work and helping people solve their problems. Now this is a common problem with legislatures, and I think there are all kinds of useful things the House of Representatives can do. But the most important one is to try and give back benchers, particularly government back benchers—because at least the Opposition back benchers know they are there to oppose, whereas government back benchers are there to become ministers, with any luck—is to give them a more formal role, a more effective role in the parliamentary process in general. Besides, if you didn't have a House of Representatives, you wouldn't have a Senate. Although in Nebraska, when they abolished a house—I think there is only one unicameral legislature in the US, and that's Nebraska—they abolished the lower house.

**Question** — Campbell, you hung the case for this lecture on an analysis, it appeared to me, of various editorials. But there is a more permanent expression of many of the views that you're putting, in the myriad of textbooks from which possibly even the editorial writers get the seeds of their views. I think one case in particular, is a paper emanating from the Constitutional Centenary Foundation, which definitely saw effective bicameralism as a much greater danger to the state than ineffective unicameralism. Another volume of this character emanating from a journalist is of course the Souter history of the parliament, which adopts a very aggressive attitude to any activity by the Senate. I just wondered why you picked on the editorialists who seemed to me to be relatively easy to knock off, rather than taking on more substantial figures like Professor Cheryl Saunders, who is the author of the Constitutional Centenary Federation document which, as I say, remains much more available than these rather ephemeral editorials.

**Professor Sharman** — Well I was going to say no one reads textbooks, but not many people read editorials either. But a lot more people read editorials and press commentary than textbooks. The thing that worries me, and I think why I was given my brief, is a pervasive theme in current debate, written debate, commentary—not the news, but the commentary. I think that is much more a threat than textbooks. The interesting thing with textbooks is that many of the current

textbooks are now much more sympathetic to the role of the Senate than they were, and in fact one or two of them are advocates of the role of the Senate. I'm thinking of Brian Galligan's book.

I think it is an interesting point that, just as academics are always maybe a year or two behind what's going on, one of the things I was thinking about these editorials is, what was the formative experience in their attitude to the Senate or government in general? And if you look at textbooks anywhere, you can see waves of attitudes. You can say, for example, the textbook by the late Finn Crisp was very majoritarian, with the belief that executive government was the only branch worth having, formed in large part by his experience as the director of the Department of Postwar Reconstruction, and his strong involvement with both the Labor Party and the executive branch. And then of course you had this swing; there was Whitlam, then you had the realisation that federalism actually existed and was important, and then you discovered the fact that the Senate exists and there's a thing called the Governor-General. I mean, the number of people who were taught about the Governor-General before 1975 was relatively small, I think. So you get these changes in attitude, and what worries me is that I think the editorial and commentary represents, if you like, an un-reconstructed view—I think the views of most of the community have moved on and what we're left with is some editorial writers who were feeding off textbooks and discussions as students ten or twenty years ago, even though the circumstances that they are describing have radically changed.