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Representation and Institutional Change

50 Years of Proportional Representation in the Senate

Edited by

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Acknowledgments

In light of the extent and significance of the institutional changes that have flowed from the adoption of proportional representation, the Political Science Program in the Research School of Social Sciences, Australian National University, in conjunction with the Department of the Senate, organised a conference to mark the jubilee of its first use for the Senate. The conference, from which this volume takes its name, was held in Parliament House, on 5 and 6 August 1999. Present and former senators, political scientists, political observers and enthusiasts for PR gathered in the Main Committee Room to present papers and debate the past, present and future of the Senate. The conference opened with a welcome to Ngunnawal land by Matilda House.

All of the conference papers are published in this volume and three of them (Goot, Lijphart, Sharman) are also being published in the *Australian Journal of Political Science*. The papers have been revised to incorporate the comments offered by conference participants, many of whom themselves made substantive contributions from the floor. One such contribution from the floor has led to an additional paper being included in the volume, Anne Lynch's paper on the growth of partisanship within the Senate committee system.

The Research Section of the Department of the Senate, headed by Wayne Hooper, provided invaluable assistance throughout. The Clerk of the Senate, Harry Evans, was an inspiration in his dedication to the Senate and its history. Professors Geoff Brennan and Frank Castles of the Reshaping Australian Institutions Project at the Research School of Social Sciences also lent every support and Mary Hapel of RAI did most of the day-to-day administration. Professor Arend Lijphart, the leading international authority on the institutional impact of PR, flew from California to be the keynote speaker at the conference. He did much to make the event a success. Our thanks to all of these and Gillian Evans, Ben Miskin and David Sullivan.

1

Overview: Institutional Design and the Role of the Senate

Marian Sawer

On 10 December 1949 proportional representation (PR) was used for the first time for the election of the Australian Senate. The election saw not only the landslide in the House of Representatives that swept away the Chifley government, but also, as a first consequence of PR, the new Menzies government's failure to achieve a similar landslide in the Senate. It was the beginning of a new era, one that eventually led to the rebirth of the Senate as a parliamentary institution controlled neither by government nor opposition.

When the founding fathers were debating last century what should be the nature of the new federal institutions, William McMillan was a leading advocate of the role of the Senate. He was also to become an active member of the Proportional Representation Society of NSW, founded in 1900. In the debate on means to deal with deadlocks between the two houses, he argued strongly against any provision that would weaken the power of the Senate as a 'revising chamber' and preventer of unwise legislation. He said:

> … the only check we have on hasty legislation, the only check which the people of the country have upon the tyranny of the house of representatives, is the check of another chamber; and we must be very careful that, while allowing for those extreme cases, we do not do anything to weaken that great necessary check on our government.[1]

From the beginning, the Senate had the authority of a house of parliament directly elected by popular franchise, unlike any other upper house in Australia or indeed in the world. The establishment of a disciplined two-party system from 1910 meant,

[1] William McMillan, *Australasian Federal Convention Debates*, 15 September 1897, p. 548.

however, that the anticipated functions of the Senate as a house of review were largely put on hold. The Senate was to achieve its destiny as the check on the tyranny of the House of Representatives or, rather, of the executive that dominates the House of Representatives, only after the adoption of PR. Even then, it took some time before the situation was achieved where no government was able to control the Senate. Campbell Sharman argues in his chapter that we should essentially date this modern era from 1955, when the Democratic Labor Party (DLP) raised awareness of the potential for minor parties in the Senate.[2]

The Barton government's 1902 Electoral Bill included PR for the Senate, and a small group of Tasmanians and South Australians led by Sir John Downer even wanted PR in both houses. Although strong arguments were mounted for PR, including the strengthening of opposition as well as representation of minorities, they were ahead of their time as far as the federal parliament was concerned. The President of the Senate, Sir Richard Baker, argued persuasively that the old system of block voting was not broke, so there was no reason to fix it.[3]

By 1948, block voting was largely seen as broke, given the unbalanced and unrepresentative chamber that resulted from it. It created what John Uhr refers to in his chapter as the 'windscreen wiper effect'. At the 1946 election, Labor had won 43 per cent of the vote for the Senate and 84 per cent of the seats. At the forthcoming election, when the Senate was being enlarged, the swing was rightly predicted to be in the other direction; as well as providing a more credible electoral system, the introduction of PR would limit the scale of non-Labor gains and Labor losses. So, despite its long-time philosophical commitment to majority government, Labor introduced PR—which had the short-term result that Labor maintained its majority in the Senate and the long-term result that Labor never again achieved a majority in the Senate in its own right.

As Sharman argues in his chapter, the role of PR in creating the situation of today, where neither the government nor the Opposition control the Senate, has been of primary significance in strengthening the Senate as an instrument of accountability. The minor parties, which have come to the fore in the Senate in the last twenty years, will never themselves be in a position to form government.[4] Therefore they have an in-built interest in upholding the functions of parliament vis-à-vis the Executive, whether in terms of strengthening legislative and executive scrutiny or broadening community participation in the legislative process. As Francis Sullivan notes in his paper, the minor parties and independents have used their pivotal role in the balance of power to become the brokers of community concerns.

While the Coalition and the Labor Party still attract three-quarters of the Senate vote, it is the minor parties and independents that have played a disproportionate role in parliamentary reform. The development of the Senate committee system, including the increased independence from government since 1994, has been the most notable

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[2] Originally under the name Australian Labor Party (Anti-Communist).

[3] Sir Richard Baker, *Commonwealth Parliamentary Debates*, 19 March 1902, p. 11007.

[4] This distinguishes them from the National Party, which although a minor party in terms of vote and parliamentary representation, is always either actually or potentially in government due to Coalition arrangements with the Liberal Party.

institutional change resulting from PR. The Senate is now able to refer matters, including legislation, to committees with non-government majorities and non-government chairs, against the wishes of government. There have been a range of other reforms, including time limits on questions and answers in question time and controls over last-minute introduction of legislation or non-proclamation of legislation. Major developments in the Senate and associated reforms are summarised in Tables 1.1 and 1.2.

Table 1.1 Milestones in Senate history since 1949

1949	First use of proportional representation
1955	Democratic Labor Party (DLP)* shows new minor parties can be elected
1971	First Aboriginal Senator, Neville Bonner, chosen to fill casual vacancy
1974	First joint sitting of both houses of parliament to resolve legislative deadlocks
1975	Senate blocking of supply precipitates downfall of Whitlam government
	The ACT and NT elect senators for first time—two each, with three-year terms
1977	Constitutional change to ensure casual vacancies filled by same party
	First Australian Democrats senators elected
1979	ALP drops platform commitment to abolish the Senate (after 60 years)
1981	Minor parties and/or independents hold balance-of-power from now on
1984	Number of senators rises to 12 per state
	Group ticket (‘above-the-line’) voting introduced
	Names of political parties printed on ballot papers
1986	Senator Janine Haines becomes first woman to lead a parliamentary party
1993	Minor parties negotiate changes to Labor Budget to increase equity
1996	Senator Margaret Reid becomes first woman President of the Senate

* *Initially called the Australian Labor Party (Anti-Communist)*

Table 1.2 Milestones in Senate reform since 1949

1949	First use of proportional representation
1970	Establishment of standing committee system (general purpose and estimates committees specialising in different portfolio areas)
1981	Scrutiny of Bills Committee established, to apply civil liberties criteria to legislation
1986	Deadline for introduction of bills ('Macklin motion') to avoid end-of-sitting rush
1987	Parliamentary Privileges Act covers evidence given by witnesses at hearings and documents submitted by them
1988	Citizens' right of reply to statements made under parliamentary privilege
1989	Annual Reports of departments/agencies to be scrutinised by standing committees
	Procedures to ensure timely proclamation of legislation, including biannual tabling of provisions not proclaimed
	Permanent procedure for absolute majority of senators to recall Senate
	New procedures adopted for regular referral of bills to committees
1990	Selection of Bills Committee starts operating, to decide on referral of bills
1992	Time limits imposed on questions and answers in Question Time
1993	Double deadline for bills initiated by Senator Chamarette, to prevent bills being rushed through House of Representatives to meet Senate deadline
	'Family-friendly' sitting hours
	Public servants to receive training in accountability to parliament
1994	Restructuring of standing committee system into legislation and references committees, the latter with non-government chairs and non-government majorities
1996	Permanent order requiring production of indexed lists of government files to facilitate FOI requests

Source: Information in *Odgers' Australian Senate Practice*, 9th edn, 1999.

Governments have responded sharply to some of these developments, arguing they should be allowed to get on with governing, as though parliament was somehow dispensable between elections. This proposition, that parliament should not interfere with the business of government, including its legislative program, raises the question

that forms the title of Fred Chaney's chapter, 'Should parliament be abolished?' This is the logical conclusion that follows from governments insisting they have a mandate that renders illegitimate any modifying of majoritarianism, including interference by parliament or the courts.

By contrast, Elaine Thompson looks at the indispensable role the Senate has come to play as a champion of democratic accountability, through estimates hearings as well as other proceedings. The Senate has constituted a counterweight to managerialism in the public service and the general impatience with democracy that has accompanied the age of competition policy, contracting out and commercial-in-confidence. The policy role of the public service has been shrinking, not only because of contracting out, but also because the balance of policy advice has been shifting in the direction of ministerial offices. No adequate mechanisms have yet been devised for making ministerial staffers accountable for their policy advice. The debate over whether ministerial staffers can be summoned to appear before Senate committees does appear, however, to have been resolved in the affirmative. Such staff have appeared either voluntarily or under summons, as with the Director of the National Media Liaison Service (known as ANIMALS) in 1995.

Harry Evans underlines the pivotal role of strong bicameralism and upper houses independent of government in achieving accountability. He believes the rise of disciplined political parties led to the demise of the basic tenet of responsible government, that the executive should be responsible to and removable by the lower house. In addition to the role of party discipline, the increased size of the executive relative to parliament (the expansion of the front benches relative to the back benches) has also contributed to executive dominance. Evans sees accountable government, government that can be forced to account for its actions by a chamber it does not control, as the modern-day substitute for responsible government. It is PR that has made this independence from government possible and given a pivotal role to minor parties and independents. Independence alone might mean a chamber dominated by an obstructionist Opposition with no capacity for negotiated outcomes on process or policy.[5]

In his chapter, Evans sets out the range of accountability measures that have been introduced by the Senate, down to the requirement that departments place lists of their files on the Internet, to assist Freedom of Information requests. All of these accountability measures (see Table 1.1) have been resisted by the governments of the day. Evans sketches the range of strategies that can be employed by parliament to ensure that governments comply with accountability demands. Most of these involve some degree of disruption to the government's legislative program until the demand is met, for example an order for production of a document.

In October 1999, the Senate imposed sanctions on a minister for refusing to comply with just such an order. Senator Jocelyn Newman had refused to table a document requested by the Senate, namely a discussion paper on welfare reform that had been suppressed. The Minister was censured by the Senate on 13 October and two

[5] In other words, without multipartism, strong bicameralism and a different party composition in the upper house might not be sufficient to achieve the modification of entrenched majoritarian modes of behaviour and the shift towards what Lijphart has defined as the consensus model of democracy.

proposals were put forward for further sanctions. Initially, the Democrats proposed that Newman be gagged until she purged her contempt—that is, that the Minister be unable to progress legislation or be heard on any other matter relating to her portfolio.

Labor did not support this gagging, which it described as a 'holiday from accountability' and proposed a different strategy that was successfully moved by the Democrats on 19 October. The motion was to lengthen question time to give the Opposition and the Democrats one additional question each (eight and three questions respectively) until the Minister purged her contempt. In other words, rather than silencing the Minister, she would be penalised by having to answer more questions. This was the first time this particular sanction had been tried.

Some of the chapters in this volume, while applauding the vigour with which the Senate is upholding principles of accountability, also express concern at the degree to which party discipline is now prevailing over other principles. Several authors note that the role of the minor parties has become a substitute for the kind of independence previously displayed by Liberal backbenchers. In 1970, Senator Lionel Murphy's proposal for the creation of the Senate standing committee system succeeded because the Opposition was supported by one Independent (Senator Reg Turnbull) and one government Senator (Senator Ian Wood).[6]

Again in 1981, the Scrutiny of Bills Committee was established against the wishes of the Coalition government, on the motion of Liberal backbencher, Senator Alan Missen. Former Senator Fred Chaney describes, in his chapter, the somersault he was forced to perform on this occasion (not the first in his career). As a minister, he was forced to speak against a proposal he himself had initiated as a backbencher. His Liberal colleagues, senators Neville Bonner, David Hamer, Robert Hill, Don Jessop, Kathy Martin and Peter Rae, crossed the floor to support Missen's proposal, which resulted in a large majority for this new civil liberties watchdog. Few believe that this kind of independence would be displayed by government backbenchers in the 1990s. Evans suggests in his chapter that governments 'now regularly oppose all accountability measures and can rely on their backbenchers' unwavering support in doing so.'

The role of minor parties is an irritant to the major parties and during the 1990s there has been a series of 'mandate wars' over whether the Senate has a right to dispute policies that have been part of a government's election platform. As Murray Goot details in his chapter, the Australian electorate clearly supports (and indeed rewards) the role of the Senate in blocking unpopular policies. The fact that a government has achieved a majority of seats in the lower house (sometimes, as in 1990 and 1998, with less than 40 per cent of the primary votes) does not mean that the electorate wants the Senate to rubber stamp all government policies. A significant number of Australians vote differently for the two houses of the federal parliament and, of those, a

[6] There was some complicated manoeuvring over the creation of the committee system, as a result of which the opposition (Murphy) motion to create seven standing committees and the government motion to create five estimates committees were both successful. Since 1994 the standing committee system has been split into eight legislation committees, with government chairs and majorities (through the chair's casting vote) and eight references committees, with overlapping membership and a shared secretariat, but with non-government chairs and majorities. Democrat senators chair two of the references committees.

percentage are quite explicit in seeing a minor party vote in the Senate as an insurance policy against overweening government.

Les Tanner, *Age* (Melbourne), 6 November 1992

The frustration experienced by the Keating government over Senate independence and obstinacy famously led Paul Keating to describe the Senate as 'unrepresentative swill'. Tasmanians do have, as a result of the wheeling and dealing over Federation, the equivalent of plural votes for the federal parliament—votes that are each worth 12 NSW votes. In other ways, however, the Senate is more representative of the social and political diversity of Australia. In my chapter I describe how questions of political representation have become more complex in recent times as social movements have mobilised new political identities alongside and cutting across old party cleavages. The Senate has been better placed to reflect this increased diversity than has the House of Representatives with its single-member electorates.

The suggestions by governments that only the House of Representatives reflects the popular will and that the Senate lacks legitimacy for its policy role are not borne out by survey evidence or by the outcomes of Senate activity. As Melissa Langerman points out, governments frequently make use of Senate processes to plaster over faults in legislation that has been rushed through the lower house. During the 37th parliament (1993–1996), 33 per cent of bills were amended in the Senate; most of these were government amendments, although often under pressure from or co-sponsored by the Democrats. Of the non-government amendments, 15 per cent were from the Opposition, 9 per cent from the Democrats, and 4 per cent from the Greens.[7]

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[7] John Uhr, 'Generating Divided Government: the Australian Senate', in Samuel C. Patterson and Anthony Mughan, eds, *Senates: Bicameralism in the Contemporary World,* Columbus, Ohio State University Press, 1999.

Senator Andrew Bartlett makes the point that since the Australian Democrats gained the balance of power after the 1980 election, the Senate has operated in a far less hostile manner than it did in the past when controlled by the Opposition. During the 38th parliament (1996–1998), 427 pieces of legislation were passed and only two ultimately rejected. More election promises remain unfulfilled because governments hope the electorate has forgotten about them than because of Senate obstruction. Of course the discovery of financial 'black holes' is another way of disposing of inconvenient election promises. None the less, as Senator John Faulkner notes in this volume, Keating was sufficiently enraged by the need to negotiate his 1993 Budget with minor parties that he contemplated replacing PR with preferential voting in 12 single-member electorates in each state.

The debate over whether the Senate had a 'mandate' became even more heated when the Coalition won a large majority of lower house seats in 1996. The new government inherited parliamentary reforms, such as Senate control over legislative timetables, that they had supported when in Opposition. These reforms (initiated by Senator Christabel Chamarette and described by Prime Minister Keating as a 'constitutional impertinence') had imposed a double deadline for the introduction of new legislation into the House of Representatives and the Senate, to enable adequate legislative scrutiny. In Opposition, the Coalition had both supported the cut-off points and been intransigent about the amount of time set aside under standing orders for government business, as contrasted to general business of the parliament. Now that it was in government, the Coalition did not want to be held back by cut-off points for new legislation and wanted much more time for government business.

The Prime Minister, John Howard, wished to brook no delay in implementing his 'huge mandate'. Senator Noel Crichton-Brown, on the other hand, used his new-found freedom as an independent Liberal senator to raise doubts. He commented that minor parties such as the Australian Democrats also had a right to stick by their campaign policies, for example on Telstra: 'their vote went up on the basis of their policies and the presentation of their leader. They can hardly roll over now, and justify the vote and support they got.'[8]

Government impatience with the Senate increased markedly after the 1998 election, when both the government and the financial press saw Senate independence as an obstacle to the speedy introduction of a goods-and-services tax (GST). Senator Helen Coonan, Deputy Government Whip in the Senate, brought forward controversial proposals for reform. She claimed that delays imposed by the government's lack of a working majority in the Senate were threatening Australia's economic performance.[9] Coonan endorsed a proposal, previously put forward by Liberal MPs Tony Abbott and Wilson Tuckey, for the introduction of a threshold system into Senate elections so that parties with a small percentage of primary votes could be removed from the count.

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[8] Radio National, Background Briefing, 'The Senate: What Goes Around Comes Around', 5 May 1996.

[9] Senator Helen Coonan, 'The Senate: Safeguard or Handbrake on Democracy?' Address to the Australia Institute, Sydney, 3 February 1999. It should be noted here that the government had received only 37.7 per cent of the Senate vote, so the lack of a working majority was seen by many as a fair outcome.

Some such change was needed to end the 'rule of minorities', which she described as getting in the way of effective government and making Australia uncompetitive.

The proposal for a threshold (80 per cent of a quota or 11.3 per cent of primary votes) was also endorsed by the Liberal Party Federal Council in July 1999. Many Labor identities joined in the call for Senate 'reform', including Stephen Loosely, Peter Walsh, Gary Johns, Bob Hogg and Peter Barron: 'Both parties hate Senate restrictions while in government. The trick is to get them to realise that the pain suffered while in Opposition is a small price to pay for the pleasure of being able to govern with real freedom…'[10] It was odd to hear the rhetoric of 'letting the managers manage' not only intruding into the public service, but also being applied to institutions of representative democracy.

It should be noted that it was not only in relation to federal parliament that major parties were attempting to change the electoral rules to remove minor parties from houses of parliament elected by PR. Indeed, it was the success of such moves in Tasmania, birthplace of the Hare-Clark system of PR, that gave momentum to the calls for Senate 'reform'. In Tasmania 'both sides of politics' (note how majoritarian discourse reduces politics to a two-party adversarial game) united in 1998 to remove 'minor party obstruction'.[11] The Tasmanian Greens had held the balance of power during both Labor and Liberal minority governments and had used this position to promote a number of reforms to strengthen the parliament vis-à-vis the executive. In 1998, the minority Liberal government and the Labor Opposition united to reduce the number of members of the lower house from 35 to 25. This raised the quota needed for election to 16.5 per cent, making it very difficult for minor parties or independents to be elected. At the time of the election the cross benches were physically removed from the parliamentary chamber, symbolically reinforcing the intent of the change. One Green did succeed, however, in being re-elected; she brought in a folding chair to sit in the gap between government and opposition.

In her chapter in this volume, Coonan extends her argument that delays imposed by Senate processes on, for example, the government's financial reforms are incompatible with the speed of decision-making in the global economy. She quotes Paul Kelly of the *Australian* to the effect that 'Compared to the speed of decision-making in the market-place, parliamentary democracy is hopelessly old-fashioned.' By contrast, Arend Lijphart had demonstrated, in his keynote address, the absence of any correlation between faster majoritarian decision-making and economic performance. Indeed, he suggested that fast decision-making was not the same as good decision-making, offering as an example the disastrous British poll-tax decision made by the majoritarian Thatcher government.

Coonan brings forward further proposals, including one first put forward by the Joint Standing Committee on Constitutional Review 40 years ago, that the Constitution be

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[10] Peter Barron, 'Why reforming the Senate is the priority', *Australian Financial Review*, 5 October 1998. A different route to eliminating minor parties is currently being mooted in NSW, where the government attracted only 35 per cent of the vote for an upper house elected by PR and a number of 'micro' parties won seats. The NSW proposal involves erecting significant barriers in terms of the cost of party registration as well as the size of membership (1000) required.

[11] Stephen Loosely, 'End the mandate muddle', *Sunday Telegraph* (Sydney), 4 October 1998.

amended to enable joint sittings of the houses to resolve deadlocks, without a prior double dissolution election.[12] While this would certainly facilitate the enactment of the policies of a government with a large lower house majority, it was seen by most of the conference participants as unacceptable for its effects on Senate independence. As Evans points out in his chapter, it is the power of the Senate over government legislation that gives it the leverage to extract accountability from government. Any weakening of that power would also be a move backward in terms of openness and transparency of government.

One issue Coonan raises that has wider resonance concerns the intrusion of partisanship into Senate committee processes. In her chapter in this volume, Anne Lynch quantifies the erosion of consensus and the growth of partisanship on Senate committees over the last 20 years. In 1978, all Senate committee inquiries resulted in consensus reports, whereas by 1998 consensus had evaporated and partisan dissent had become the norm. Whereas there had once been a stark contrast between the 'ritual stag fights' of the chamber and relatively non-partisan work out of the spot light, this was no longer the case.

Lynch concludes that neither the structural changes to the committee system (which have reduced government control) nor the increased volume of work are responsible for the increased acrimony. She postulates that one reason for it is the increased media attention that has accompanied the more activist role of the Senate, and the temptation to play to the gallery. Consensus politics is regarded as poor media. Paul Bongiorno discusses the interesting relationship between the media and political styles in his chapter on the introduction of television to the Senate. While the media love conflict, the public react strongly to seeing their political leaders brawling.

Michelle Grattan confirms that media interest has moved to the Senate, and the 'cracking good stories' generated by the unpredictability of outcomes where the government is not in control. She points to the irresistible attraction of the dirty linen brought to light through Senate committees, but also notes the difficulty of keeping up with the wealth of information committees generate. Langerman observes the dulling of media interest where committee reports do not focus on bills immediately before parliament or where there is a long delay in the government response. So the media coverage of committee work is very uneven, regardless of the quality of reports, the cogency of public submissions or the importance of the subject matter. Australian Associated Press (AAP) is the only news service providing full-time coverage of the Senate, and even AAP has to prioritise its coverage.

As noted in a number of the chapters, particularly those by Peter Sekuless and Francis Sullivan, partisan behaviour in Senate committees now extends to the treatment of witnesses, with members of the community being subjected to bullying and other forms of partisan attack. Sekuless reminisces about attending his first committee hearing in the late 1960s, when Dame Ivy Wedgwood was chairing the Public Accounts Committee: she saw it as her role to protect witnesses, even public servants, from over-zealous and partisan questioning. Today, the behaviour of politicians

[12] A former national secretary of the ALP made a similar suggestion in 1998, with the further gloss that during such joint sittings the Senate vote might be weighted on a basis consistent with state populations, so that the 12 NSW senators would comprise a vote worth 35 per cent of the total.

during committee hearings is seen as contributing to a general cynicism about politicians and parliamentary institutions. This, in turn, fuels movements to bypass the representative and deliberative elements of democracy in favour of forms of plebiscitary democracy such as citizen initiated referenda (CIR) or popular election of a president.

Other problems that threaten the functioning of Senate committees include those highlighted in Dee Margetts' chapter—budget cuts that undermine the independence of committees and lead to replacement of staff by departmental personnel or even private contractors. She cites as an example of the blurring of separation of powers a serving military officer becoming acting secretary of the Defence Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade, and saluting other officers during a committee inspection of a defence establishment.

Nevertheless, Sekuless claims that Senate committees and their secretariats often have more corporate memory of policy areas than do the continually restructured public service departments that are supposedly responsible for them. He uses the example of the Senate committee that put together a new regulatory regime for the export of education services, after the collapse at the beginning of the 1990s of the unregulated industry.

Ian Marsh also has a more optimistic view of the potential of Senate committees, which he sees as the primary vehicle for a regime change in policy development, now that political parties have abdicated their earlier roles in interest aggregation and agenda setting. Marsh sees the potential for Senate committees to involve a broad range of policy protagonists and community interests in the strategic phase of policy development, before positions harden and consensus becomes impossible. Ideally, Senate committees should conduct much of the consultative phase of policy development currently left to bureaucracy. This would enable the refurbishment of methodologies of consultation once regarded as exemplary in global terms, but currently atrophying under managerialist regimes.

The potential of Senate committees to help broaden community input into policy development is also referred to by Sawer. The referral of legislation to committees enables much broader participation in the deliberative process than is possible where legislative review is restricted to parliamentarians. Sawer discusses this contribution to more inclusive representation and deliberation both in terms of the Senate's own processes, and its potential to oversee the adequacy of consultative mechanisms across government. Just as the Senate oversees other forms of accountability, so it should ensure that consultation protocols are adequate to ensure those most affected by policy have the opportunity and capacity to participate in the policy process. One aspect of this is capacity building, through public funding of community-based peak bodies and other forms of strengthening weak voices, so that all sections of the community can be effectively represented to government and to parliament.

This more optimistic note is continued in Senator Kate Lundy's contribution, which looks at the potential of cyberdemocracy in broadening the interaction between citizens and senators as well as enabling current developments such as the live webcasting of proceedings. Lundy argues for the introduction of the new information and communication technologies to the floor of parliament, suggesting the current

restrictions are anachronistic in the face of ways the Internet and Intranet are transforming the political landscape.

In terms of electronic democracy, the Senate led the way in 1997 with the acceptance of electronic petitions, provided the senator presenting them certified that the full text of the petition had been visible to the signatories. In 1999 the House of Representatives baulked at taking the same step, concerned, among other things, that the gathering of signatures through the Internet did not involve the community in the same way as gathering signatures at shopping centres or community activities.[13] The latter suggests that cyberspace is in some way not true public space where active citizenship can be encouraged and social capital accumulated.

The volume concludes, as did the conference, with Geoffrey Brennan's observations on perennial issues of institutional design such as whether the virtue of PR is inherent—in which case should it be extended to the House of Representatives as urged by Bartlett—or whether the virtue consists in the achievement of a different party composition in the two houses and, in particular, the independence of the Senate from either government or opposition. Brennan also draws attention to the honourable place of PR among the many democratic experiments and institutional innovations that have found a home in Australia. It is too often forgotten that long before its adoption by the Senate, it was Australian colonies that were responsible both for the first public use of PR and its first parliamentary use—not Switzerland or Belgium.[14] The conference ended, as does this volume, with the celebration of a milestone in the evolution of our democracy.

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[13]House of Representatives, Standing Committee on Procedure, *Its Your House: Community Involvement in the Procedures and Practices of the House of Representatives and Its Committees*, Canberra, Parliament of the Commonwealth of Australia, 1999, p. 13. Cf. *Odgers' Australian Senate Practice*, 9th edn., p. 446.

[14] In Australia, PR was used for the election of the Municipal Corporation of Adelaide in 1840 and was adopted for the election of Hobart and Launceston Members of the Tasmanian House of Assembly in 1896. It was used at the Tasmanian elections of 1897 and 1900 and for the Tasmanian members and senators of the new Commonwealth Parliament in 1901. In Switzerland, PR was used for elections in the Canton of Ticino in 1891, and the d'Hondt system of PR was adopted for Belgian parliamentary elections in 1899.

2

Why We Chose Proportional Representation

John Uhr[*]

Synopsis

This background paper answers the historical question: why did Australia adopt proportional representation for the Senate? The bare facts are well known: in 1948 the Chifley government initiated amendments to the Electoral Act to alter the existing method of counting the Senate vote which had traditionally rewarded the majority party with a disproportionately large share of Senate seats. Labor itself had a Senate majority of 33 to 3 after the 1946 election. But why did the Chifley government introduce proportional representation? The standard answer, given by Opposition leader Menzies at the time, was that Labor knew that it would lose the 1949 election (and probably most of its contested Senate seats) and so devised this change to consolidate its parliamentary power base in the Senate to frustrate the expected Menzies government. This answer is true as far as it goes. But a fresh review of the historical record shows that the 1948 decision was really the final stage in a frequently-deferred plan of parliamentary reform that goes back to Federation. Even before Federation, many prominent constitutional framers had expected the first Parliament to legislate for proportional representation for the Senate. Sure enough, the Barton government included Senate proportional representation in the original Electoral Act, but this was rejected in the Senate on the plausible ground that it would undermine the established conventions of strong party government. But over time even the partisans of strong party government came round to see the merits of the original plan. At many stages between the first Parliament and 1948, advocates of proportional representation moved for its adoption for Senate elections, with many party leaders joining the ranks of parliamentary reform: conservative leaders such as Cook, Page, Bruce, McEwen; and Menzies; and even Labor leaders such as Scullin, Curtin and Chifley. This paper summarises the history of early hopes and delayed fulfilment.

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[*] Thanks to Wayne Hooper, Rosemary Laing, Anne Lynch, Marian Sawer and Bernard Wright for helpful comments on earlier drafts of this background paper; and especially to Senator John Faulkner for his assistance in providing important material from Australian Archives which has improved this revised version.

Introduction

The purpose of this background paper is to help answer the question as to why proportional representation (PR) was chosen by Parliament in 1948 for Senate elections, beginning with the 1949 general election. As a balance to the conventional wisdom which holds that the 1948 decision reflects more party pragmatism than democratic principle, this paper reports the widespread appreciation within Australian politics of the theoretical merits of PR. Other Conference papers examine the track-record after the 1949 elections to determine to what extent Senate performance has matched the high expectations held out by advocates of PR.

There are many good reasons to celebrate the 50th anniversary of PR in the Senate. But there is also a danger that one might exaggerate the benefits of PR and fail to acknowledge any shortfall between the theory of a proportionally representative Senate and the practical realities of Senate elections. This introductory note simply forewarns readers that the practical operations of any system of PR can fall below the highest hopes of advocates of PR. Although this shortfall is no reason to walk away from PR, readers should be prepared for the discovery that, like all electoral systems, those based on PR admit of endless variety in their practical operations. Depending on the precise rules for parliamentary representation, the established major parties can exert formidable influence in stage-managing the system.

When it comes to evaluating the performance of a Parliament, it pays to keep things in proper perspective. The more one exaggerates the promise of PR, the easier it is for its critics to document the many gaps between promise and reality. Hence it is prudent at the very outset to acknowledge that, despite the adoption of PR, the Australian Senate retains something of the character of those nominee upper houses so roundly criticised by a long tradition of Australian democrats at state as well as national level. The version of PR that was consolidated as recently as the 1980s allows party officials at state level to nominate their party list of candidates and invites electors formally to approve their preferred party list. Almost all Australian electors take this easy option of voting ‘above the line’ which confirms the nominating power of party officials in each state.

All of this is simply to suggest that PR refers to a family of electoral possibilities. Australian electors should watch as closely as possible the ways in which the participating political parties manage the system. The decision in 1948 was not the end of the matter. Parliament can just as easily today unmake what it made in 1948; and so too Parliament can change the rules to amend or refine details of the electoral system, as it has done repeatedly since 1948, often of course for good reason. This paper clarifies the basic framework but makes no attempt to trace through the many refinements that Parliament has made since 1948.

Labor’s legacy?

Preparing a background paper on the 1948 decision by the Commonwealth Parliament to adopt PR for Senate elections is no easy task. Although the record of the parliamentary passage of the legislation giving effect to PR is open and accessible, a certain mystery surrounds the prior decision by the Chifley Labor government to introduce legislation to replace the traditional ‘block vote’ electoral system with the new proportional system. It is curious that such a momentous decision has not attracted

a wealth of historical scholarship and somewhat frustrating that there is no definitive article laying out the various reasons behind the Chifley government's decision in favour of PR.

This background paper attempts to summarise what is known about the political and parliamentary decision to adopt PR. It is only fair to report at the outset that we really know too little to be very confident about what was in the mind of those members of the Parliament when they replaced the traditional electoral system dating from 1902. To the outside observer, this change has many of the qualities of an institutional revolution but there are few if any members of that parliamentary generation claiming the title as Reformer of the Senate or Founder of the New Senate. One problem is that Labor, which is otherwise a party with a keen interest in all facets of its own political history and tradition, has appeared reluctant to celebrate this decision to adopt PR. As initiator of the change to PR, Labor might have been uncomfortable championing the renewed effectiveness of the federal upper house. Only as recently as 1979 did the Labor party withdraw its policy calling for the abolition of the Senate. And while it is true that Mr Beazley has this year responded to recent non-Labor calls for a change of rules to make it harder for minor parties to secure Senate representation with a refreshing defence of PR, it is still the case that the original Labor decision of 1948 cuts across the grain of Labor's traditional understanding of responsible government, as I will illustrate towards the end of this paper through Arthur Calwell's commentary on the role of the Senate.

To my mind, it would be a great pity if Labor were not to come forward with a contemporary justification of the merits of the Chifley reforms. I say this because, as though to prove that the original decision was somehow flawed, forces on the conservative side of national politics are now mobilising to wind back the degree of commitment in Australian electoral law to minor party representation. Both sides of politics have something of an interest in maintaining the conventional wisdom that the 1948 decision was either a mistake giving rise to unintended consequences, or an understandable but still uncommendable partisan act from which we should now distance ourselves. The conventional account holds that the Chifley government opted for PR primarily for reasons of party-political expediency—as a stratagem to boost their own electoral chances at the 1949 general election they rightly feared they would lose. In this view, Labor hoped that it could take advantage of the transitional arrangements to the new and enlarged Senate and build a new if temporary power base in the Senate for their opposition to the likely Menzies government.

The stratagem worked, at least until Menzies beat Labor at its own game and brought on the 1951 double dissolution to wash out Labor's power-base in the Senate and usher in that Indian summer of Australian parliamentary politics from 1951-1955 when governments had a majority in both houses. Executive governments can now only dream about the ease of parliamentary management enjoyed then by Menzies. But the institutional changes associated with PR had already begun to develop their own chain of consequences, as other papers and speakers at this conference will document.

The Chifley government's decision

The starting point for understanding the decision of the Chifley government to adopt PR is to appreciate their interest in increasing the *size* as distinct from altering the *composition* of Parliament. The talk of the time was the need to enlarge the size of the 75 member House of Representatives which had not been changed since the election for

the first Commonwealth Parliament in 1901. Nor of course had the size of the Senate which remained at 36 with six senators per state. The House of Representatives originally had seats with an average number of 12 000 electors but by the time of the first general election after the conclusion of the Second World War that average had risen to over 63 000 electors.[1] After winning the 1946 election, the Labor government began to intensify internal discussions over how best to enlarge the House of Representatives from 75 to 121 which can be traced back to cabinet interest from at least the 1942 Labor party conference. One new stimulus was the anticipation of a redistribution of House of Representatives electorates following the 1947 census.[2]

For constitutional reasons, any enlargement of the House requires an enlargement of the Senate: section 24 of the Constitution requires that the number of House members 'shall be, as nearly as practicable, twice the number of senators'. The Chifley government had no option but to include an enlargement of the Senate. The timing of this revision of the size of the Senate thus had little to do with any deep-seated interest in enlarging or otherwise altering the composition of the Senate. The driving force was the interest in smaller, more stable and hence more secure seats for the Labor backbench in the House of Representatives. As party discussions took place after 1946, two factors emerged to turn the attention of the parliamentary Labor party towards the introduction of PR in the Senate.

First, there was a lingering sense of dissatisfaction with the traditional Senate electoral system that produced huge majorities in turn to whichever political party built up House of Representatives majorities. This 'block vote' system was included in the original Electoral Act of 1902 and was revised to include preferential voting from 1919. The practical result of this system was the so-called 'windscreen-wiper effect' which delivered almost all contested Senate seats in each state to whatever political party achieved a majority. Senate majorities oscillated wildly between the two major political parties (Labor and successive Non-Labor coalitions), both of which could expect to take their turn as the majority party in the Senate. The first two Senate elections after the establishment of the 1902 Electoral Act saw a relatively even 'two third: one third' distribution of Senate seats. But once the political parties became consolidated the system began to deliver disproportionate victories to whichever political party was riding high with the passing electoral majority: Labor won all of the 18 seats on offer at the 1910 election; non-Labor won all on offer at the 1918 and 1925 and 1934 elections; and Labor won all Senate seats at the 1943 election and 15 of the 18 on offer at the 1946 election.[3]

According to Crisp, the adoption of PR was in large part 'a desperate effort to avoid the grotesque results of two previous systems of election to the Senate…', meaning the

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[1] L. Barlin (ed), *House of Representatives Practice*, 3rd edn, Canberra: AGPS, 1997, p. 108.

[2] P. Weller (ed), *Caucus Minutes. Volume 3:* 1932-1949, Melbourne, Melbourne University Press, 1975, p. 417; L. F.Crisp, *The Australian Federal Labor Party 1901-1951*, Melbourne, Longmans, 1955, pp. 228-9.

[3] A. Fusaro, 'The Effect of Proportional Representation on Voting in the Australian Senate', *Parliamentary Affairs*, vol 20, number 4, Autumn, 1967, p. 330.

block vote as modified through the adoption of preferential voting from 1919.[4] The choice of PR was far from surprising because it was not a new idea, having been frequently advocated as a way of repairing the defects of the traditional 'winner-takes-all' electoral system. The web site of the Proportional Representation Society of Australia contains copies of documents recording that Society's history of vigorous advocacy of PR (see http://www.cs.mu.oz.au/~lee/prsa). For instance, the Society organised a public meeting in Melbourne in October 1943 which resulted in a letter to prime minister Curtin reporting their resolution about the urgent need to reform the electoral system to include PR, for the House of Representatives no less than the Senate. Given this widening public interest in electoral reform, it soon became apparent that an enlarged but otherwise unchanged Senate would pose risks to the public credibility of Parliament, particularly at a time when public funds were being spent on old Parliament House to accommodate the many new members. As the Senate Clerk at the time recorded, any increase in the size of the Senate made all parliamentarians realize 'that to continue a system which might result in a Senate of 60 members all belonging to one party would make a farce of Parliamentary government'.[5]

But there was an important second factor: the closer the Labor party got to the end of its three year parliamentary term the more fearful it became that with the changing electoral tide against Labor, it would soon be Menzies' turn to dominate both chambers. Even if Chifley was confident of retaining office, many in the caucus feared that their time was up.[6] It was at this point that Labor discussions took an ever-keener interest in the dual merits of PR: as the revival of a long-discussed option to bring party balance to the Senate that would be in the long-term interests of both major party blocs; and as a newly-discussed option to provide Labor with a short-term parliamentary power-base through the one-off transitional arrangements to the larger Senate which would benefit Labor given its existing domination of Senate numbers. Labor had won 15 of the 18 Senate seats at the 1946 election and before the 1949 election had 33 to the opposition's three Senate seats. Thus Labor had a near monopoly of long-term sitting Senators and faced the prospect of winning half of the enlarged group (seven from each state as a one-off transitional arrangement) of 42 newly elected senators under the reformed electoral system, promising to give it a very healthy majority for many years.

The alternative was to stick with the traditional system and risk losing this large swag of Senate seats to the incoming Menzies government. At the 1949 general election, Labor emerged in a minority position in the enlarged 121 member House, with 47 to Menzies 74 seats but won a victory in the Senate with 34 seats to the governments 26. Labor lost office but the Senate gamble worked. In the words of Reid and Forrest, PR emerged 'not as a result of the pursuit of principles of electoral justice, but from pragmatic consideration of party gain'.[7]

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[4] L. F. Crisp, op. cit., p.219.

[5] J. Edwards, 'The Senate of the Commonwealth of Australia', *The Table*, vol 17, 1948, p. 243; cf G. Souter, *Acts of Parliament*, Melbourne: Melbourne University Press, 1988, p. 397.

[6] L.F. Crisp, *Ben Chifley*, Sydney, Angus and Robertson, 1961, p. 369.

[7] G.S. Reid and M. Forrest, *Australia's Commonwealth Parliament*, Melbourne: Melbourne University Press, 1989, p. 99; A. Fusaro, 'The Australian Senate as a House of Review' in C.A. Hughes (ed), *Readings in Australian Government*, St Lucia: University of Queensland Press, 1968, pp. 129-130; J. Rydon, 'Electoral Methods and the Australian party System 1910-1951' in C.A. Hughes, op. cit., pp.

Labor's Party Debate

A useful portrait of the pre-reformed Senate is contained in Denning's *Inside Parliament*.[8] Observers noted that the traditional Senate performed more good legislative work than its was credited for, but few were prepared to enlarge the existing Senate without alteration of its electoral system. It seems that even Curtin as Labor leader a decade before the 1946 election at the 1936 party conference had favoured an enlarged Parliament on the condition that the Senate be altered through PR.[9] Reid and Forrest chronicle the history of caucus discussions over the enlargement of the House and the gradual turn of interest to the reform of the Senate electoral system.[10] In April 1947, the minutes of caucus reveal a notice of a motion by Labor backbencher Lawson of a recommendation to cabinet that Parliament be increased 'by at least 25%'. Lawson was allowed to delete his precise reference to a 25% increase and another motion to set up a caucus committee was lost.[11] In May 1947, the Labor caucus recommended to cabinet that the size of Parliament be increased before the next redistribution of seats. After preliminary cabinet discussion in July relating to the prior need for reliable census information, cabinet finally established a sub-committee in December 1947, comprising the minister for the Interior (Victor Johnson as chair of the sub-committee) the minister for Health and Social Services (Senator McKenna) and the minister for Information and Immigration (Arthur Calwell). 'Calwell was the dominant member: he was mainly responsible for the Committee's recommendations, and it was he who sold them to Caucus'.[12]

So tradition has it: Calwell made PR a reality. But the caucus minutes reveal the sustained contribution of Senator McKenna, Labor's Senate leader. At a caucus meeting on 17 February 1948, Prime Minister Chifley called on senator McKenna to report on the cabinet sub-committee proposals which had been agreed on by cabinet in January. The caucus minutes record that McKenna 'also suggested a system of PR be recommended for the election of the Senate and added that the method would be decided by the Party'.[13] After what is described as 'a lengthy discussion', McKenna is reported as saying that the party would have to determine 'by what number Parliament should be increased and the system of voting'. He relayed the news that cabinet favoured an increase of senators from 6 to 10 per state, to be elected through 'a system of PR'.[14] McKenna's motion 'That the law be amended to provide for PR for the election of the Senate' was carried on the voices, as then was his second motion for an increase from 6 to 10 senators per state.[15]

183-6; Iain McLean, 'E.J. Nanson, Social Choice and Electoral Reform', *Australian Journal of Political Science*, vol 31, number 3, November, 1996, p. 380.

[8] W. Denning, *Inside Parliament*, Sydney: Australian Publishing Company, 1947, pp. 61-70; A. Fusaro, 1968, 'The Australian Senate as a House of Review' in C.A. Hughes. op. cit., pp. 123-139.

[9] L.F. Crisp, *The Australian Federal Labor Party*, op.cit., p. 222.

[10] Reid and Forrest, op. cit., pp. 118-122.

[11] Weller, op. cit., p. 421.

[12] Souter, op. cit., p. 395.

[13] Weller, op. cit., pp. 438-9.

[14] Weller, ibid., p. 439.

[15] L.F. Crisp, *Ben Chifley*, op. cit., pp. 368-9.

So much for the formal record of caucus decision-making. The best insider account is available in the entertaining memoirs of veteran Labor parliamentarian Fred Daly who was a young House of Representatives member at that time. According to Daly, the scheme for Senate reform 'was the brainchild of Arthur Calwell who argued that we would retain a majority there after the next elections, due in 1949, and probably into the future'. Daly reports that Chifley was personally opposed to PR and may well have voted against it in the cabinet. But Calwell 'won the day by convincing sitting senators that they would be re-elected in 1949 and that the new voting system favoured them in the future'.[16] This is consistent with Calwell's preference for centralism and big government, and his biographer notes that Calwell was convinced that the support of ALP senators provided him with his base of support in caucus, where 33 senators comprised nearly half of the caucus total of 76 members.[17] Another commentator reports that Calwell 'had given Labor senators a large present and could reasonably look forward to future 'paybacks'.[18]

Daly also records the much-quoted response to Calwell by Labor's House speaker Jack Rosevear who opposed the Calwell plan which he described in classic terms as a 'gold brick' proposal—one that was too good to be true, with its promise of electoral success to sitting House members, who would now have safer seats as well as sitting senators. Daly ruefully comments: 'Time has proved Rosevear right. Proportional representation in the Senate was disastrous for the Labor Party'.[19] Never again was Labor to obtain a Senate majority and minor parties, noted Daly, have arisen with 'the opportunity to play an over-important part in national politics, even to controlling governments'.[20] This rueful reference to the rise of minor parties reflects the widespread assumption of the time that PR would simply restore the balance between the major parties in the Senate. The major parties which managed the transition to a PR system gave little thought to the possible effects in encouraging the formation of minor parties, even though the historical case against PR was that it would jeopardise the conventions of strong party government.

The 1948 Parliamentary Debate

Despite Calwell's involvement in developing the basic policy, it was Attorney-General Evatt who introduced the 1948 legislation in the House. Predictably, Evatt explained the reformed system of Senate representation as 'one most likely to enhance the status of the Senate'. According to Evatt, the direct aim was to ensure that 'the majority group will get the majority of seats and no more', a policy on representation long advocated by the Country party, and recommended by the 1929 royal commission on the Constitution.[21] Not that the government really knew all the likely effects of these reforms, which were not designed to encourage minor parties but to redress the imbalance between the major parties. Senator McKenna, the government's leader in the

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[16] F. Daly, *From Curtin to Hawke*, revised edition, Melbourne, Sun Books, 1984, p. 51.

[17] C. Kiernan, *Calwell*, Melbourne, Nelson, 1978, pp. 149-150; cf J.R. Odgers, 'The Senate: case for the defence', *Australian Quarterly*, vol 20, number 4, December, 1948, p. 91.

[18] R. Lucy, *The Australian Form of Government*, Melbourne: Macmillan, 1988, p. 210.

[19] F. Daly, op. cit., p. 52; cf Souter, op. cit., p. 396.

[20] F. Daly, ibid., p. 52.

[21] *CPD*, (*Commonwealth Parliamentary Debates*), 16 April, 1948, pp. 965-68, 1295-96; cf McEwen, p. 1014; Beazley, 28 April, p. 1171. See also Souter, pp. 395-6.

Senate, emphasised 'the greatest blessing any country can have is a strong government—one that is strong enough in numbers to take hold of the reins of government and really rule'.[22]

Opposition Leader Menzies clearly identified Labor's partisan strategy in which a Labor majority in the Senate was an insurance policy against the probability that they lost office at the next election, as in fact happened. Menzies also foreshadowed the possibility of a government using the barely tested procedures for double dissolutions to attempt to restore majority representation in both houses, which is exactly what he did in 1951. For Menzies, the existence of the constitutional provision for double dissolutions and subsequent joint sittings was proof enough of the subordinate place of the Senate in Australian government. The 'will of the people' must trump the representation of minority groups in the Senate; and it is the people's House which 'makes and unmakes governments'.[23] Consistent with this, the Opposition moved to delay the adoption of PR until after a referendum seeking to abolish the s24 'nexus' provision. If carried, such a referendum would have meant that the House could then be enlarged without any increase to the size of the Senate. The government defeated this Opposition move, arguing that this proposed change would jeopardise the interests of the smaller states, whose representation would suffer disproportionately, and be a body blow to the future of the Senate.[24]

There were those who clearly identified the costs of re-legitimating the Senate. One sobering voice raised in warning about the long-term consequences was future conservative Prime Minister Holt, who identified the reformed representation as 'a profound constitutional change'. Holt foresaw the emergence of 'a powerful opposition in the Senate' with 'a very much stronger voice' which might compete against the dominant party in the House.[25] A more strident voice was that of aging Jack Lang, a former state premier dedicated to the traditional Labor policy of Senate abolition. Warning of the potential of the new Senate to 'frustrate' and 'obstruct the decision of the voters', Lang reflected the majoritarian norms of strong party government in ridiculing 'the chamber of obstruction', although he also called for restoration of the House's 'deliberative status' which had been reduced under the system of 'junta control' carried over from the war.[26]

The issue of the States' rights function divided parliament. Enthusiasts for Senate reform noted that the States' rights function had never taken off, and some like Beazley defended the reforms as providing a substitute role for the Senate as a house of review, 'in a manner analogous to the constitution of the United States of America'.[27] Among the opponents of the reform were those who argued that the only legitimate role for the Senate was as protector of States' rights, and that PR would do nothing to keep state

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[22] *CPD*, 21 April 1948, McKenna, p. 1474.

[23] *CPD*, 21 April 1948, Menzies, pp. 1001-3.

[24] See for examples exchanges between Evatt and Beazley, *CPD*, 29 April 1948, pp. 1254-6, and McKenna, p. 1475.

[25] *CPD*, 23 April 1948, Holt, pp. 1102-3.

[26] *CPD*, 28 April 1948, Lang, pp. 1137-41.

[27] *CPD*, 28 April 1948, Beazley, p. 1174.

delegations cohesively together. Better alternative schemes of representation included indirect election by state Parliaments.[28]

For the purposes of this background paper, it is important to return to the historical origins of the Australian Senate and to recover the original rationale for its intended contribution to Australian parliamentary life and to try to discern any evidence of early anticipations of the 1948 choice for PR. The story that emerges is that PR is not a late addition to the institution of Parliament but one of the original ingredients assembled and prepared by the constitutional framers and successor parliamentarians, although not successfully used until 1948. But the legitimacy of that 1948 decision takes on a new dimension when seen against the background of earlier expectations of a Senate based on PR. Once we appreciate that the history of expectations about the Senate and PR goes back well beyond the fifty years since the 1949 election, we can begin to look anew at the merits of the decision made by the Chifley government. The 1948 reform can then be seen as a late delivery on a very early promise about the importance of a proportional Senate in Australian government.

Pre-Federation views of the Constitutional framers

As we approach the centenary of Federation, it is important that we see the events and institutions of 1901 in light of the original intent of the constitutional framers in the pre-Federation decade. But one challenge for this search for evidence of interest in 'PR' is that this term has taken on many different meanings in the past. A search for the term will throw up many false leads, such as discussion of the nexus between the two parliamentary chambers where the relationship in size of House and Senate members was understood by the framers to be one of proportionate representation.[29] And again, many framers spoke of 'PR' when referring to the relative proportions of House seats that would accrue to the different States according to their different populations.[30] Thus for example section 24 of the Constitution refers to the 'proportion' of House members from each state. The existence of representation proportional to population was frequently cited as a prerequisite of democracy, with Canadian precedents drawn from the composition of the Senate of Canada.[31]

But it is only in reference to debates over the role of the Senate that we find any real evidence of the framers' interest in what we mean by PR. It is well known that the design of the Senate repeatedly gave rise to the most protracted disputes during the 1890s Conventions in which the Constitution was framed.[32] The Convention delegates were divided over the purpose and practices associated with a federal house of review. Progressive liberals tended grudgingly to accept the Senate as the price that had to be paid for federation and the transition to the new nation. Perhaps the most exaggerated

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[28] See for example Abbott, *CPD*, 28 April 1948, pp. 1180-83.

[29] See for example Barton, *Convention Debates*, Australasian Federal Convention, 1891, 1897-98, 5 volumes, (republished Sydney: Legal Books 1986), Adelaide, April 1897, pp. 435ff.

[30] See for example, *Convention Debates*, op. cit., Isaacs, 26 March 1897, p. 170; Solomon, 30 March 1897, p. 265.

[31] See for example Lyne, *Convention Debates*, 26 March 1897, p. 163.

[32] Consider B. Galligan, *A Federal Republic*, Melbourne: Cambridge University Press, 1995, pp. 63-86; J. Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament*, Melbourne, Cambridge University Press, 1998, pp. 77-81.

liberal view was that of Victorian framer H B Higgins. Higgins fought for as small and as insignificant a Senate as possible, in the belief that the primary institution of responsible parliamentary government would be the appropriately named House of Representatives, from whose majority the governing party would be drawn, and to whose majority that government would be solely accountable. At the other extreme were conservatives like Hackett, famous for his preference for federalism and States' rights over traditional responsible government: a preference which elevated the Senate into a place of co-ordinate importance with the House within the institutions of government.

There were of course many views caught between these extremes, with two loose clusters associated with the two great colonial Premiers and proven masters of responsible government: on one hand, Parkes' open tolerance of a Senate designed to represent each of the States equally; and on the other hand, Griffith's more adventurous enthusiasm for reshaping traditional conventions of responsible government by conferring equality of power on the two institutions of the new national Parliament.[33] The Constitutional design for a Senate based on equal state representation and armed with legislative powers virtually equal to those of the lower house was agreed to on the principle that 'minorities' deserved legislative protection against what Thynne called 'the tyrannic exercise of the power of temporary majorities'.[34] This approach to equal state representation is frequently confused with a conservative defence of States' rights, but from the outset of the 1890s constitutional debates it was made clear by advocates of an elected Senate that equality of state representation was the most promising institutional device to protect the rights of minorities against what Tynne termed 'hasty, corrupt, or dishonest action on a part of any section, now matter how large it may be'.[35] The first federal election of 1901 took place, of course, without any federal electoral legislation. Senators, for example, were elected according to prevailing state electoral law, with Tasmania adapting its established Hare-Clark system of PR. Although the exception, the Tasmanian model of PR was by no means inconsistent with the framers' intentions in regard to the Senate. From time to time, delegates at the 1890s Constitutional Conventions raised the question of the most appropriate electoral basis for a federal house of review, eventually deciding to have the Constitution leave electoral arrangements to be decided by the federal Parliament. It is clear from the scattered commentary and such practices as the Tasmanian 1901 reliance on PR that the framers considered PR to be an acceptable, possibly even the preferred, electoral basis of the upper review house.

The Convention records reveal too little for a conclusive case to be made, but what calls that there were for the use of PR attracted only scattered rebuttal. The argument for PR derived from a distinction made between a democratic principle of 'rule of the majority' and a liberal-constitutional principle of 'rule of the people'. The argument was in two steps: first, the theoretical case for protecting minority representation, by which was meant not a claim to rule by minorities but the rights to parliamentary representation of those who support the non-governing parties; and second, the

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[33] J. Quick and R. Garran, *The Annotated Constitution of the Australian Commonwealth,* Sydney: Legal Books, 1976 (originally 1901), p. 126.

[34] See for example Thynne, *Convention Debates*, 6 March 1891, pp. 104-8. My thanks to Wayne Hooper for drawing this to my attention.

[35] *Convention Debates*, ibid.

practical case for the provision contained in s9 of the Constitution which kept the door open to PR by allowing Parliament to legislate as it saw fit, thereby protecting the option for PR for the Senate if there was sufficient parliamentary support.

The framers' theoretical case for PR is scattered and largely implicit. Emphasis should be placed on the fact that the framers rescinded their early preference for 'States Assembly' as the name for the upper house, and substituted the American term 'Senate' with its connotations of national as well as federal responsibilities.[36] Furthermore, many of the framers were under few illusions as to the likely place of party-politics in *both* houses of the federal parliament; some, like Deakin and Barton, quite probably tolerated PR as a means of adapting the principle of party to serve a distinctively qualified Australian variant of parliamentary government.[37] The argument for an upper house conceded the case that equal state representation was the inevitable entry price being extracted by the smaller States; but it reached beyond that to issues relating to the structural requirements for effective parliamentary deliberation.[38]

The framers' case was that Parliament must widen its representation from prominent partisan opinion to something more like 'a reflex of the opinion of the people' as a whole.[39] The Senate offered hope that 'everyone, whether they are in the majority or the minority, will know they are fairly represented'.[40] Tasmanian advocates of Hare-Clark tilted against South Australian advocates of what they preferred to call 'Hare-Spence', although both supported PR on the ground that its 'essential merit...is to widen the area of the electors' choice'.[41] Glynn went so far as to present a petition in defence of the 'The Hare–Spence method' for the election 'especially of senators'. His petition declared that 'while desirous of leaving undisturbed the rule of the majority', it was vital that 'the minority should not be absolutely silenced'.[42]
So much for the framers' political theory. The practical case about the feasibility of PR is perhaps more surprising, in that very prominent framers like Deakin and Barton went on the record predicting that Parliament would probably opt for PR for the Senate. Deakin, for example, expressed his preference to 'take care' that States which 'think fit to adopt a system of proportional voting for the representation of minorities shall have the power to do so'.[43] Along with Barton and O'Connor, Deakin argued for a liberal interpretation of 'the method of choosing' provision in what was to become s9 of the Constitution. O'Connor agreed that the provision 'must allow for representation of minorities'or indeed any other manner of recording votes which Parliament might see fit to arrange.[44] This reference to the rights of minorities was understood to refer to rights to parliamentary representation as distinct from any misguided claim to the rights of minorities to rule. Barton was later to come under some criticism for his

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[36] Reid and Forrest, op. cit., p. 88.

[37] Quick and Garran, op. cit., p. 444.

[38] Quick and Garran, ibid., pp. 386-7 and 422.

[39] See for example Clarke, *Convention Debates*, 30 March 1897, p. 304.

[40] Howe, *Convention Debates*, 31 March 1897, p. 358.

[41] Glynn, *Convention Debates*, 15 April 1897, pp. 677-8.

[42] *Convention Debates*, 20 January 1898, p.2.

[43] Deakin, *Convention Debates*, 15 April 1897, p. 673; J. Quick and R. Garran, op. cit., p. 426.

[44] See for example O'Connor, *Convention Debates*, 15 April 1897, p. 673; Clarke , op. cit., pp. 367-8.

endorsement of 'the Hare system' as one designed to secure 'the proper representation of the people', and for holding the constitutional door open with his clarification of the likely practical effect of s9's protection of the competency of the federal parliament: that being the adoption of PR.[45]

Models of Senate representation

The Australian framers had two models of federal upper houses designed to operate as houses of review. The first model was derived from fully-operational Senates: the set of constitutional provisions then in place for the two main examples of federal upper houses, the Senates of the US and Canada. The second model was theoretical: being derived from the influential political argument advanced by, among others, John Stuart Mill, for the institution of PR in a house of Parliament. It would certainly be possible to combine these two sources of influence and construct an upper house appropriate to the purposes of a federal polity, and credit goes to those framers who, as I shall show, attempted to do just that. Yet the two types of models contain many interesting examples of institutional features which were *not* adopted by the Australian framers, but which might be important to an effective review capacity. It all depends on the task of political representation considered appropriate to the Australian Senate. Some attention should first be paid to the institutional design principles inherent in each of the two types of possible models, in order to recover the latitude of scope open to the Australian framers in equipping the Senate with a notional review *function*, regardless of whether the institutional review *capacity* was sufficiently considered.

The framers certainly had a model before them of a Senate designed to perform differently from a lower house: many commentators have recognised the powerful presence of the US Senate as an instructive working model of a house of review, even if the lessons were primarily of a sobering negative kind for constitutional designers operating in a parliamentary environment. Still, many of the constitutional features of the US Senate held the attention of many Australian framers in search of the institutional roots of a house of review. The Australian framers derived only a limited range of provisions from the US model. These include: equality of state representation; six year terms; retirement by rotation (but subservient to the double dissolution mechanism) so as to establish a 'permanent' institution; and votes for individual senators, as distinct from state delegations, as had been the 1891 expectation.[46] But consistent with the majority's understanding of the 'House-centredness' of responsible government, the framers withheld from the Australian version of the Senate any specific grant of power in relation to the confirmation of top officials in executive and judicial branches, and any hint of specific legislative function associated with treaties. Stripped of exclusive constitutional functions, the Australian Senate had no need for those other structural devices designed to differentiate the Senate from the House and so enhance the review capacity: such as the different age qualification—again attempted in 1891 but later abandoned[47]—and commitment to as small an upper house as feasible.

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[45] See for example Barton, 7 March 1898, p. 1924; cf *CPD*, 26 and 27 February 1902 p. 10343 and p. 10432; Reid and Forrest, op. cit., p. 85; Graham, op. cit., p. 205.

[46] Quick and Garran, op. cit., p. 412.

[47] ibid., p. 439.

The Canadian model should have been of great interest, since the whole rhetoric of 'responsible government' derived from the Canadian struggle for self-government; but the Canadian federal model in the 1867 British North America Act attracted very little support during the Conventions.[48] Sure enough, Canada was a federation with a parliamentary form of government, but part of the problem was that the Canadian upper house had little of the makings of a house of review, and even less legitimacy when it came to political representation. The creature of understandable 1860s over-reaction against the States'-rights orientation of the US system, the Canadian Senate was an appointive body, with the gift of life-membership in the hands of the federal government (BNA Act, ss21-36). It substituted equality of regional for state (or more correctly 'provincial') representation, with Quebec's representatives being chosen for carefully identified 'electoral divisions' within that province, presumably to balance English and French interests within that province. Eligibility qualifications for Senators which hint at a conscious review capacity included a lower age limit of 30 years, together with tests for property and against indebtedness.

Political Theory: Hare, Mill, Clark, Spence

The world of political theory also opened up the prospect of PR. Many important constitutional framers were convinced that PR would give substance to the promise of the Senate as a house of review, by establishing a different parliamentary institution capable of representing a range of community views either not wanted or needed in the House. When push came to shove with the inclusion of PR in the original electoral bill, opponents quite rightly saw the guiding influence of such philosophical liberals as J S Mill, who was derided by Senator Symon as 'a logician' and a supporter of 'a great many things that were theoretical'.[49] O'Connor for instance, the initial mover in the first parliament of PR for the Senate, probably had Mill in mind when he referred to 'the vast heap of literature on the subject' of representative government, recent 'social and political movements', and 'advanced political writers'.[50]

The academic literature on PR identifies two British authorities and two Australian champions as the standard bearers acknowledged by the constitutional framers. The two British authorities are Thomas Hare and John Stuart Mill, the two Australian champions are Andrew Inglis Clark of Tasmania and Catherine Helen Spence of South Australia. Hare is the originator of the Hare system of PR which J S Mill did so much to publicise as the best basis of parliamentary reform. This is not the place to review Hare's distinctive contribution to electoral systems but some attention should be given to the Australian reception of Hare's version of PR, first published in a series of publications in the 1850s, and here it is instructive to note the role played internationally by Spence in promoting electoral reform.

Australian scholarship has tended to give pride of place to Tasmanian constitutional framer Andrew Inglis Clark because of the early acceptance in Tasmania of what

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[48] ibid., pp. 41, 55 and 119; J. Uhr, 'The Canadian and Australian Senates: Comparing Federal Political Institutions', chapter 5 in B.W. Hodgins et al (eds), *Federalism in Canada and Australia: Historical Perspectives 1920-1988*. Trent University. Peterborough, Canada, 1989, pp. 130-146; J. Uhr, *Deliberative Democracy*, op. cit., p .66-69.

[49] See for example *CPD*, 26 February 1902, Playford, p. 10327; 27 February 1902, Symon, p. 10426.

[50] See for example O'Connor, *CPD*, 31 January 1902, p. 9535 and pp. 9541-42.

became known as ‘the Hare-Clark system’ which is documented so well in the collection edited by Marcus Harward and James Warden.[51] Clark was certainly one of the most creative of the Australian constitutional framers: drafter of the original version of the 1891 Constitution; founder of the Tasmanian system of PR in 1896 after more than twenty years of public advocacy, and later a Tasmanian supreme court judge. But the international scholarship gives due recognition to Catherine Helen Spence, who stood unsuccessfully for election to the 1897-98 Constitutional Convention after a very busy international career promoting the ideas of her British friends Hare and Mill.[52]

Spence’s *Autobiography* tells the story of her original discovery of the principles of PR through her observation of her father’s work as town clerk of Adelaide, when he used PR-like mechanisms in Adelaide’s initial city council elections of 1840. It was later through her avid reading of the works of Hare and Mill that Spence came to see the larger import of PR and the international relevance of her own early writings on ‘effective voting’: in her words ‘reform of the electoral system became the foremost object of my life’.[53] As the elected member for Westminster, Mill circulated and defended amendments to include in the 1867 Reform bill provision incorporating both women’s suffrage and PR.[54] Spence became familiar with Mill’s revisions of Hare’s approach and closely followed the fate of Mill’s public campaign for PR. Arguably, Mill’s account of the merits of a second chamber organised on PR provides one of the important missing ingredients in the framers’ confident recipe for a federal house of review.[55] Mill provides the substance for the argument only hesitatingly put by a few of the framers that the primary purpose of an upper house, and of PR, is to enhance the deliberative capacities of parliamentary institutions. Deliberation might sound like too elevated a task for Australian parliamentary bodies, but Mill himself identified Australian discussion of PR as evidence that the Hare method was not unduly complicated and that it could be introduced and made to work.[56]

Mill’s case is made most conveniently in his *Considerations on Representative Government*. In reluctantly accepting the place of a second or checking chamber, Mill noted that it need not be ‘of the same composition’ as the other house. The aim of the second chamber was to act as ‘the centre of resistance to the predominant power in the Constitution’, which in modern democracies is the force of the majority, or what he termed ‘democratic ascendancy’ with its defective tendency to cultivate what he, following Tocqueville, identified as the tyranny of the majority. The review chamber is there to check ‘the class interests of the majority’ and to represent above all the interests of vulnerable minorities, although Mill is particularly conscious of the need to

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[51] M. Harward and J. Warden, (eds), *An Australian Democrat*. Hobart,Centre for Tasmanian Historical Studies, University of Tasmania, 1995.

[52] See generally Jennifer Hart, *Proportional Representation* . Oxford, Eng, Clarendon Press, 1992, pp. 24-55; cf M. Sawer and M. Simms, *A Woman's Place*. (2nd ed) Sydney,Allen and Unwin, 1993, pp. 1-16.

[53] C.H. Spence, 'Autobiography' in Helen Thomson (ed), *Catherine Helen Spence*, St Lucia, Qld, University of Queensland Press, 1987, pp. 429-30, p. 437 and p. 440.; cf Jennifer Hart, op. cit., p. 45.

[54] Hart, op. cit., pp.49-51.

[55] Reid and Forrest, op. cit., pp. 87-94.

[56] J. S. Mill, 'Considerations on Representative Government' in J. Grey (ed) *On Liberty and Other Essays*. Oxford, Eng., Oxford University Press, 1991, p. 325.

reinforce rather than undercut the political principles of majority rule and so to promote 'nothing offensive to democratic feeling'.[57]

PR makes good the promise of a friendly critic of democracy, and defender of the elusive principle of democratic equality which might otherwise suffer at the hands of the utilitarian practice of majority rule. Institutions based on this supplementary form of political representation will never have overwhelming moral authority, or even the crude voting power, to compete with popular elective bodies for the right to rule or determine broad public policy. Their custodial task is directed toward procedural justice rather than preferred public policy—through management of institutional filters which are designed to protect the community against ill-considered and unjustifiable uses of executive power, and to force the majority party to mobilise minorities so as to 'speak and vote in their presence, and subject to their criticism'.[58]

The review function is one which Mill termed 'the function of Antagonism', by which he refers to the check or control to be placed on the unexamined power of 'the ruling authority'. Control in this legislative sense means open, public examination of the reasons for ruling; and PR can provide the requisite 'rallying point' around which 'dissentient opinions' can form and thereby review and revise the policy and administrative priorities of the ruling majority. Mill even anticipated some of the standard criticisms of PR: that on the one hand, it tends to confer undue power on 'knots or cliques; sectarian combinations' of small groups capable of blocking measures of wider community benefit; and on the other hand, it can favour 'the great organised parties' when operating through a 'ticket system' of 'party lists'. Mill conceded 'that there is a difficulty', but preferred to go down the reform road in which 'the two great parties' would for the first time be 'confined within bounds', and forced to use—or at least respond to demands from—the forum of parliament for their negotiations over private place and public policy.[59]

Australian advocates of proportional representation

Australian political science gives pride of place to Melbourne professor of mathematics E J Nanson as 'the expert's expert' on PR. Nanson was an adviser to the first Commonwealth government and is regarded as the source of the legislative provisions relating to PR for the Senate. Nanson's important role has been covered elsewhere and for this occasion it is preferable to share the spotlight around and to treat others, like Spence and the Ashworth brothers, who were more politically active than professor Nanson.[60]

As early as 1861 when in Adelaide, Spence had published her own version of PR at a time when the legislatures of New South Wales and Victoria both debated the merits of PR.[61] Spence later formed the Effective Voting League. After women had won the vote

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[57] ibid., pp. 386, 388 and 391.

[58] ibid., p. 314; cf Uhr, *Deliberative Democracy*, op. cit., pp. 70-74.

[59] Mill, ibid., pp. 315-6 and pp.320-22; cf Hart, op. cit., pp. 44-45.

[60] McLean, op. cit., pp. 369-385; Reid and Forrest, op. cit., pp. 88-89. See also D Headon, 'No Weak-Kneed Sister', ch 3 in Helen Irving (ed) *A Woman's Constitution*. Sydney: Hale and Iremonger, 1996, pp. 42-54.

[61] Hart, op. cit., pp. 45-6.

in South Australia in 1894, Spence put herself forward as a candidate for the 1897-98 Constitutional Convention on a platform of 'a just system of representation' claiming to be 'the first woman in Australia to seek election in a political contest'.[62] In the hope of establishing 'a truly democratic ideal' through Federation, Spence promoted 'effective voting' as one vital means of ensuring that 'equality is to be as real in operation as in theory'. She held that 'it is incumbent on all States to look well to it that their representative systems really secure the political equality they all profess to give, for until that is done democracy has had no fair trial'.[63]

Spence's *Autobiography* reports that her Effective Voting League came forward to warn South Australian premier Kingston of the risks of 'the monopoly of representation by one party in the Senate, and the consequent disenfranchisement of hundreds of voters throughout the Commonwealth'. She and her supporters lent their considerable support to Glynn during the 1897-98 Constitutional Convention and Glynn in turn publicly advocated her cause. For Spence, the 'fundamental principle of PR is that majorities must rule, but that minorities shall be adequately represented'. The minority 'can watch the majority and keep it straight'.[64]

By way of illustrating the breadth of interest in PR at the time of Federation, I can take one of the many examples identified by Reid and Forrest to suggest the colour and cogency of the electoral reform movement. The example is the work *Proportional Representation Applied to Party Government* by the two Ashworth brothers.[65] T R Ashworth was to remain active in the promotion of PR at the Commonwealth level for many years, culminating in his involvement as one of the 1927-29 royal commissioners into the Constitution, which recommended in favour of PR for the Senate, as I will report below.

The Ashworth book deserves brief comment for several reasons. First, the book was published during the year 1900 on the eve of the elections for the first Commonwealth Parliament. It was designed to broaden Australian interest in PR at the outset of the Commonwealth. Second, the authors take pains to demonstrate the many varieties of PR and in particular to promote their own version of a list system which is designed to consolidate rather than fragment the two party system of parliamentary government, much like some contemporary critics from the major political parties. Their target was to balance out the imbalance of seats between the governing majority and the Opposition party by protecting the parliamentary presence of the official Opposition as an integral component of the system of government. To the Ashworth brothers, the Senate is important as a site for PR but not as important as the House of Representatives where Government and Opposition should face each other on the basis of their proportional electoral strength.[66] Third, the Ashworth view, even before

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[62] C.H. Spence, op. cit., pp. 465 and 467; Sawer and Simms, op. cit., pp. 4-5; J. Uhr, *Deliberative Democracy*, op. cit., pp. 110-111. See also Ann Millar, 'Feminising the Senate', ch 8 in Helen Irving (ed) *A Woman's Constitution*, Sydney, Hale and Iremonger, 1995, esp. pp. 128-136.

[63] Spence, ibid., p. 466.

[64] p. 467 and pp. 470-71; see also Glynn, *Convention Debates*, 15 April 1897, p. 678.

[65] Graham, op. cit., pp. 204-6; Reid and Forrest, op. cit., pp. 92-94.

[66] T.R. Ashworth, and H.P.C. Ashworth, *Proportional Representation Applied to Party Government*. Melbourne: Robertson and Co, 1900, pp. 200-204.

elections for the first Commonwealth Parliament, is that the Senate would operate not as a States' house but as a party house like the House of Representatives. Their interest in securing PR in both chambers rests on their belief that both would be driven by the pressures of party politics and ideally should fairly display the community's balance of governing and opposing parties.

The Ashworths' commitment was distinctive among the promoters of PR in that they singled out the importance of 'organization and leadership' of both the governing party and the party of the official opposition as the predominant institutional requirements of an effective parliamentary system. They saw 'the fundamental error' in Australian democracy to be the belief that 'responsible leadership in Parliament is incompatible with popular government'.[67] Whereas most proponents of PR reach out to 'minorities' that are excluded from the parliamentary system, the Ashworths' approach the opposition as the most deserving of minorities and seek institutional arrangements to bolster opposition numbers in Parliament. Unlike Hare, who sought 'to allow representation to as many minorities as possible', the Ashworths sought barriers against the parliamentary representation of the sort of 'cranks and faddists' commonly feared by opponents of PR.[68] Critical also of Mill and Spence, the Ashworth brothers distanced themselves from the Tasmanian experiment in PR, especially in their argument that the 'true function' of minor parties 'is to influence the policies of the main parties'.[69] Thus they are very critical of the emerging Labor Party as a sectional interest capable of gaining disproportionate influence over national governments.[70] The Ashworth argument used the new Senate as an illustration of how PR could be made to redress the imbalance in parliamentary representation between government and opposition. The authors state that their intention in writing their book was to prevent the adoption of the block vote for the Senate.[71]

The Barton Government's Electoral Act of 1902

The practical result of the framers' consideration of these sources is the remarkably permissive s9 of the Constitution, which provides that Parliament may legislate as it sees fit for any nation-wide 'manner of voting' for the new Senate. The original 1901 Senate elections were held of necessity on state-wide systems, with Tasmania and South Australia using state-wide systems for their initial election of House members as well. But only Tasmania adopted a form of PR for the 1901 elections: indeed, for both of its federal houses.[72]

The parliamentary records for the first year of the Commonwealth Parliament include two reports which would appear to have helped prepare the ground for the government bill proposing PR. Home Affairs minister Sir William Lyne convened a committee of parliamentary experts on electoral law and practice. Among the terms of reference was one relating to the 'practicability of the Hare-Spence system of voting'. This group

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[67] ibid., p. 87.

[68] ibid., pp. 25-6.

[69], ibid., pp. 41-45 and pp. 147-8.

[70] ibid., p. 197.

[71] ibid., pp. 79, 97-103, and pp. 204-5.

[72] S. Bennett, 'These New Fangled Ideas' in Haward and Warden, op. cit., p. 157; M. Mackerras, 'The Operation and Significance of the Hare-Clark System', Haward and Warden, op. cit., p. 170.

reported to him in July 1901 in favour of PR for the Senate.[73] The committee of experts provided no reasons for their recommendation which was included among a long list of very practical reports about emerging best practice across Australian electoral systems. Claiming to have given the Hare-Spence system 'our fullest consideration', the committee simply implied that it was 'practicable' and moved on to recommend the 'contingent vote' for all single member electorates (para 29).

The second report was on the Hare-Clark system of voting and 'the true voice of the electors' prepared for the Senate by the Returning Officer and the Statistican from Tasmania.[74] The two Tasmanian authors quote extensively from Justice Andrew Inglis Clark's exposition of the merits of what he preferred to call 'the Clark-Hare system' then in use in the two state electorates of Hobart and Launceston: 'which enables every section of political opinion which can command the requisite quota of votes to secure a number of representatives proportionate to its numerical strength'. The two Tasmanian authors emphasise that too many opponents of PR show a misplaced interest in topics related to 'the ease and convenience of the candidate' in preference to 'fairer representation of the elector and his greater freedom of choice'. Their paper reviews the counting that was used for the first election of Tasmanian members and senators to the Commonwealth Parliament, striving to demonstrate that systems of PR greatly benefit 'the represented' who they identify as 'the Hamlet of all matters regarding representation'. This report in particular was cited as authority during the 1902 parliamentary debate over the electoral bill.[75]

The electoral bill introduced by the first post-election federal ministry was, after a false start in the House, introduced in the Senate and provided for PR as the basis for counting of the Senate vote.[76] Of interest here is the lively debate in the Senate which, although in O'Connor's words was 'full of the most admirable matter', eventually led to the rejection of PR, against the warnings of the government that such a move, coupled with the adoption of a first-past-the-post system of representation might make the Senate little more than a echo of the House of Representatives, open to the charge of redundancy.[77]

When introducing the 1902 bill in the Senate, minister O'Connor quite correctly stated that this legislation was designed for 'bringing the Constitution of Australia into operation'. The Labor party respected the occasion by granting its federal members a free vote on the issue.[78] Together with the accompanying franchise legislation, the electoral legislation bill aimed to provide for 'the most representative Parliament, according to the truest principles of democracy, which exist in the world'.[79] O'Connor defended PR in terms of establishing the true voice of the majority, and not simply in

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[73] See for example *CPP*, 1901-02, vol. 2, pp. 203-7; cf. Graham, op. cit., pp. 205-6.

[74] See for example *CPP*, 1901-02, S/46, pp. 1-8.

[75] See for example, *CPD*, 31 January 1902, O'Connor, pp. 9541 and 6 March 1902, pp. 10709-11; Syme, p. 10430.

[76] Reid and Forrest, op. cit., pp. 94-102; Maclean, op. cit., p. 379, J. Uhr, *Deliberative Democracy*, op. cit., pp. 109-113.

[77] See for example O'Connor, op. cit., p. 10701; Keating, CPD, 1902, pp. 10432-33.

[78] See for example O'Connor, ibid., p. 9529; G. S. Reid and M. Forrest, op. cit., p. 104.

[79] See for example O'Connor, ibid., p. 9530.

terms of minority rights. With some force, he argued that the conventional 'block-vote system' too easily protected 'the choice of a minority' in the way in which it rewarded a group which, compared with any other single group, attracted the highest number of votes—despite the possible existence of a majority of votes cast against that group. And even when the majority of opinion wins the available seats, 'that majority has the absolute power of securing the representation of its own opinion only, and a large number of the electors go unrepresented altogether'. The 'moral aspects of the question' are considerable in that a 'compact minority' from among 'the two dominant parties in politics' might alone secure representation, with 'all sorts of wire-pulling and log-rolling and combinations' practised in the pursuit of voter preference.[80]

The proponents of PR stopped well short of advocating minority rights to rule, but they did defend minority rights to representation. They explicitly accepted that democracy means that 'the majority in decision must rule', and that the minority has 'a right to be heard and not to rule'.[81] But for all practical purposes, 'government by the people' means that the people elect their representatives who rule on behalf of the community, and the only fair system of representation is one arranged 'proportionate to the opinion of the community'. Traditional forms of representation associated with 'the British Constitution', and even those traditional organising principles of executive government which have been 'invested with a certain amount of sacredness' are, in O'Connor's articulation of Australian constitutionalism, 'altogether unsuited to modern times'.[82] Parliament must strive to become 'a true reflex of the opinion of the people' by arranging political representation so that 'every shade of opinion, as far as possible, may be represented'. That phrase 'as far as possible' reflects the Barton government's commitment to a modified form of the Hare-Clark system in which representation is organised according to quotas of popular votes obtained, with an institutional design priority of cultivating manageable quota-sized pockets of opinion and representation.[83]

After extensive debate, the Senate threw out the provision for PR, chiefly on the understandable fear that it would introduce a war of representation into the new federal Parliament, probably challenge the conventions of cabinet government (or 'honest party government' as it was called[84]), and increase the potential of the Senate to compete for popular legitimacy with the House. Symon derided it as making the parliament 'a kaleidoscope, not a representation of the majority'.[85] The problematical issue of representation was clear: 'To which Chamber is the Government directly responsible?'.[86] Downer complained that 'under Hare's principle...majorities will have to go to the wall'. Strong party government would be wrecked in that it would 'prevent the parties working out what they desired' and so incapacitate the operation of majority

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[80] See for example O'Connor, ibid., pp. 9535-6 and pp. 9541-42.

[81] See for example O'Connor, ibid., p. 9537; *CPD*, 26 February 1902, Best, p. 10349; cf Graham, op. cit., pp. 206-7 and p. 216.

[82] See for example *CPD*, 31 January 1902, O'Connor, p. 9537; Best, pp. 10343-49.

[83] See for example O'Connor, ibid.,, p. 9541; Keating, 27 February 1902, pp. cit., pp. 10431ff.

[84] See for example Symon, *CPD*, 27 February 1902, p. 10425.

[85] See for example Symon, ibid., pp. 9759 and pp. 10417-19.

[86] See for example Symon, ibid., p. 10415.

rule.[87] In Symon's pithy words, PR would force governments to stoop to conquer and to work 'both sides of the gutter, so to speak'.[88] The preconditions of responsible cabinet government would be eroded, in that under what the opponents cleverly called 'fractional representation' political leadership would be challenged by the activity 'of sections and fads', enfeebling cabinet's claim to representative leadership as 'the dominant power'. How, asked Symon, could a 'many men many minds' Parliament feasibly create a government, when it has all the potential to 'altogether paralyze responsible government modelled upon the British system'?[89]

The great divide was that over the merits of strong party government. The proponents of PR argued that the British conventions of party government did not suit the circumstances of the new federal polity, and that to the extent that British conventions held sway then due account should be taken of electoral reform sentiment in Britain which pointed the way to the future. The continued existence of 'two great parties' was at best doubtful and at worst undesirable.[90] The proponents argued that hidden minorities already held much power, in that the major parties contained 'factions' dependent on the hidden influence of powerful minority groups interested in financing sympathetic parties or representatives within parties.[91] The opponents defended party government in the belief that so-called 'faddists' would alter the system of government to such an extent that 'the principle of log-rolling' would replace the conventions of majority government. They feared the growth of 'cliques and minorities' which would fragment 'the symmetry of the system' of party government, in which each of the major parties ruled in turn according to the swings of popular confidence.[92]

The push for proportionality

It is instructive to note the early assessments of contemporary authorities like Harrison Moore to the effect that Parliament had not yet (in this case, as at 1910) given favourable consideration to any scheme for PR for the Senate: as though such consideration was only natural and would one day come to pass.[93] Moore's analysis lays out the groundwork for later Senate reform and his book highlights the mood of anticipation found among many critics of the early Parliament. Moore illustrates the early sense of dissatisfaction with the Senate's electoral system: as he so clearly puts it 'the existing system is, of course, open to the objection that it enables an organized plurality of voters to secure the whole representation, though it has only a small majority of votes, or, even in the case of a large number of candidates, is an actual minority of the electors voting'.[94] In a remarkably strong defence of the constitutional rights of the Senate, Moore evaluates the emerging character of the Senate by reference

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[87] See for example Downer, *CPD*, 26 February 1902, p. 10327 and p. 10338.

[88] See for example Symon, op. cit., p. 10415.

[89] See for example Symon, ibid., pp. 10418-19 and pp. 10421-22.

[90] See for example Keating, op. cit., pp, 10441-43; O'Connor, 6 March 1902, pp. 10705-06.

[91] See for example O'Connor, ibid., pp. 10706-07.

[92] See for example, *CPD*, 5 March 1902, Smith, p. 10631; 26 February 1902, Downer, p. 10338; 19 March 1902, Millen, p. 11019; 19 March, 1902, Baker, pp. 11007-10.

[93] W.H. Moore, *The Constitution of the Commonwealth of Australia*, (2nd edn). Melbourne: Maxwell, 1910, pp. 115-117 and pp. 150-153.

[94] ibid., p. 115.

to its 'popular basis than by its position as a House of States' or by its constitutional permanence. Further, he defended the Senate as displaying more progressive tendencies than those evident in the House of Representatives. Rejecting such traditional categories as 'second chamber' and 'house of review', Moore emphasises that the 'actual part of the Senate in Australian politics appears to reveal a new role for a Second Chamber' especially in the areas of 'informing' and 'educating' which traditionalists like Bagehot thought essential to the functions of lower houses.[95]

Moore points out the potential for Senate reform. What follows is a selective listing of the major instances when PR came to the fore in national politics as a desirable alternative to the 'block vote' system in the Senate. The aim of this listing is to illustrate the evolving depth and eventual breadth of attraction for PR. Seen against this background, the 1948 decision is part of an evolution of Australian parliamentary institutions that gives due recognition to a form of political representation long anticipated as an essential component of the Australian constitutional system.

The Labor party was ambivalent about the merits of Senate reform. By 1919 the party had committed itself to abolition of the Senate but this represents something of an ambit claim. As we shall see, prominent Labor figures broke through the mould of formal party policy to pose PR as an alternative to abolition. The traditional Labor view is nicely captured by its original prime minister, Watson, who told the 1912 party conference that PR would entrench minority representation, and with it minority legislation. At the same party conference one of the party's backbench members spoke out against PR as producing 'a sort of shandy-gaff politician' and raised the awful prospect of a proportionally represented House of Representatives that 'could only work by compromise'. Labor again defeated an interest in PR at the 1918 party conference.[96]

During debate on the 1922 electoral bill, the future Labor Prime Minister James Scullin recorded his support for the introduction of PR for Senate elections.[97] The passage is short but significant. Scullin states that the existing system 'is obsolete': a system that allows Labor in 1910 to win all 18 seats and then allows Labor to win only one in 1919 'does not secure the representation of the electors proportionately, and we should try to give representation on the basis of the strength of the great sections of the electors'. Apart from the reported preference for PR by Curtin at the 1936 party conference, Labor had little to say for Senate reform until the time of the Chifley government.[98]

But there were many interesting noises made on the other side of national politics. The leader of the Liberal party, Joseph Cook, included a policy in support of PR for Senate elections during the 1913 (which he won) and the 1914 general elections (which he lost).[99] We also find fascinating instances like Glynn's October 1914 motion that: 'with a view to securing as far as possible representation of parties in proportion to their

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[95]ibid., pp. 116-17 and pp. 152-155.

[96] *The Australian Federal Labor Party*, op. cit., p. 218.

[97] See for example Scullin, *CPD*, 14 September 1922, pp. .2283-4.

[98] *The Australian Federal Labor Party*, p. 222.

[99] G. Sawer, *Australian Federal Politics and Law 1901-1929.* volume 1, Melbourne: Melbourne University Press, 1956, p. 128.

strength at the polls, the method of election by quota and transferable vote be adopted as the method of choosing senators'.[100]

Another distinctive instance is the 1915 report of the Royal Commission on Commonwealth Electoral Law and Administration.[101] This inquiry was generated by disputes over the conduct of the 1913 general election, including allegations over official interference involving the Minister for Home Affairs King O'Malley. The report provided a major stimulus to the development of a professional body of electoral administrators under the direction of a Chief Electoral Commissioner with powers stipulated in law. In a report containing many detailed observations about the practical management of national elections, including recommendations for compulsory voting generally and preferential voting in House of Representatives elections, the commissioners boldly state: 'In view of the large area represented by Senators, a system of PR should be adopted; applying, of course, to each separate State' (para 12; cf paras 11, 31).

The 1919 introduction of preferential voting owes much to the rise of the Country party as a demanding and capable third force in Australian politics and it is important to acknowledge that the Country party was also inclined to support a change to PR for the Senate.[102] According to Geoffrey Sawer: 'The budding Country Party group tried unsuccessfully to obtain PR on Hare-Clark principles for the Senate, claiming with justification that the application of the simple alternative vote would tend to give all the Senate seats in a State to one party'.[103] The following report of events in 1919 and 1922 confirms this impression but also indicates that the interest in PR was far from confined to Country party circles.

Proponents and opponents of proportional representation

Government changes to the Electoral Act in 1919 and 1922 sparked extensive parliamentary debate over the merits of PR, with several proposals for the adoption of PR brought forward to test the mood of both the House of Representatives and the Senate. All the proposals for PR were unsuccessful. The government proposals were more successful. The 1919 changes included the establishment of preferential voting and the 1922 changes included the party grouping of candidates to make party preferential voting easier. Neither change would have come about if it had not coincided with the electoral interests of the major parties. The illustrations that I will use here come from one episode of a failed attempt at a second-reading amendment in 1919[104] and from several episodes from 1922 of failed second reading amendments[105], committee stage amendments[106], and also votes over third reading of bills.[107] The second

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[100] See for example Glynn, *CPD*, 28 October 1914, p. 410; G. Sawer, op. cit., p. 149.

[101] *Commonwealth Parliamentary Papers*, 1914-1917, vol 2, part 1, pp. 435-453.

[102] Sawer, op. cit., pp. 158-9;

[103] ibid., p. 169.

[104] *CPD*, 15 October 1919, pp. 13308-13345.

[105] *CPD*, 2 August 1922, pp. 973-995.

[106] *CPD*, 9 August 1922, pp. 1203-1222.

[107] *CPD*, 23 August 1922, pp. 1569-1580.

set of episodes took place when New South Wales was operating on a system of PR (1920-1926) that was attracting considerable national interest.[108]

Those proposing PR for the Senate were never government ministers and they included many representatives of the smaller States. Proponents tended to argue that the Senate was not acting as a States' house because its party composition was driven by the changing tides of electoral popularity sweeping the lower house: the Senate either duplicated the party in power in the House of Representatives or reflected the lost popularity of the majority that had preceded the current government. Rarely if ever did the Senate provide a balance of representation between the two major party blocs: Labor and non-Labor. Proponents of change noted that periods of opposition domination of the Senate can and did occur but they were not convinced that this antagonism to the political party dominating the House of Representatives provided adequate safeguards for state interests, particularly the interests of the smaller states.

Federalism was clearly an issue of considerable importance to the proponents of PR but they were not alone in their reliance on the rhetoric of federalism. The opponents of PR challenged the advocates of change to demonstrate how PR would enhance the capacity of the Senate to perform its original role as protector of States' interests. The interesting response highlighted another model of federalism that went beyond the simplistic rhetoric of states' rights to the more sophisticated rhetoric of minority rights, including those of national minorities. In this more ambitious view, the equal representation of each of the states gave the Senate its legislative leverage and it was now up to Parliament to ensure that those using this leverage properly reflected the range of deserving if unrepresented interests across the nation. Proponents of change argued that the prevailing electoral system failed to protect the interests of many minority interests and that PR would enable the Senate to claim to represent the vulnerable minorities that the government-sponsored changes in 1919 and 1922 failed to protect. For example, Senator O'Keefe supported the 1919 push for PR on the basis that 'the party spirit' dominant initially in the House of Representatives had long ago upset the original hopes that the Senate would act as a States' house; now that the Senate too was a party house it was time to widen the span of party representation to protect those interests that remain unrepresented by 'the party spirit' of the lower house.[109] Proponents also argued that the thesis about the Senate being primarily a States' house was falsified by the constitutional protection that each state must be represented by six senators rather than one senator, thereby inviting diversity of representation which Parliament had a duty to protect.[110]

Proponents of PR argued that preferential voting without PR in effect provided for 'the block-vote under a new name'.[111] Proponents held fears that 'the very strong shackles, ties, and limitations of the party system' were suppressing the representation of minority opinion.[112] The presence of minorities was an essential ingredient of

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[108] R.S. Parker, *The Government of New South Wales.* St Lucia, Qld, University of Queensland Press, 1978, pp. 19-21.

[109] See for example O'Keefe, *CPD,* 15 October 1919, p. 13344.

[110] See for example Keating, *CPD,* 9 August 1922, p. 1209.

[111] See for example Needham, *CPD,* 15 October 1919, p. 13309.

[112] See for example Pratten, *CPD,* p. 13321.

parliamentary deliberation: proponents argued that 'in order to ensure the Senate being a deliberative assembly, the principal sections of public opinion in the nation should have satisfactory representation'.[113]

A common distinction that helps clarify the nature of minorities was that between 'the great sectional interests of this country' and the interests of the great political parties which have failed to take up the interests of those vulnerable minorities not capable of extracting concessions from the major parties. For instance, the Country Party was put forward as an example of a 'section' excluded from the Senate and a political party supportive of PR.[114] Although proponents often justified PR by reference to 'the principle of minority representation', most proponents conceded that not all minorities could hope for representation.[115] A Parliament with regular election for only three senators for each state would not be capable of sharing representation among very many groups and 'could not possibly represent, directly and in detail, small bodies of public opinion outside supported by only a very inconsiderable section of the people'.[116] Senator Elliott drew a distinction between minorities as such and 'the great minorities' deserving of parliamentary representation.[117]

Advocates of PR put their case in terms of 'equitable justice' or 'plain electoral ethics': 'the Senate at all times should be a reflex of the opinions of the community'.[118] In response to government fears that PR would unleash heatwaves of heterogeneity, proponents responded with defences of 'the composite opinion of the community'. In this distinction, 'composite' highlights the positive qualities whereas 'heterogeneity' highlights less consensus-building qualities. The alternative to PR was to condemn the Senate to the representatives of 'the momentarily dominant majority on the momentary questions of the day'.[119]

Many proponents publicly stated their knowledge that PR would not be easily conceded by the major parties and that the struggle would be a long one. As stated by Tasmanian senator Bakhap: 'We know, with the present *personnel* of this Parliament, that there is very little hope of it being embodied in our statute-book, but it is our duty to hold up to the people something worthy of achievement'.[120] They knew that the Barton government had attempted to legislate for PR and senators in particular appreciated the irony that their parliamentary chamber had put paid to the plans of the Barton government. The feasibility of PR was driven home by reference to the operation of similar systems in Tasmania since 1909 and in New South Wales from 1920-1926. The Government of Ireland bill was another frequently cited inspiration.[121] To do nothing to advance PR would be to risk public disfavour. To proponents of Senate reform, the

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[113] See for example Bakhap, *CPD*, p. 13327.

[114] See for example Elliott, *CPD*, 2 August 1922, pp. 977-78; Gardiner, *CPD*, 9 August 1922, p. 1218.

[115] See for example Bakhap, *CPD*, 23 August 1922, p. 1571.

[116] Keating, *CPD*, 15 October 1922, p. 13336.

[117] Elliott, op. cit., p. 1205.

[118] Bakhap, *CPD*, 2 August 1922, p. .987; and 15 October 1919, p.13325; see also Pratten, p. 13320.

[119] Keating, *CPD*, 15 October 1919, p. 13335-6; and 9 August 1922, p. 1210

[120] See for example Bakhap, *CPD*, 15 October 1919, p. 13326.

[121] See for example Keating, *CPD*, 15 October 1922, p. 13336.

practical danger was that public opinion would not tolerate a parliamentary chamber 'in which perhaps one half of the electors are unrepresented'. This would be 'a splendid argument for the abolition of this Chamber'. PR would make the Senate 'less a target for ridicule and disrespect'.[122]

But it was the opponents of Senate reform who won these rounds of parliamentary struggle. Many arguments were clever distractions rather than admirable feats of parliamentary deliberation. For instance, opponents successfully defended the powers and composition of the Senate on the basis that compared with the lower house it was 'the more democratic house because it speaks for a larger constituency'. And again, at times opponents would contend that if PR was really desirable then it was more appropriate to the House of Representatives which claimed to represent population rather than geography.[123]

More seriously, opponents argued that PR would fragment the solid voice of each state with the prospect of each state sending to the Senate 'six different sets of opinions, and all more or less representing minorities'.[124] How could the Senate ever act as States' house, thundered senator Pearce, if through PR 'we would divide up the Senate into a series of sections representing varying political views'. Imagine, he continued, the existence of a political party with one representative from each state but none capable of really representing their state 'because their primary function would be to represent the political views' of their section.[125]

Opponents contended that the purpose of the Senate as a States' house precluded PR because that would ensure that State representatives were 'divided, not by interests of the States, but by factions as represented by quotas'.[126] Critics feared that there were 'wrangles enough' with the clash of state interests 'without superimposing upon them the wrangling of the representatives of rival sections in the different States'. Opponents of Senate reform won the day with their picture of a reformed Senate behaving as a 'House of proportions...a House of brawling political factions' and as 'a place of brawling votaries'.[127] Behind all these incidental defects loomed that one basic defect: responsible government might become impossible because of Senate stalemates between equal representation of government and opposition forces. Responsible government required the 'party system' as its basic operating rule, and opponents won the day with their rally to the support of 'the system of majority rule'.[128]

All of the above material comes from the record of the Senate. There is one important episode from the record of the House of Representatives in 1922, in addition to the

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[122] See for example Bakhap, *CPD*, 15 October 1919, p. 13325; O'Keefe, p. 13343; MacDonald, p. 1570.

[123] See for example De Largie, *CPD*, 2 August 1922, p. 974; Pearce, *CPD*, 9 August 1922, p. 1580.

[124] De Largie, *CPD*, 2 August 1922, p. 974.

[125] Pearce, *CPD*, 9 August 1922, p. 1206.

[126] Pearce, ibid, p. 1207.

[127] See for example Lynch, *CPD*, 9 August 1922, p. 1221; 23 August 1922, pp. 1575.

[128] See for example De Largie, op. cit., p. .974 and p. 976; Millen, *CPD*, 9 August 1922, p. 1219.

supportive comment from Scullin quoted a few pages earlier.[129] Country party leader Earle Page feared that the government bill to permit the grouping of party candidates on Senate ballot papers would consolidate the party characteristics of the upper house and ensure that it followed the party swings of the lower house. Arguing that the existing system was 'recognised by everybody throughout Australia to be ludicrous', Page warned that 'the one-party character of the Senate' would eventually cause great public offence when the community understood that there were alternatives capable of reforming Senate representation to include 'all classes of the people'. The 'very essence of representative government is that all sections of the community should have their spokesmen in Parliament'. Page proposed a series of committee stage amendments to introduce PR for the Senate, also providing for the record a chart of comparable countries where PR was in place or being introduced, particularly in relation to upper houses. Page's amendments were defeated by 9 votes, Scullin voting with Page.

Further evidence

The interest in PR did not end there. Country party leader Page included policies for PR during election campaigns in the early 1920s and also advocated that a constitutional convention be organised on PR of interested political parties.[130] Further, Stanley Bruce was also reported to be favourable to Senate reform based on PR.[131] As late as the 1943 general election, Page was still advocating PR for the Senate.[132]

The Peden Royal Commission on the Constitution of the Commonwealth (1927-1929) included as one of its commissioners T R Ashworth, co-author of *Proportional Representation* examined earlier. The royal commission noted that the introduction of preferential voting for House and Senate elections, which was designed to secure parliamentary representation for candidates with the highest number of votes, 'gives no room for the representation of minorities'. The Report noted the historic imbalance among Senate parties and regretted 'that there may be no opportunity for the presentation of different points of view'. The commissioners argued that 'the Senate would be better qualified to act as a chamber of revision if senators were elected under a system of PR' which they recommended for adoption on an experimental basis for ten years.[133]

The 'Supplement and Recommendations by Mr Ashworth' is the Royal Commission's most extensive treatment of PR.[134] Ashworth distanced himself from the majority's attempt to 'excise minor disabilities or cure minor ailments' and called for 'a complete change in the character and constitution of the Senate'. Repeating the earlier thesis about the merits of two party systems elected under list systems, Ashworth emphasised that 'it becomes the duty of minorities to work through the constitutional parties'. Preferential voting 'is a direct encouragement to party multiplicity'. The Senate is 'slowly atrophying' and given that it has failed to represent the States it should be

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[129] CPD, C, 15 September 1922, pp. 2331-6 and pp. 2472-74.

[130] G. Sawer, op. cit., pp. 183-4 and p. 223.

[131] Crisp, *The Australian Federal Labor Party*, op. cit, p. 221.

[132] G. Sawer, op. cit., p. 73.

[133] J. Peden (Chair), *Report of the Royal Commission on the Constitution*, Canberra: Government Printer, 1929, pp. 42, 47-48 and 267.

[134] ibid., pp. 277-93.

reformed to represent something new: in this 'age of association' it should be reformed to represent 'the various interests and vocations' with the German Federal Economic Council as one possible model.

Although the 1929 royal commission had no immediate effect, it did provide a resource for many generations of later advocates of Senate reform. One source from the Australian Archives is the October 1935 cabinet memorandum prepared for the Lyons government by Thomas Paterson, Minister for the Interior. This memorandum canvasses the general issue of PR and although it does not advocate a change, it reflects a growing confidence within government that a change to PR can be made to work effectively. The Page initiative of 1922 is used as an illustration of the periodic eruption of interest in PR within even the ranks of the House of Representatives. It would seem that nothing came of this 1935 cabinet interest.

I can conclude this section with one such episode of advocacy involving rising Country party leader John McEwen.[135] In a general debate in 1937 on a supply bill, McEwen directed his comments at the Labor opposition, which at the time had only three Senators, as though to test their interest in Senate reform. Claiming to be interested in greater parliamentary representation for minorities, McEwen wondered aloud what it would take for 'a great political party to be always assured of some representation in that chamber, without it being necessary for it to be beholden to any other political party in the arrangement of joint tickets for candidates'.

Was this a plea for help to Labor from the Country party which suffered at the hands of its conservative allies? McEwen surveyed the record of the 1890s constitutional conventions and detected strong support for the principle of PR, driving home his message with his call that 'Parliament should declare that the time is ripe for a real reform of the method of electing senators'. Drawing on recent electoral statistics, McEwen contended that 'there has been a very substantial minority body of political opinion which has been denied representation' in the Senate, and he called on the government to bring in legislation to reform the Senate 'as a democratic body in which it is possible for minorities to secure representation'. The parliamentary record has no obvious response from the serving government but there is a fascinating reply from Labor's Lazzarini which taunts McEwen almost exactly as Menzies was later to taunt the Chifley government in 1948.[136] Menzies argued that Chifley's Senate reform package was really designed to secure a Senate power base in the event that Labor lost control of the House of Representatives at the 1949 election. So too Lazzarini claimed that McEwen's only real interest was in securing a consolation prize of upper house seats for his Country party in the event that Labor's stocks continued to rise and sweep it into office and the Country party out of its House of Representatives seats at the next general election.

Reviewing Labor's legacy

The 1948-49 changes have transformed the Senate. But it has taken many years of close study for Australian political analysts to shake off their traditional views about the subsidiary role of the Senate in Australian government. One of the best formulations of

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[135] *CPD*, 24 June 1937, pp. 352-5.

[136] *CPD*,24 June, 1937, pp. 360-61.

the perverse pathology attributed to the Senate comes from Australian political psychologist A F Davies.[137] Writing during the late 1950s and early 1960s when the reformed Senate was itself still learning about the potential reach of its new institutional capacity, Davies damned the new Senate with the faint praise appropriate to the pre-reformed Senate. With his characteristic cleverness, Davies described the Senate as the maniac/depressive institution in Australian government: he saw the Senate as operating through 'manic and depressive phases, so to speak': manic in pursuit of its own interests when dominated by an opposition majority and depressive and unproductive when dominated by a government majority.[138]

This is exactly the view of the Senate that one finds in Calwell's later contributions. Despite his role in fashioning the 1948 changes, Calwell reflects the traditionalism of an earlier version of Australian democracy where majoritarianism rules supreme. Calwell's chief manifesto *Labor's Role in Modern Society* is virtually silent on the place of the Senate. His later memoirs *Be Just and Fear Not* report little about the introduction of PR, other than a reference to 'our wretched, undemocratic, preferential voting system' on which it was based.[139]

What little Calwell does have to say about the place of the Senate reflects a very traditional Labor stance on the abolition of the Senate. On the eve of the 1972 electoral victory of the Whitlam Labor government, Calwell repeats the traditionalism about the importance of the 'abolition of the Senate' which he sees as 'a useless institution', a 'shocking waste of public money', and a 'time wasting, expense-consuming political liability'. This from the founder of the modern Senate! Whatever his motivations in 1948, Calwell's considered view was that the Senate is fundamentally anti-democratic because of its 'non-representative character', by which he means its lack of proportionality of representation with population: he sees equal state representation as the Senate's enfeebling birth defect. Calwell maintains to the end his antagonism to the Senate which to him has 'no moral rather than to try to frustrate the will of the people, as expressed at the previous House of Representatives election'.[140]

A more challenging version of the same thesis is presented in Whitlam's *The Truth of the Matter*. Where can one turn to try to find a contemporary Labor account of the Senate that is consistent with the best hopes of 1948? Consider this contrast between two Labor leaders of the opposition: Calwell and Hayden who had been a minister at the time of the 1975 dismissal, yet somehow has found room for praise of the Senate.[141] Hayden's perspective is the mirror opposite of that of Calwell: where Calwell cools on the Senate after PR, Hayden warms to it. Hayden brings a new sense of realism to the Labor debate over the Senate. He acknowledges that even before Federation there was an expectation, even among Labor, that the Senate would act as a party house. Hayden also acknowledges the history of Labor's use of its occasional control of the Senate to check governments of the day, as in 1913-1914 and 1914-1951. Other contributors to

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[137] A.F. Davies, 1966, *Australian Democracy*, (2nd edn), Longmans. 1966, pp. 38-46.

[138] ibid., p.42.

[139] A.A. Calwell, *Be Just and Fear Not*, Hawthorn, Vic., Lloyd O'Neil, 1972, p. 260.

[140] ibid., pp. 253-54.

[141] B. Hayden, *Hayden : An Autobiography*, Sydney: Angus and Robertson, 1996, pp. 241, 288 and 544.

this conference will judge where to place the mark between the two assessments of Calwell and Hayden. Hayden does not hide his estimate of the value of the contemporary Senate as a foundation for Australian democratic governance.[142]

Conclusion

Let me draw-out from this lengthy history three of the most significant illustrations of the case for proportional representation. Each case illustrates a distinctive voice of parliamentary reform: the 'minorities voice' as mobilised by Catherine Helen Spence from South Australia, one of the most significant non-aligned or independent political actors around the time of Federation; the 'multicultural voice' as raised by Senator Thomas Bakhap from Tasmania, perhaps the first Chinese- speaking Commonwealth legislator: a progressive Liberal who stands out as a wonderful early model of Australian multiculturalism; and finally the 'reform voice' as articulated by Senator Albert Gardiner from New South Wales, Labor leader of the Opposition in the Senate during the Hughes governments, who tried to hold up the 1918 consolidation of Australian electoral laws into a comprehensive code until the government saw the merit of PR.

Each of these voices represents something deeply honourable in the tradition of Australian public life. All were advocates of proportional representation but they were not the voices that are, or at least not yet, recorded in our history books on this issue. To me, these three voices represent core components of the enduring case for PR in the Senate. They were the voices who sustained the case until enough party leaders were persuaded of the merits of PR. To the extent that we credit the wisdom of the party leaders and forget the tenacity of these forgotten voices, we distort the history of PR in Australia and weaken its real achievement.

Think first of the contribution of Spence, who is to my mind a neglected founder of the Federation framework. She dominates the scene before Federation as one of the most articulate and politically astute advocates of PR, linking British political theory with Australian, and especially Tasmanian parliamentary practice. Spence narrowly lost out on being elected to the 1897-98 Constitutional Convention on the platform of electoral reform. Her advocacy of the electoral rights of minorities (ie, rights to representation as distinct from rights to rule) provides much of the moral energy that was to motivate proponents of PR from Federation through to the 1940s. I think that her feminist case for minority representation is still relevant as a threshold test of a representative assembly.

Think next of Senator Bakhap, a largely forgotten Senator (there are many in that large club) who appears to have been the son of Australian parents, later raised in a Chinese-Australian family involved in mining and commerce in Victoria and Tasminia. Before election to the Senate, Thomas Bakhap was a Liberal member of the Tasmanian parliament where he would have experienced the practical operations of one influential version of PR. In the Commonwealth Parliament his career was not rewarded by any ministerial office (indeed this is the case for most senators, and not necessarily a bad thing). But executive governments did recognise Bakhap's cultural and business competencies in the early bridge-building exercises between Australia and the modernising China: he led one of Australia's first trade missions to China after World

[142] B. Hayden, ibid., pp. 545-47.

War One. A frequent contributor to Senate debates, Bakhap is one of those now-forgotten voices who spoke up in defence of PR, just as he spoke up during the First World War in defence of racial tolerance. Indeed, the two issues can be closely related, especially when we think of their common focus on the protection of diversity within a democracy. Bakhap shares with Spence a commitment to addressing representation in terms of political morality, or what he called 'electoral ethics'.

Finally, think of Albert Gardiner, Labor's lonely leader of the Opposition in the Senate at the end of World War One when the Hughes government introduced preferential voting, initially for the House of Representatives only. Senator Gardiner led a rump of an Opposition which in numerical terms was no match for the majority of Nationalist Senators. But when the time came, he spoke up in defence of PR: first during the 1918 debates on the consolidated Electoral Act and subsequently during debate on the many machinery amendments which filled out the Electoral Act during the early 1920s. Unlike Bakhap, Gardiner was leader of a parliamentary party. In 1918 he welcomed the introduction of preferential voting into the lower house but called for its extension to the Senate, which was done in 1919. Gardiner did not stop there but called for the further electoral reform of basing the Senate on PR. He lost the vote, but we should not lose the recollection of his voice.

Let me conclude with a minor word about a major theme: federalism. The main point is not whether the Senate has acted as a states' house (I happen to think that it has and still does). The main point is that the federal Constitution provides for equal representation of each of the states in the Senate. Why is this important? There are many answers, but among them should be the answer that it is important to protect minorities: particularly groups and individuals in the smaller states who would find it difficult to have their voices heard and to secure representation in the national Parliament. The Constitution's regime of representation includes equality of state representation on the basis that the populations of the smaller states include vulnerable minorities. I again emphasise that the framers who devised this regime of representation with its protection of equality of state representation were open to the practical option of proportional representation in the states' house. Seen in historical perspective, the 1948 turn to PR was not really a regrettable detour, as some would have it, but more of a homecoming. By that I mean that the Senate which from its beginnings has represented the minor states now also represents minorities within the states: within the big states as well as smaller ones.

That is no small achievement as we prepare to celebrate the centenary of Federation. This achievement is yet another demonstration of the originality and remarkable vitality of the Australian political system in devising new and effective forms of representative government.

3

The Senate and Representative Democracy

Elaine Thompson

The organ by which the will of the people is expressed is not necessarily the house of representatives alone.
EDMUND BARTON, 1891

Australia was created as a representative democracy. Uniquely at the time of Federation, both houses of the federal parliament were elected by the people—originally by universal male suffrage and within a couple of years by universal suffrage. Moreover, all those eligible to vote were also eligible to stand for election. As Reid and Forrest noted in 1989:

> The founders of the Australian federation were united in their expectation that the Commonwealth Parliament would embrace the highest ideals of political representation ... they were … unanimous that both houses should be elected.[1]

That commitment to representative government was embedded in the Constitution, which provides at ss 7 and 24 that both houses of the Federal Parliament are to be 'directly chosen by the people'. The Constitution also embraces the democratic commitment to 'one person, one vote', by providing in ss 8 and 30 that in choosing members of parliament 'each elector shall vote only once.'

While the Senate gives equal representation to each state regardless of population size, the Senate was never a crude 'states' house': unlike the United States Senate in 1900, its membership was not appointed by state legislatures; nor was it indirectly

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[1] G.S. Reid & Martyn Forrest, *Australia's Commonwealth Parliament 1901–1988: Ten Perspectives*, Melbourne, Melbourne University Press, 1989, p. 85.

elected via state legislatures nor appointed by state governments, and that remains the case.

Both Australian houses of parliament are elected, so that Australia's federal system is designed as one of joint democratic representation. The Senate's role in the joint representation of the people was further constitutionally embedded in s. 24, 'the nexus' guaranteeing that the membership of the House of Representatives shall be 'as nearly as practicable, twice the number of the senators'. That clause underlines the commitment of the founders to a dual system of representation of *the people* by ensuring that as the population expanded so did *both* houses of parliament. In that way—through the continuing expansion of the Senate as the population grew—it could continue to function as a representative democratic chamber.

The constitutional arrangements place the Senate as the second chamber, with extensive powers to review and reject legislation, as well as to judge and to hold to account the government formed from the majority in the lower house. It also has the power to reject supply and to force the government (and the lower house) to go before the people in an election or yield government. While the Senate has never rejected supply (the events of 1975 notwithstanding), the appropriateness of its power to do so remains much disputed.

Comparisons have been made between the upper houses of the United Kingdom, Canada and Australia, because they are all parliamentary systems. Such comparisons should be dismissed as irrelevant and indicative of a misunderstanding of the representative democratic nature of the Australian upper house. Because the House of Lords and the Canadian Senate are not democratically elected, their powers over the popularly elected house have been limited to, at best, delaying legislation and recommending amendments. By way of contrast, the constitutional arrangements of the Australian Senate gave it a representative democratic character and so justify its extensive powers.

However, despite the extensive constitutional powers given the Australian Senate, the domination by the major political parties of both houses of parliament between 1910 and 1949, and the resultant control by the government of the day of the Senate, ensured that the Senate did not fulfil the expectations of the creators of the Australian Constitution. By 1949, the Senate, while not quite moribund, was largely regarded as a weak institution, irrelevant to the conduct of politics.

The introduction of proportional representation (PR) helped change that view. Over the fifty years since PR, the Senate has developed into a vital, representative, democratic second chamber, which actively attempts to ensure 'that laws are supported by a majority, properly representative of the country, and ... that ministers are accountable for their conduct of government to the Australian public.'[2]

The nature of democratic representation

Representation is a complex idea and few agree on its content. However, a relatively simple test is whether or not there is agreement *within the particular society* that the

[2] The Role of the Senate, *Senate Brief* No. 10, March 1998.

system is 'fair': 'fair' in that the outcomes of elections are regarded as legitimate and accepted, 'fair' in that the parliament is accepted as representing the people who elected it, and 'fair' in that the government is formed from the group that gained the support of the majority of the people. Governments formed from the will of the majority then are accountable to all the people through elected parliaments that are representative of the people. Debate arises over the extent of such accountability.

Party Representation: comparing the House and the Senate

Because representation in the House of Representatives is based around single-member geographically determined electorates, elections regularly produce distorted results. The chance for distortion in Australia is made greater by the requirement that electorates are drawn up within state boundaries. Under this system, governments often are elected with a majority of the seats without having gained a majority of the vote. Even when the distortion is not as dramatic as that, the percentage of seats gained frequently bears little resemblance to the percentage gained by that party of the popular vote.

In a study of the vote for each house in the 1998 election, Campbell Sharman found that in the House of Representatives the coalition parties won just under 40 per cent of the vote, but gained over 54 per cent of the seats, while in the Senate, the Coalition won 37.7 per cent of the vote, but gained 42.5 per cent 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 … than the House of Representatives result itself … It is the House of Representatives that is unrepresentative, not the Senate ... The Senate is certainly more than representative enough to have its actions underpinned by a powerful sense of popular legitimacy.[3]

The Senate's claim to fairer party representation is also true if we look at the minor parties. For example, in the 1998 election, 25 per cent of voters voted away from the major parties, resulting in a net gain in minor party representation of two. The 1999 Senate gives to the minor parties and independents 12 of the 76 senators, or 16 per cent. The first preference vote for minor parties in the House of Representatives was around 20 per cent and yet only one representative was elected who was not from the major parties—an Independent in Calare (NSW).

The shift to PR has ensured that the Senate represents significant groups of electors not able to secure the election of members to the House of Representatives, and fulfils the expectations of 1948 Attorney-General H.V. Evatt, who on introducing the PR legislation, argued that 'the fairest system and the one most likely to enhance the status of the Senate is that of PR.'[4]

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[3] Campbell Sharman, 'The Senate and good government' *Papers on Parliament*, no. 33, May 1999, pp. 158–159.

[4] *CPD* (*Commonwealth Parliamentary Debates*), 16 April 1948, p. 965 quoted in Electing Australia's Senators, *Senate Brief* No. 1, March 1998.

Minority representation

The situation with the Senate is complex. Because the Constitution gives equal representation to the states, and because the Australian states have different population sizes, a Tasmanian vote is worth 12 times a vote in NSW. If the notion of 'one vote, one value' is seen as central to representative democracy, the Senate fails one important test. However, 'one vote, one value' is only one definition of 'fair' representation. The granting of equal representation to the Australian states, regardless of their population size, was regarded as fair and proper because the founders were concerned to protect the smaller states from being swamped by the larger. That supplementary form of representation (over and above representation in the House of Representatives) was seen as essential for the operation of a federal system: hybrid forms of representation to match a hybrid form of government. The founding fathers deliberately chose that form of representation for the 'federal house' as an essential part of federalism, building dual forms of representation into the Australian system.

While the Australian system of representative government was not intended to be one of simple majoritarian representation, the major parties' domination of both the Senate and the House between 1910 and the late 1960s led to a view of the Australian system as one of majoritarian democracy. There developed a series of constitutional conventions supporting that view, the most important being that the Governor-General would always act on the advice of the Prime Minister and that the Senate would never use its powers to block supply.

Developments including the constitutional crisis of 1975 show that such a majoritarian view of Australian representative democracy is no longer valid. The slow break-down of voting support for the major parties has given Australia a system of representative democracy that is far more than majoritarianism—and slowly the executive is recognising that fact, albeit with ill-grace.

These developments have strengthened, not threatened, Australia's democracy. Democracy involves not just the unfettered expression of majority will, but also the creation of institutions that can hear, protect and enhance the voices of minorities. The representation of minorities can occur in many ways, for there is no one answer to what forms a fair representative system. The Australian founders chose to protect minority states, but there could be alternative forms of representation. For example, the famous Fabian G.D.H. Cole suggested that we should be represented in terms of our 'interests'. Thus we would vote *en masse* as citizens for some portion of the elected house(s), but we could also vote as 'factory workers' for a factory representative, or as women for a women's representative. The most radical suggestions for guaranteeing that the voices of minorities were heard against the cacophony of the majority came from Humphrey McQueen, who 30 years ago suggested that votes be allocated inversely to the power that individuals possess. Thus a party leader or business magnate would only be entitled to one vote—as a citizen. An elderly, single, Aboriginal woman caring for a number of children, such as the late Mum Shirl, would receive five votes.

Table 3.1 Senate party composition since 1949

Election	ALP	LIB	NATS	DLP	Aust Democrats	Greens	Greens (WA)	Indep	One Nation
1949	34	20	6						
1951	28	26	6						
1953	29	26	5						
1955	28	24	6	2					
1958	26	25	7	2					
1961	28	24	6	1				1	
1964	27	23	7	2				1	
1967	27	21	7	4				1	
1970	26	21	5	5				3	
1974	29	23	6					2	
1975	27	27	8					2	
1977	27	29	5		2			1	
1980	26	28	4		5			1	
1983	30	24	4		5			1	
1984	34	28	5		7			2	
1987	32	27	7		7			3	
1990	32	29	5		8		1	1	
1993	30	30	6		7		2	1	
1996	28	31	6		7	1	1	2	
1998	29	31	4		9	1		1	1

Source: G.S.Reid & Martyn Forrest, *Australia's Commonwealth Parliament 1901–1988: Ten Perspectives*, op.cit., p. 65, updated to reflect election results since 1987. Note the figures show the state of the parties from 1 July following the election except for the double dissolution elections of 1951, 1974, 1975, 1983 and 1987.

Representing Australia's diversity

For many years in Australia, it was (and still is in some quarters) argued that the world view, values and interests of minority groups such as Aborigines, non-English speaking background migrants or women could be represented by the white, almost overwhelmingly 'Anglo-Australian', highly educated, and largely male representatives who make up elected politicians in general, and the leadership of the major political parties in particular.

Twenty-five years of research into discrimination has shown, unambiguously, that men in positions of power do not share the world views and values of minorities. In the arena of elected politics, there has been a rejection of such a paternalistic version of representation and a commitment that the elected representatives in both houses of

parliament should reasonably reflect the population in terms of ethnicity, race and gender: that the parliament should be a microcosm in gender, race and ethnicity of the larger Australian population. The pre-selection practices of the major parties have been changing, especially with respect to the representation of women.

Ethnicity and race

Neither house of parliament can claim to be reasonably representative in terms of the ethnic and racial make-up of the parliamentarians. There is only one Aboriginal senator (new in 1999), only one senator of Asian background (new in 1999), and no more than six or seven senators from non-'Anglo-Australian' backgrounds. The only other Aboriginal to have served in the federal parliament also served in the Senate (Neville Bonner). Most senators are Australian born, and of those born overseas, most are from 'Anglo' or Irish backgrounds. Seven senators (9 per cent) were born in the United Kingdom, one in Eire, one in Zimbabwe, one in New Zealand and one in Papua New Guinea. All 11 are 'Anglo' in ethnic terms. In addition, one senator is from Germany, of German/English background. The House of Representatives contains no Aboriginal representative, and no member with an Asian background. It does, however, have eight representatives born in non-English speaking countries (about 5 per cent), and ten representatives who, while Australian-born, come from 'non-Anglo' ethnic backgrounds.

The Australian population has a very different profile. The present mix comprises about 74 per cent Anglo-Celtic, 19 per cent other European, Asian 4.5 per cent and Aborigines and Torres Strait Islanders at around 1.5 per cent. Also, 23.5 per cent were born overseas, and 15 per cent speak a language other than English at home.

Gender

Half of Australia's people are women, and while neither house approaches 50 per cent representation of women, there are 23 women senators in the present Senate, or 30 per cent. These numbers strengthen the Senate's claim to be more representative in terms of gender than the House of Representatives, where 33 of 148 members are women, or 22 per cent.

The Senate has also been the house in which more women play leadership roles. There is a strong historical base on which to make the claim that the Senate is more representative in the sense that it enables the world views and values of women to be heard through their attaining leadership positions. Table 3.2 summarises the advances in leadership which women have made in the Senate since 1949.

Had it not been for the change to proportional representation in 1949, these gains in the representation of minor parties, and the representation of women, as well as women's ascent to political leadership would not have occurred. In itself, PR was not a sufficient condition for such change—as evidenced by the fact that relatively little happened until the 1970s—but it was a necessary condition. There has been no similar progress in the House of Representatives in terms of leadership roles.

Table 3.2 Executive and Party Leadership in the Australian Parliament—positions first achieved by women senators

1966	Senator Annabelle Rankin becomes the first woman to administer a federal government department as Minister for Housing.
1976	Senator Margaret Guilfoyle becomes the first woman in Cabinet with portfolio responsibilities.
1983	Senator Susan Ryan becomes the first Labor woman in Cabinet.
1986	Senator Janine Haines becomes the first woman elected to lead a parliamentary party, the Australian Democrats.
1990	Senator Janet Powell succeeds Janine Haines as Leader of the Australian Democrats. She also becomes the first woman from either house to have a private bill passed by both houses (the *Smoking and Tobacco Products Advertisements (Prohibition) Act*, 1989).
1993	Senator Cheryl Kernot becomes the third woman to lead the Australian Democrats.
1997	Senator Meg Lees replaces Cheryl Kernot as leader of the Australian Democrats.

Accountability

The apparently permanent appearance in politics of a situation in which the balance of power in the Senate is held by minor parties and independents is a direct flow-on from the introduction of PR. It has led a general trend towards the enhanced influence of the Senate over the government, a trend profoundly strengthened with the birth in 1977 of the Australian Democrats led by Senator Don Chipp (to whom we owe the phrase 'keeping the bastards honest').

'Keeping the Bastards Honest': holding ministers accountable

The Senate, through the use of its power of censure, has developed an important role in holding ministers answerable. It will censure a minister if it believes a minister has not acted with propriety, has failed to declare an interest in a matter, has refused to produce documents in compliance with a Senate order, has misled or lied to the Senate.[5]

The power of censure is taken very seriously by the Senate *and* by the government because a Senate censure can have, and has had, repercussions on the credibility of the government as a whole. It has led to the resignation of ministers. For example, in

[5] *Odgers' Australian Senate Practice*, 9th edn, Canberra, Department of the Senate, 1999, pp. 455ff.

1992, during the Keating Labor government, the Senate censured the Minister for Transport and Communications, Graham Richardson for, among other things, 'attempting to interfere in the justice system of another country.' Questions were also raised in the Senate over whether he had lied to the Senate. Richardson resigned. During the Howard government also, the Senate's actions have led to ministerial resignations. In 1996, the Senate passed a resolution calling on the Assistant Treasurer, Senator Jim Short, and the Parliamentary Secretary to the Treasurer, Senator Brian Gibson, to explain apparent conflicts of interest arising from their shareholdings. Both subsequently resigned.

However, Senate attacks do not always result in resignations. For example, between January and May 1998, the Labor Opposition launched a sustained attack on the Minister for Resources, Senator Warwick Parer. Central to the attack was the claim that Parer had failed to disclose to the Senate a full list of his financial interests, as required, and that his personal interests were in conflict with his ministerial duties. The Prime Minister supported his close friend, refusing to yield to the pressures and force the Senator's resignation.

The success of the Senate's attempts to hold ministers fully accountable depends (as it does in the House) on whether the individual minister is a 'mate' of the leader and whether there is enthusiastic, consistent media coverage. If there is enough pressure and if there is evidence that the issue is damaging the leadership and/or the government, then the Prime Minister will usually ask the minister to resign as a damage-limitation strategy.

While this multi-step system of holding ministers accountable may be a long way from the text-book descriptions of the conventions of ministerial responsibility, it nonetheless demonstrates the serious role that the Senate plays in 'keeping the bastards honest'.[6]

'Keeping the Bastards Honest': budgetary accountability

In 1993, because the Keating government lacked a majority in the Senate, the Budget was held up for so long that parliament sat until Christmas. As a response in part to its embarrassment at being forced to back down publicly over a number of budget positions, the government recognised the power of the Senate and shifted the Budget from July back to May, and developed a time-line for budgetary negotiation.

The Howard government further developed the 'behind closed doors' aspect of budgetary procedures. For example, for much of February, March and April 1999, substantial new policy proposals were considered by the Expenditure Review Committee (ERC), after which the decisions went to the rest of Cabinet for routine acquiescence. These government budgetary decisions are still subject only to the internal checks within the party and the common sense imposed by the need to maintain electoral popularity. The difference from the past is that the closed processes of Cabinet once produced a budget that was non-negotiable and the progress of which through both houses of parliament was regarded as automatic. Today, the budget that emerges in May can be challenged, on some items at least. The absolute power, legitimacy and authority of the government to dictate the budget has been modified.

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[6] ibid.

While the government retains the initiative with respect to the budget, the minor parties and independents have, since 1993, been able to negotiate specific items in return for their support for the whole budget. The new system is different and has opened the budget to a new level of scrutiny.

'Keeping the Bastards Honest': Senate oversight through its committees

As a result of PR, party numbers in the Senate have been more evenly balanced, and 'political behaviour in the Senate came to reflect a greater flexibility and hence independence than existed in the more rigidly party-dominated and disciplined House of Representatives.'[7] This more flexible environment enabled the Senate to emerge as an important power centre, especially but not exclusively in terms of overseeing government activities, and scrutinising and challenging legislation. This process began seriously under Lionel Murphy in the late 1960s and gathered strength from 1970 when major reforms were put in place creating new standing committees. In 1970, a comprehensive system of legislative and general purpose standing committees, which would 'stand ready' to inquire into matters referred by the Senate, was introduced. These committees looked at policy and administrative issues covering the full scope of government activity. Estimates committees were also established at this time to scrutinise the particulars of proposed government expenditure. At the time, the *Sydney Morning Herald*, peering confidently into the future, stated that the 'introduction of a wide-ranging committee system will make the red-carpeted Upper House potentially the most powerful parliamentary chamber in Australia.'[8]

Between 1979 and 1982, the Senate Standing Committee on Finance and Government Operations, chaired by Senator Peter Rae, surveyed all the non-departmental units of government (quangoes) it could find, and recommended that annual reporting, financial oversight and governmental control be vastly improved. The committee had found:

> somewhat to our surprise, that no section of government had a complete list of the statutory authorities ... The Committee found ... that while governments have been forever increasing their demands on the private sector for information - economic, demographic and so forth ... they have never brought together the same information in relation to the activities of the public sector.[9]

The findings of the Rae committee 'lifted the lid on a can of worms so complicated, so non-productive, so incestuous and so arrogantly insensitive as to boggle the imagination—to stand as a stinging rebuke to lazy, negligent parliaments over many years.'[10] Rae found at least 1000 of these bodies with total assets of more than $11 billion. Few were required even to report annually to parliament. In addition, they had

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[7] 'Senate Legislative and General Purpose Standing Committees: the First 20 Years 1970–1990', http://www.aph.gov.au/senate/committee/history/conthist.htm, 8 June 1999.

[8] *Sydney Morning Herald*, 3 November 1970, quoted in ibid.

[9] Peter Rae, 'The Financial Accountability of Statutory Authorities', in J.R. Nethercote, ed., *Parliament and Bureaucracy*, Sydney, Hale and Iremonger, in association with the Australian Institution of Public Administration, 1982, p. 242.

[10] *Australian*, 15 February 1980.

a combined deficit, outside the official Budget deficit, of $698 million. As a result of this Senate review, some of the quangoes were shut down and the reporting processes of those that survived were reformed. Serious reviews began about which government trading enterprises ought to be privatised, and which corporatised.

In the 1990s, the Senate was

> instrumental in bringing the sports grants case to a constructive conclusion with undertakings that accountability mechanisms in public administration will be strengthened. In its review activity, it has revealed serious deficiencies costing millions of dollars in the performance-based pay program in the public service. It disallowed a generous determination in favour of the former controller-general of customs. And it maintains a continuing and active vigilance over the civil liberties of citizens through the work of its standing committees on regulations and ordinances and scrutiny of bills.[11]

Such developments have strengthened the Senate's oversight capacity, with the Senate by and large acting responsibly for the public interest.

The Senate restructured its committee system in October 1994 by establishing a pair of standing committees—a References Committee and a Legislation Committee—in each of eight subject areas: Community Affairs; Economics; Employment, Education and Training; Environment, Recreation, Communications, and the Arts; Finance and Public Administration; Foreign Affairs, Defence and Trade; Legal and Constitutional; Rural and Regional Affairs and Transport.[12]

The Senate has built up its committee expertise and developed 'multi-purpose bodies, capable of undertaking policy-related inquiries, examining the performance of government agencies and programs or considering the detail of proposed legislation in the light of evidence given by interested organisations and individuals'.[13] Another valuable role is the scrutiny of policy, legislative and financial measures. The Senate's committee system is a significant development, allowing the Senate more effectively to review government decisions and to attempt to keep the government accountable for its actions.

On occasion, however, the Senate's committees become stages for narrow adversarial partisan politics. For example, in 1994 there was a clash between government and the Senate when a Senate committee examining foreign ownership in the print media requested documents and government witnesses for its hearings. The government, having opposed the committee's formation, refused to comply. While the Senate attempted to make the executive accountable to the instrument of the people,[14] the

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[11] 'The Senate and responsible government', editorial, *The Independent Monthly*, June 1994, p. 8.

[12] Senate Committees, *Senate Brief* No. 4, December 1998.

[13] *Odgers' Australian Senate Practice*, op. cit., chapter 16, Committees.

[14] See, for example, Innes Willox, *Age*, (Melbourne), 15 February 1994; P.P. McGuinness, *Australian*, 19–20 February 1994; editorial, 'Give and take in the Senate', *The Weekend Australian*, 12–13 February 1994.

government treated the inquiry in purely partisan terms. The result was a stand-off, but the Senate played an important role in exposing government actions to publicity and increased public awareness.

Community participation

Committees also provide a formal channel of communication between parliament and the public that encourages greater community participation in the parliamentary process. In recent years, select committees have inquired into matters such as superannuation, uranium mining and milling, the Victorian casino, aircraft noise in Sydney, a new tax system, and currently, the socio-economic consequences of the National Competition Policy.[15]

Citizens can and do participate in law making and policy review. Anyone may make a submission to a committee inquiry and the Senate now 'goes to the people', meeting outside Canberra and 'gaining first hand knowledge of and exposure to issues of concern to the public.'[16] For example, when the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee considered the Higher Education Legislation Amendment Bill 1999, 28 witnesses gave evidence at the one day scheduled for public hearings. The committee also received form letters from more than 3000 students. In addition, the committee received more than 400 submissions including some 160 from private individuals. The submissions from organisations ranged from the Armidale and District Soccer Association to the Australasian Union of Jewish Students, NSW; from the Australian Vice-Chancellors' Committee, to the University of Sydney Students' Representative Council, Aboriginal Affairs Department NSW, and the Young Liberal Movement, Queensland.

In the period 31 May 1999 to 9 June 1999, the Senate advertised (on the World Wide Web as well as in more traditional channels) public hearings on the following issues (among others):

- Aboriginal Land Rights (Northern Territory) Amendment Bill (no. 2) 1999
- Examination of Developments in Contemporary Japan and the Implications for Australia
- Deregulation of the Australian Dairy Industry
- Statutory Powers and Functions of the Australian Law Reform Commission (Sydney and Melbourne)
- Health and Aged Care
- ATSIC
- Office of the Status of Women
- Environment and Heritage
- Communications, Information Technology and the Arts
- 1999–2000 Budget Estimates[17]

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[15] Senate Committees, *Senate Brief* No. 4, December 1998. I am indebted to Wayne Hooper from the Senate for these recent committees.

[16] *Odgers' Australian Senate Practice*, op. cit.

[17] Senate, Public Hearings, http://www.aph.gov.au/senate/committee/hearings/hear.htm, 2 June 1999.

The Senate has demonstrated a serious commitment to public participation in its committee processes. Such participation is no longer *ad hoc*, but an institutionalised part of the Senate's procedures.

Managerialism and accountability

Over the past fifteen years, there have been attempts to create a 'new' public administration, with the development of the managerialist state through privatisation, corporatisation, and contracting-out. The 'new' public administration has led to new concepts of public sector accountability focusing on efficiency, outcomes, and concepts such as risk management and letting the managers manage. According to some of the proponents of the managerialist state, accountability can be assured by ensuring the private sector delivers the services the government has contracted to it in a client-sensitive way, and through creating legally enforceable contracts ensuring compliance by service providers. This process is said to be efficient because competition between service providers will ensure that 'clients' or 'end-users' have a choice of price and product.

The most extreme proponents argue that the mechanisms parliament has put in place to enhance the accountability of bureaucrats, including freedom of information, administrative appeals tribunals and Ombudsmen, are irrelevant to modern governance. For example, a sometime chairman of the Public Service Board publicly attacked these mechanisms suggesting that their operation may well mean that 'Australia's economic performance and well-being suffers'.[18] Another example can be found in the discussion paper on public service reform put out by Workplace Relations Minister Peter Reith in 1996, 'Towards a Best Practice Australian Public Service'. Neither its Table of Contents nor its overview make any reference to democracy or accountability—let alone equity, responsibility, ethics or participation.

Its overview begins:

> To provide the Australian people with better government the Australian Public Service (APS) has to undergo significant change. It no longer enjoys a monopoly in the delivery of government services so it must prove that it is able to compete on cost and quality with best practice in the private sector … The culture of the APS does not sufficiently promote high performance or drive innovation, and the important contribution often overlooked or stifled by process and unnecessary regulations. There is evidence of a lack of collective vision amongst its leadership. Management remains cautious and conservative.

The Senate has been monitoring the impact of managerialism. For example, a May 1998 Senate committee report, *Contracting Out of Government Services*, raised concerns about the accountability mechanisms that were being developed. The committee supported the view of the Commonwealth Auditor-General that contracting out of a service 'does not equate to contracting out the responsibility for

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[18] R.W. Cole, 'The public sector, the conflict between accountability and efficiency', *Australian Journal of Public Administration*, vol. 47, no. 3, September 1988, pp. 223–232.

the administration of the service or the program.'[19] While the Senate committee readily acknowledged the problems with traditional modes of public service delivery of services, it nonetheless insisted that where:

> public money is expended on the provision of services, the responsibility for that expenditure remains with the government agency contracting the service ... The importance of making the public sector transparent and accountable has been a continuing theme of public administration and the parliamentary process for many years. ... The committee wishes to ensure that these advances ... are not undermined.
>
> There is real concern that the progress that has been made may be threatened as significant areas of public expenditure are subject to contracting out and operational responsibility is transferred from the public to the private sector … that agencies may be less accountable for the manner in which they discharge their responsibilities.[20]

Because the Senate is concerned not to let the managerialists weaken public sector accountability, the Senate and the government continue to argue over issues of accountability with respect to the 'new' public administration. The Senate tries to remind the government that 'letting the managers manage', for example, does not imply:

> that only the managers have any right to know how they are managing. A necessary accompaniment of devolution is increased accountability ... The quest for economic rationalism should not blind us to the old philosophical debate about ends and means. Parliamentary committees have a proper interest in both.[21]

Conclusion

At an institutional level, Australian democracy remains firmly centred around partisan politics and the executive remains dominant. Nonetheless, since 1949 the Senate has developed from an all but moribund institution to a vibrant part of Australia's system of representative government.

This change could not have occurred had the Senate remained under the control of either major party. The introduction of proportional representation in 1949 gave hitherto unrepresented groups a chance to gain a place in the Senate. The result was the growth of a series of small parties as well as the election of a number of independents. Proportional representation combined with a growing propensity of Australians to vote away from the major parties and to 'ticket switch' by giving their vote to one party in the House and another in the Senate. The 1984 changes to the Senate's voting system further enhanced the growth of minority parties. The continued decline in the vote for the major parties, combined with the change in the

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[19] Senate Finance and Public Administration References Committee, *Contracting Out of Government Services, Second Report*, Canberra, Department of the Senate, May 1998.

[20] ibid.

[21] Linda English, 'Redefining public accountability', *Australian Accountant*, March 1990, p. 24.

quota required for election to the Senate, has made it easier for minor parties to be elected. The placing of the party names on to the ballot paper, and the introduction of the 'contract-bridge' above-the-line, below-the-line system of voting, increases the visibility of the minor parties and makes it easier to vote for them. As a consequence, since the 1970s, it is usually the case that neither major party controls a majority in the Senate.

Proportional representation, the voting patterns of Australians and its constitutionally embedded powers have given the Senate a base on which to develop into a serious, expert parliamentary institution. The Senate's activities ensure that the government is not unchallenged, and there is a growing acceptance that the Senate, as an institution, has the right to take on the government. The government partially acknowledged the power of the Senate in that it changed the budget process and now accepts changes to specific budget items.

John Power has described the strengthening of the Senate's various roles as a move towards a consensual style of politics in which there are no longer clear-cut choices; instead policy packages emerge out of hard negotiation.[22] The major parties have been forced to modify their policies, and the minor parties have used 'their numbers to check the power of the Government in ways that undoubtedly have been in the public interest. In the process they have forced the Government to agree to some worthwhile reforms, such as the improvements in accountability.'[23] These developments seem to be, as the Clerk of the Senate Harry Evans noted, part of a slow, step-by-step process of reform towards a system where the Senate can work so that the 'exercise of power ... [is] carefully watched and monitored.'

However, developments in the direction of a more managerialist state represent a fundamental challenge to the idea that when public monies are being spent, the public interest is best served and protected by holding the policy-making arm of government, the executive, directly accountable to the elected representative institutions of the parliament. Were managerialist developments to continue, large areas of policy could be excluded from the Senate's oversight. For the moment, the Senate is resisting managerialism and continuing to insist (where it can) on the traditional accountability of government to the parliament.

Governments do not like it, but (to twist Malcolm Fraser's words) democracy was never meant to be easy.

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[22] John Power, *Canberra Times*, 23 February 1994.

[23] Editorial, *Australian Financial Review*, 8 March 1994.

4

Australian Democracy: Modifying Majoritarianism?

Arend Lijphart[*]

The Westminster model and Westminster adapted

The Westminster model has been extremely influential in the shaping of modern democracies, particularly, of course, in democracies that were formerly ruled by Britain. In my recently published book *Patterns of Democracy*, I analyse the universe of well-established modern democracies, defined as all countries with a population of at least 250,000 that were democratic in the late 1990s and that had been continuously democratic since 1977 or earlier. There are 36 democracies that fit these criteria. Of these 36, no less than 15–42 per cent of the total, not counting the United Kingdom itself—are democracies with a history of being under British rule.[1]

However, in most of these democracies formerly ruled by Britain, the Westminster model was not adopted without various modifications. Anthony Payne uses the term 'Westminster adapted' in characterising the governmental systems of the former

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* I am very grateful for the comments that I received from participants in the Representation and Institutional Change Conference and, in particular, for the many helpful suggestions by Murray Goot.

[1] Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, New Haven, Yale University Press, 1999. These 36 countries are also the countries used in the statistical analyses in the second part of this chapter. They are: Australia, Austria, Bahamas, Barbados, Belgium, Botswana, Canada, Colombia, Costa Rica, Denmark, Finland, France, Germany, Greece, Iceland, India, Ireland, Israel, Italy, Jamaica, Japan, Luxembourg, Malta, Mauritius, Netherlands, New Zealand, Norway, Papua New Guinea, Portugal, Spain, Sweden, Switzerland, Trinidad, United Kingdom, United States, and Venezuela.

British colonies in the Caribbean,[2] and this term can be appropriately applied to former British dependencies elsewhere, too. The main institutions of democracy tend to vary among countries along two dimensions, which I have called the executives-parties dimension and the federal-unitary dimension. Where the Westminster model has been influential, it is along the first of these dimensions that it has often been adopted, but along the second dimension that it has usually been adapted, or even changed radically.

The first (executives-parties) dimension groups together five characteristics of executive power, executive-legislative relations, and the party, electoral, and interest group systems. In majoritarian, Westminster-style, democracy, power is concentrated in the hands of the majority, and majoritarian democracy has the following institutional characteristics:

(1) one-party majority cabinets,
(2) executive dominance over the legislature,
(3) two-party systems,
(4) majoritarian and disproportional electoral systems, and
(5) pluralist interest group systems with free-for-all competition among groups.

Consensus democracy, in contrast, is characterised by sharing, dispersing, and limiting power instead of concentrating power, and it has the following typical features:

(1) executive power-sharing in broad multi-party coalitions,
(2) executive-legislative balance of power,
(3) multi-party systems,
(4) proportional representation (PR), and
(5) a coordinated, 'corporatist' interest group system aimed at compromise and concertation.

The second federal-unitary dimension also consists of five elements: the federal-unitary contrast, bicameralism vs. unicameralism, the degree of difficulty in amending constitutions, judicial review, and the degree of independence of central banks. Here, too, majoritarian systems are systems of concentrated power:

(1) unitary and centralised government,
(2) concentration of legislative power in a unicameral legislature,
(3) flexible constitutions that can be amended by simple majorities,
(4) legislatures that have the final word on the constitutionality of their own legislation, and
(5) central banks that are dependent on the executive.

Consensus systems typically have

(1) federal and decentralised government,

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[2] Anthony Payne, 'Westminster adapted: the political order of the Commonwealth Caribbean', in Jorge I. Domínguez, Robert A. Pastor and R. DeLisle Worrell, eds., *Democracy in the Caribbean: Political, Economic, and Social Perspectives*, Baltimore, Ma., Johns Hopkins University Press, 1993, pp. 57–73.

(2) division of legislative power between two equally strong but differently constituted houses,
(3) rigid constitutions that can be changed only by extraordinary majorities,
(4) laws that are subject to a judicial review of their constitutionality by supreme or constitutional courts, and
(5) strong and independent central banks.

Because not only the first of these differences, but also the other four are commonly associated with the contrast between federalism and unitary government, this second dimension can be called the federal-unitary dimension.

The clearest examples of Westminster-inspired systems that are majoritarian on the executives-parties dimension, but consensual-federalist on the federal-unitary dimension are Australia, Canada, and the United States. But it is true, more generally, that the Westminster model has been much more influential with regard to the first than to the second dimension. For instance, the Caribbean democracies are very strongly majoritarian on the first dimension; with regard to the second dimension, they are unitary instead of federal—they are obviously too small for federalism to make sense—but they do have the other federalist characteristics: bicameral legislatures, constitutions requiring super-majorities for amendment, judicial review, and fairly independent central banks. In fact, the only example of a former British colony that faithfully followed both dimensions of the Westminster model was New Zealand; since the adoption of proportional representation (PR) in 1996, however, New Zealand has moved in the direction of consensus democracy on the first dimension and is therefore no longer a good example of the Westminster model. There are other exceptions to my general proposition that could be noted, but that, for brevity's sake, I shall not mention; the one exception worth pointing out, because of its relevance in the context of this paper, is the use of the single transferable vote (STV) system for parliamentary elections in Ireland and Malta—which makes these countries cases of 'Westminster adapted' instead of pure Westminster systems on the first dimension.

STV and the Australian majoritarian/federal system

Then, of course, there is the unusual case of 'Westminster adapted' represented by the use of STV elections by the Australian Senate. From the perspective of the two-dimensional majoritarian-consensus contrast, this adaptation makes Australian democracy slightly, but by no means insignificantly, more consensual on both dimensions.

Let me discuss the second (federal-unitary) dimension first. The relevant variable here is the contrast between unicameral legislatures at one extreme (the most majoritarian-unitary characteristic) and strong bicameralism (the most consensual-federal characteristic) at the other extreme. The strength of bicameralism depends on two criteria: the symmetry and incongruence of the two houses of the legislature. Two houses are symmetrical if they are equally powerful and if they are both directly elected by the voters and therefore both enjoy full democratic legitimacy. Two houses of a bicameral legislature are incongruent if they clearly differ in composition. The House of Representatives and the Senate in Australia do not have equal power, but by comparative standards the Senate is a very powerful body, and the relationship

between the two houses can therefore be classified as only moderately asymmetrical; moreover, both houses are popularly elected. The two houses are also clearly incongruent in their composition. They already qualify for the label of strong bicameralism in this regard as a result of the equal representation of the states in the Senate in spite of the states' highly unequal populations—a feature of many federal systems. The difference in the methods of election—the majoritarian alternative-vote system for the House of Representatives and PR for the Senate—makes the two houses even more different in composition and reinforces their incongruence. STV therefore has the effect of strengthening bicameralism and also the federalist character of Australian democracy on the second dimension.

As far as the first (executives-parties) dimension is concerned, the election by STV of one chamber of the legislature—the less important but still very strong chamber—adds an element of proportionality to the political system and therefore also at least a small measure of consensus democracy. But how proportional is the STV election system in Australia really, given the divergent effects of PR on the one hand and the equal representation of the states, and hence the highly unequal and disproportional representation of the populations of the different states (and territories), on the other hand? This question can be answered easily because we can measure the degree of disproportionality of the 20 Senate elections conducted by STV so far and compare it with both PR and majoritarian elections held in other countries. Of the several alternative measures of disproportionality that are available, I prefer the index proposed by Michael Gallagher.[3] It measures the total percentage by which the over-represented parties are over-represented (which is, in principle, the same as the total percentage of under-representation), but it does so in such a way that a few large deviations between parties' vote and seat shares are weighted more heavily than a lot of relatively small vote-seat share deviations. The highest percentage of disproportionality in the Australian Senate STV elections was 9.68 per cent (in 1961) and the lowest was 1.44 per cent (in 1980). The average for the 20 elections was 4.15 per cent. (These percentages were calculated on the assumption that the Liberal and National parties can be regarded as one party.)

Table 4.1 shows average disproportionalities of elections in 36 democracies in the post-World War II period (from the first democratic election in each country until 1996). For most countries, the figures shown in the table are the indices of disproportionality in the elections of the lower or only house of the legislature. I made two adjustments, however, that require explanation. First, I counted closely allied parties (the Liberal and National parties in Australia, the Christian Democratic Union and the Christian Social Union in Germany, and three pairs of Belgian parties) as one-and-a-half parties, that is, halfway between one and two parties. And I made a similar adjustment, but in the opposite direction, for factionalised and uncohesive parties in Colombia, India, Italy, Japan, and the United States—counting each of these as one-and-a-half parties instead of one party. (The main purpose of these adjustments was to measure the degree of multi-partism more accurately, but they have consequences for measuring the degree of disproportionality, too.) Because these operationalisations may be controversial, I also provide alternative measures of disproportionality in the table—based on the one-party assumption for tightly twinned parties (in accordance

[3] Michael Gallagher, 'Proportionality, disproportionality and electoral systems', *Electoral Studies*, vol. 10, no. 1, March 1991, pp. 33–51.

with the prevailing Australian academic custom of thinking in terms of a single 'Liberal-National party' instead of two parties) and the same one-party assumption for factionalised parties. As the table shows, the alternative indices for these countries tend to be higher, but only very slightly.

Table 4.1 Average Electoral Disproportionality and Type of Electoral System in 36 Democracies, 1945–1996

	Disproportionality	Alternative Disproportionality	Electoral System
Netherlands	1.30	-	PR
Denmark	1.83	-	PR
Sweden	2.09	-	PR
Israel	2.27	1.75	PR/(PM)
Malta	2.36	-	PR-STV
Austria	2.47	-	PR
Germany	2.52	2.58	PR
Switzerland	2.53	-	PR
Finland	2.93	-	PR
Belgium	3.24	3.23	PR
Italy	3.25	3.49	PR
Luxembourg	3.26	-	PR
Ireland	3.45	-	PR-STV
Portugal	4.04	-	PR
Iceland	4.25	-	PR
Norway	4.93	-	PR
Japan	5.03	5.30	SNTV
Greece	8.08	-	PR
Spain	8.15	-	PR
Australia	9.26	9.57	AV
Papua New Guinea	10.06	-	Plur.
United Kingdom	10.33	-	Plur.
Colombia	10.62	3.38	PR/Pres
New Zealand	11.11	-	Plur
India	11.38	12.37	Plur
Canada	11.72	-	Plur
Botswana	11.74	-	Plur
Costa Rica	13.65	4.13	PR/Pres
Trinidad and Tobago	13.66	-	Plur
Venezuela	14.41	4.28	PR/Pres
United States	14.91	5.33	Plur/Pres
Bahamas	15.47	-	Plur
Barbados	15.75	-	Plur
Mauritius	16.43	-	Plur
Jamaica	17.75	-	Plur
France	21.08	11.84	Maj/Pres

Source: based on data in Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, New Haven, Conn., Yale University Press, 1999.

Key :	PR	Proportional Representation	Plur	Plurality
	STV	Single Transferable Vote	Pres	Presidential
	SNTV	Single Non-Transferable Vote	Maj	Majority
	AV	Alternative Vote	PM	Parliamentary Majority

My second adjustment, for presidential democracies, has more far-reaching consequences. Presidential elections in these countries are at least as important as legislative elections, and I therefore averaged the disproportionalities in the two types of elections (using the geometric mean). Because presidential elections entail the selection of a single winning candidate, they are inherently majoritarian and disproportional; the combined indices of disproportionality are therefore much higher than the indices for the legislative elections. The alternative disproportionality column in Table 4.1 ignores the presidential elections and gives the values for legislative disproportionality only (in Colombia, Costa Rica, Venezuela, the United States, and France).[4]

As Table 4.1 shows, the disproportionality in PR systems ranges from a low of 1.30 per cent in the Netherlands to a high of 8.15 per cent in Spain. The legislative disproportionalities in presidential Colombia, Costa Rica, and Venezuela (which use PR in their congressional elections) fall within this range, too. The mid-point of this range is 4.72 per cent. The average 4.15 per cent disproportionality in the STV elections of the Australian Senate is actually a bit lower than this mid-point, indicating a slightly more proportional performance than what PR systems generally achieve. A less favourable picture emerges when we insert the Australian Senate's 4.15 per cent figure in the table between Portugal and Iceland. The 4.15 per cent is higher than the percentage of disproportionality in 14 of the PR systems (16, if we include Colombia and Costa Rica) and lower than that of only four other PR systems (five, if we include Venezuela). The table also shows a strikingly clear line dividing the PR (and parliamentary) systems from the plurality (first-past-the-post) and majority systems. The Australian Senate's 4.15 per cent disproportionality is well above this line. Therefore, even though Australian Senate elections are only partly proportional (because of the STV system) and partly disproportional (because of the population disparities between the states), in practice the system works mainly like a PR system.

There are two other respects in which the Australian Senate elections since 1949 resemble PR elections in other countries. One is that PR is generally associated with a change from two-party to multi-party systems or an increase in multi-partism. Australian Senate elections show a very clear trend toward multi-partism. A good measure is the effective number of parties represented in the Senate; it counts the number of parties, but weights them by their sizes, which means that larger parties are counted much more than small parties. For instance, in a pure two-party system with two equally strong parties, the effective number of parties is exactly 2.0, and in a three-party system with three equally strong parties, the effective number is 3.0. If one of the three parties is considerably weaker than the other two, the effective number will be somewhere between 2.0 and 3.0, depending on the relative strength of the third party.[5] Counting the Liberals and Nationals as one party, the first three PR elections yielded virtually pure two-party systems (effective numbers of 1.98 and 1.99); since 1980, the system has been more like a two-and-a-half party system (with

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[4] In Israel, I also included the direct popular election of the prime minister in 1996—a highly disproportional election, too. Because it entailed only one election, however, the alternative Israeli percentage, based solely on legislative elections, is barely lower than the original percentage.

[5] For the exact formula, see *Patterns of Democracy*, op. cit., p. 68. Independents are counted as tiny one-member parties.

between 2.40 and 2.68 effective parties). When the effective number of parties is regressed on the election year, the correlation coefficient is a very strong 0.80 and the adjusted r-squared 0.63 (statistically significant at the 0.1 per cent level).

Second, the degree of proportionality in PR elections depends a great deal on the average magnitude of the election districts (that is, the average number of representatives elected in each district): proportionality tends to increase with increasing district magnitude. In the Australian Senate elections, the magnitudes have varied considerably as a result of the increases in the number of senators for each state, the addition of the ACT and the Northern Territory as new districts, and the fact that while most elections have been half-senate elections, there have been five elections of the entire Senate following double dissolutions. The usual negative relationship between magnitude and disproportionality turns up in the 20 Senate elections, too, although it is not exceptionally strong; the correlation coefficient is 0.32, which is statistically significant at the 10 per cent level. Average magnitudes have ranged from 4.25 to 10 senators elected per district, and for each additional senator elected, disproportionality decreases by 0.35 per cent.

As I mentioned earlier, in the discussion of Table 4.1, most of the disproportionality percentages are based exclusively on elections of the lower or only houses of parliaments; the one exception is that in presidential democracies, presidential elections were also taken into consideration. Elections of upper houses were never counted. When upper houses are relatively powerful, however, a very good case can be made for adding the disproportionality of the upper house election to the overall disproportionality figure for a political system. In the Australian case, this would mean a lower percentage than the 9.26 per cent (or 9.57 per cent) indicated in Table 4.1—which is already relatively low compared with the other plurality and majority election systems. This adjustment would not change Australia's classification from a majoritarian to a consensus democracy on the first dimension, but it would give Australia a somewhat lower overall majoritarian score on this dimension. More importantly, in substantive terms, the PR election of the Senate in Australia clearly brings an element of consensus into what remains, on the first dimension, a basically majoritarian democracy.

What would be needed to turn Australia into a consensus democracy? My answer to this hypothetical question is: the adoption of PR for the election of the House of Representatives. This is probably not just a necessary, but also a sufficient condition. The case of Malta shows that it is possible to have PR and still maintain a strict two-party system, but the Australian experience with PR in Senate elections suggests very strongly that Malta does not provide a good analogy. My prediction would be that PR for House elections in Australia would almost certainly lead to considerably lower electoral disproportionality (lower than that in Senate elections because of the larger size of the House and the election of the entire House at one time instead of having staggered elections), a multi-party system (even if the Liberal and National parties are counted as one party), multi-party coalition cabinets or minority cabinets, and a less dominant executive and more assertive legislature.

What would be the consequences of a switch to PR in terms of government performance and policy outputs? In the next section, I turn to the comparative evidence that we have on this question.

PR versus plurality: does it make a difference?

Does the difference between PR and majoritarian elections make a difference for the operation of democracy, especially for how well democracy works? The conventional wisdom is that there is a trade-off between the quality and the effectiveness of democratic government. On the one hand, the conventional wisdom concedes that PR may provide more accurate representation and, in particular, better minority representation and protection of minority interests, as well as broader participation in decision-making. On the other hand, the conventional wisdom maintains that the one-party majority governments typically produced by plurality elections are more decisive and hence more effective policy-makers. This view is reflected in the adage, recently restated by Samuel Beer, that 'representative government must not only represent, it must also govern.'[6] This has a clear implication that representativeness comes at the expense of effective government.

This conventional wisdom has long been widely accepted without adequate empirical examination, perhaps because its logic appears to be so strong that no test was thought to be needed. For instance, A. Lawrence Lowell wrote in 1896 that it was a self-evident 'axiom' that one-party majority cabinets, resulting from plurality elections, were needed for effective policy-making.[7] I shall first examine the second part of the conventional wisdom, which posits a link between PR and ineffective decision-making; in the next section, I shall discuss the first part, which concerns democratic quality.

The theoretical basis for Lowell's axiom is certainly not implausible: concentrating political power in the hands of a narrow majority can promote unified, decisive leadership, and hence coherent policies and fast decision-making. But there are several counter-arguments. Majoritarian governments may be able to make decisions faster than the coalitions produced by PR, but fast decisions are not necessarily wise decisions. In fact, the opposite may be more valid, as many political theorists, notably the venerable authors of the *Federalist Papers*,[8] have argued. The introduction of the so-called 'poll tax', a new local government tax in Britain in the 1980s, is a clear example of a policy, now universally acknowledged to have been a disastrous policy, that was the product of fast decision-making; in all probability, the poll tax would never have been introduced had it been more carefully, and more slowly, debated.

Moreover, the supposedly coherent policies produced by majoritarian governments may be negated by the alternation of these governments; this alternation from Left to Right and vice versa may entail sharp changes in economic policy that are too frequent and too abrupt. S.E. Finer, in particular, has forcefully argued that successful macro-economic management requires not so much a *strong* hand as a *steady* one, and that PR and coalition governments are better able to provide steady, centrist policy-making.[9] Finally, policies supported by a broad consensus are more likely to be

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[6] Samuel Beer, 'The roots of New Labour: liberalism rediscovered', *The Economist*, vol. 346, no. 8054, 7 February 1998, p. 25.

[7] A. Lawrence Lowell, *Governments and Parties in Continental Europe*, Boston, Houghton Mifflin, 1896, pp. 73–74.

[8] Alexander Hamilton, John Jay and James Madison, *The Federalist*, New York, McLean, 1788.

[9] S.E. Finer, *Adversary Politics and Electoral Reform*, London, Anthony Wigram, 1975.

successfully carried out and to remain on course than policies imposed by a 'decisive' government against the wishes of important sectors of society. These counter-arguments appear to be at least slightly stronger than the argument in favour of majoritarian government that is based narrowly on the speed and coherence of decision-making.

The empirical evidence is mixed, but gives a slight edge to PR and consensus government, too. For instance, Richard Rose and Francis G. Castles find no significant differences in economic growth, inflation, and unemployment between PR and non-PR systems among the industrialised democracies.[10] On the other hand, Peter Katzenstein and Ronald Rogowski have shown that small countries adopted PR and corporatist practices in order to compensate for the disadvantages of their small size in international trade;[11] that is, these consensus elements served as sources of strength instead of weakness.

The analyses by the above four scholars all had to do with aspects of macro-economic management; these are indeed excellent performance indicators because they involve crucial functions of government and because precise quantitative data are available. Because the theoretical arguments and the empirical evidence are mixed, but are slightly more favourable to PR, my working hypothesis will be that PR produces better results—but without the expectation that the differences will be very strong and significant. Another reason not to expect major differences is that economic success is not solely determined by government policy. As far as British macro-economic policy is concerned, for instance, Rose points out that

> many influences upon the economy are outside the control of the government … Decisions taken independently of government by British investors, industrialists, consumers and workers can frustrate the intentions of the government of the day. In an open international economy, Britain is increasingly influenced too by decisions taken in Japan, Washington, New York, Brussels, or Frankfurt.[12]

Rose's point obviously should not be exaggerated: the fact that governments are not in full control does not mean that they have no control at all. When the economy performs well—when economic growth is high, and inflation, unemployment, and budget deficits are low—governments routinely claim credit for this happy state of affairs. And voters are known to reward government parties in good economic times and to punish them when the economy is in poor shape.

However, Rose's argument does highlight the need to take these other influences into account. To the extent that they are identifiable and measurable variables, they should be controlled for in the statistical analyses. One such potentially important

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[10] Richard Rose, *What Are the Economic Consequences of PR?*, London, Electoral Reform Society, 1992; Francis G. Castles, 'The policy consequences of proportional representation: a sceptical commentary', *Political Science*, vol. 46, no. 2, December 1994, pp. 161–71.

[11] Peter J. Katzenstein, *Small States in World Markets: Industrial Policy in Europe*, Ithaca, N.Y., Cornell University Press, 1985; Ronald Rogowski, 'Trade and the variety of democratic institutions', *International Organization*, vol. 41, no. 2, Spring 1987, pp. 203–23.

[12] Rose, op. cit., p. 11.

explanatory variable is the level of economic development. Another is population size, if only because our democracies differ widely in this respect. It is not clear, however, whether size is a favourable or an unfavourable factor: large countries have greater power in international relations, which they can use to gain economic benefits, but greater international influence also means more responsibility and hence higher expenses, especially for military purposes.

There may also be fortuitous events that affect economic success, such as the good luck experienced by Britain and Norway when they discovered oil in the North Sea. The effects of such fortuitous events, as well as external influences that cannot clearly be identified and controlled for, can be minimised when economic performance is examined over a long period of time and for a large number of countries. These two desiderata frequently are in conflict with each other: extending the period of analysis often means that some countries have to be excluded. And they may both conflict with a third desideratum—that the most accurate and reliable data be used. Therefore, in the analysis below, I shall usually report the results for different periods, different sets of countries, and different types of data, in order to provide as complete and robust a test of the hypotheses as possible. Finally, I limit the potential disturbing impact of external forces on economic performance by excluding the five smallest democracies with populations of less than half a million—the Bahamas, Barbados, Iceland, Luxembourg and Malta—from the analysis because these small countries are obviously extremely vulnerable to international influences.[13]

Table 4.2 shows the results of the bivariate regression analyses of the effect of PR on five sets of macro-economic variables: economic growth (average annual growth rates), inflation (both in terms of the conventional consumer price index and the more comprehensive GDP deflator), unemployment (both the standardised annual averages and the unstandardised percentages—less reliable but available for more countries), strike activity (working days lost per thousand workers per year), and budget deficits (average annual deficits as a per cent of GDP). My independent variable is the degree of electoral proportionality (as in the first column of Table 4.1); because all of the economic variables are for the 1970s or later years, the proportionality variable that I used is also for the 1971–96 period (instead of the longer 1945–96 period shown in Table 4.1).[14]

The estimated regression coefficient is the increase or decrease in the dependent variable for each unit increase in the independent variable—in our case, each increase by one percentage point of proportionality. Because the range in the degrees of proportionality is about 20 percentage points, the distance between the ‘average’ PR system and the ‘average’ non-PR system is about 10 points. Therefore, in answer to the question ‘how much difference does PR make?’, the reply can be—roughly—ten times the value of the estimated regression coefficient. For instance, based on the fourth row of Table 4.2, the effect of PR on inflation is approximately ten times the estimated regression coefficient (which is -0.412 per cent): about 4.1 per cent less annual inflation in PR than non-PR systems.

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[13] The remaining 31 countries are listed in note 1 above.

[14] I also reversed the sign of the percentages in order to measure the degree of proportionality instead of the degree of *dis*proportionality.

Because the table reports bivariate regression results, the standardised regression coefficient in the second column equals the correlation coefficient. The statistical significance of the correlations depends on the absolute t-value, shown in the third column, and the number of cases, shown in the fourth column. Whether or not the correlations are significant is indicated by asterisks; three levels of significance are reported, including the least demanding 10 per cent level. If the number of countries is 21 or lower, the countries are usually the OECD countries and the data are usually the most reliable OECD data; when the number is above 21, the developing countries are also included to the extent that the necessary data on them are available.

Table 4.2 Bivariate Regression Analyses of the Effect of Electoral Proportionality on 16 Macro-Economic Performance Variables

	Estimated Regression Coefficient	Standardised Regression Coefficient	Absolute t-value	Number of countries
Economic growth (1980–93)	-0.032	-0.104	0.562	31
Economic growth (1970–95)	-0.002	-0.019	0.076	18
Economic growth (1980–95)	0.003	0.025	0.110	21
GDP deflator (1980–93)	-0.412**	-0.350	2.010	31
GDP deflator (1970–95)	-0.093	-0.254	1.049	18
GDP deflator (1980–95)	-0.074	-0.108	0.473	21
Cons. price index (1970–95)	-0.104	-0.303	1.274	18
Cons. price index (1980–95)	-0.094	-0.139	0.610	21
Unempl., standard. (1971–95)	-0.142*	-0.396	1.432	13
Unempl., unstand. (1971–95)	-0.092	-0.199	0.812	18
Unempl., standard. (1980–95)	-0.172	-0.262	0.939	14
Unempl., unstand. (1980–95)	-0.120	0.170	0.750	21
Strike activity (1970–94)	-7.743	-0.253	1.045	18
Strike activity (1980–94)	-5.786	-0.119	0.575	25
Budget deficits (1970–95	0.035	0.066	0.247	16
Budget deficits (1980–95)	0.031	0.049	0.204	19

* Statistically significant at the 10 percent level (one-tailed test).
** Statistically significant at the 5 percent level (one-tailed test).

Source: based on data in Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, New Haven, Conn., Yale University Press, 1999.

The bivariate relationships in Table 4.2 indicate mixed results. Electoral proportionality is associated with less economic growth (according to two of the three measures) and with higher budget deficits, but, on the positive side, with less inflation (as measured by the GDP deflator and the consumer price index), less unemployment (according to both standardised and unstandardised statistics), and fewer strikes (working days lost per thousand workers); all of these measures are annual averages. The picture turns uniformly favourable for PR, however, when the level of economic development and population size (logged) are controlled for. First, all three of the estimated regression coefficients for economic growth are now positive. Second, the

negative bivariate relationship between proportionality and the GDP deflator in 1980–93 is strong and statistically significant at the 5 per cent level, and it remains significant when level of development and population are controlled for; moreover, the other four relationships remain negative and, in addition, become extremely strong and highly significant—at the 1 per cent level—when these controls are introduced. Third, with the same controls, all four relationships between proportionality and unemployment remain negative, and the first achieves statistical significance, albeit merely at the 10 per cent level. Fourth, the relationships with strike activity also remain negative with the same controls in place, and the relationship in the 1970–94 period becomes significant at the 10 per cent level. Fifth, the two positive—that is, unfavourable—relationships between proportionality and budget deficits become negative when the controls are introduced.

These findings warrant three conclusions. First, PR has a uniformly better macro-economic performance record than majoritarian systems, especially with regard to the control of inflation, but also, albeit more weakly, with regard to all of the other economic performance variables. Second, however, only a few of the correlations are statistically significant, and they clearly do not permit the definitive conclusion that PR systems are better policy-makers than majoritarian systems. Therefore, third, the most important conclusion is a negative one: majoritarian democracies are clearly *not* superior to PR systems as policy-makers—and the conventional wisdom is clearly wrong in claiming that this is the case.

PR and democratic quality

The conventional wisdom argues—erroneously, as I have just shown—that majoritarian systems are better at governing, but admits that PR is better at representing—in particular, representing minority groups and minority interests, representing everyone more accurately, and representing people and their interests more inclusively. This section will examine the relationship between PR and five frequently used sets of indicators of the quality of democracy and democratic representation: women's representation (in parliaments and in cabinets), income equality, voter turnout, satisfaction with democracy, and proximity between governments and citizens. Table 4.3 shows the bivariate relationships—all of which are statistically significant at the 5 or 1 per cent levels, and all of which show that PR works better than non-PR.

Women's political representation is an important measure of the quality of democratic representation in its own right, and it can also serve as an indirect proxy of how well minorities are represented generally. The fact that there are so many different kinds of ethnic and religious minorities in different countries makes comparisons extremely difficult, and it therefore makes sense to focus on the 'minority' of women—a political rather than a numerical minority—that is found everywhere and that can be compared systematically across countries. The average percentage of women's parliamentary representation—which ranges widely, from a high of 30.4 per cent in Sweden over the period 1971–1995 to 0.9 per cent in Papua New Guinea—is about 5.8 percentage points higher (ten times the estimated regression coefficient, as explained earlier) in PR than in non-PR systems. Women tend to be better represented in developed than in developing countries, but when the level of development is controlled for, the relationship between proportionality and women's legislative representation weakens only slightly and is still significant at the 1 per cent level. The

pattern is similar for the representation of women in cabinets—ranging from 42.1 per cent in Norway to 0 per cent in Papua New Guinea—although the correlation is significant only at the 5 per cent level.

Political equality is one of the basic goals of democracy, and the degree of political equality is therefore an important indicator of democratic quality. Political equality is difficult to measure directly, but economic equality can serve as a valid proxy, since political equality is more likely to prevail in the absence of great economic inequalities.

Table 4.3 Bivariate Regression Analyses of the Effect of Electoral Proportionality on 10 Indicators of the Quality of Democracy

	Estimated Regression Coefficient	Standardised Regression Coefficient	Absolute t-value	Number of countries
Women's parl. repr. (1971–95)	0.577**	0.455	2.983	36
Women's cab. repr. (1993–95)	0.620*	0.348	2.161	36
Rich-poor ratio (1981–93)	-0.255*	-0.465	2.462	24
Decile ratio (c. 1986)	-0.080**	-0.578	2.747	17
Voter turnout (1971–96)	0.890**	0.400	2.543	36
Voter turnout (1960–78)	1.014**	0.534	2.960	24
Satisf. with dem. (1995–96)	1.936*	0.487	2.228	18
Differential satisf. (1990)	-1.090*	-0.634	2.46	11
Government distance (1978–85)	-0.055*	-0.580	2.251	12
Voter distance (1978–85)	-0.864*	-0.611	2.439	12

* Statistically significant at the 5 percent level (one-tailed test).
** Statistically significant at the 1 percent level (one-tailed test).

Source: based on data in Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, New Haven, Yale University Press, 1999.

The rich-poor ratio is the ratio of the income share of the highest 20 per cent to that of the lowest 20 per cent of households. The ratio varies between 16.4 in highly inegalitarian Botswana and 4.3 in egalitarian Japan. Electoral proportionality and inequality as measured by the rich-poor ratio are negatively and very strongly related (statistically significant at the 5 per cent level and almost at the 1 per cent level). The more developed countries have less inequality than the developing countries; when the level of development is controlled for, the correlation between PR and equality weakens only slightly and is still significant at the 5 per cent level.

The decile ratio is a similar ratio of income differences: the income ratio of the top to the bottom decile. It is available for most of the OECD countries, based on the most

painstaking comparative study of income differences that has been done so far.[15] Finland has the lowest decile ratio, 2.59, and the United States the highest, 5.94. PR systems are again the more egalitarian; the correlation is significant at the 1 per cent level and is not affected when level of development is controlled for.

Voter turnout is an excellent indicator of democratic quality for two reasons. First, it shows the extent to which citizens are actually interested in being represented. Second, turnout is strongly correlated with socio-economic status and can therefore also serve as an indirect indicator of political equality: high turnout means more equal participation and hence greater political equality; low turnout spells unequal participation and hence more inequality. The basic measure is the number of voters as a percentage of voting-age population; Italy had the highest average turnout, 92.4 per cent, and Switzerland the lowest, 40.9 per cent, in the 1971–96 period. PR and voter turnout are positively and very strongly correlated (significant at the 1 per cent level). Turnout in PR systems is about 8.9 per cent higher than in non-PR systems. However, several controls need to be introduced. First of all, compulsory voting, which is somewhat more common in PR than in majoritarian countries, strongly stimulates turnout. Second, turnout is severely depressed by the high frequency and the multitude of electoral choices to be made both in the Swiss PR system and in the majoritarian United States. Third, turnout tends to be higher in more developed countries. When compulsory voting and the frequency of elections (both in the form of dummy variables) as well as the level of development are controlled for, the effect of PR on voter turnout weakens only slightly (and is still significant at the 5 per cent level). The regression analysis was repeated with the average turnout data collected by G. Bingham Powell for an earlier period (1960–78)—with virtually identical results.[16]

Does PR affect citizens' satisfaction with democracy? Hans-Dieter Klingemann reports the responses to the following survey question asked in a large number of countries, including eighteen of our democracies, in 1995 and 1996: 'On the whole, are you very satisfied, fairly satisfied, not very satisfied, or not at all satisfied with the way democracy works in (your country)?'[17] The Danes and Norwegians expressed the highest percentage of satisfaction with democracy: 83 and 82 per cent, respectively, said that they were 'very' or 'fairly' satisfied. The Italians and Colombians were the least satisfied: only 19 and 16 per cent, respectively, expressed satisfaction. Citizens in PR systems are significantly more satisfied with democratic performance in their countries than citizens of majoritarian democracies; the difference is approximately 19.4 percentage points.

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[15] Anthony B. Atkinson, Lee Rainwater and Timothy M. Smeeding, *Income Distribution in OECD Countries: Evidence from the Luxembourg Income Study*, Paris, Organisation for Economic Co-operation and Development, 1995.

[16] G. Bingham Powell, Jr., 'Voting turnout in thirty democracies: partisan, legal, and socio-economic influences', in Richard Rose, ed., *Electoral Participation: a Comparative Analysis*, Beverly Hills, Calif., Sage, 1980, pp. 5–34.

[17] Hans-Dieter Klingemann, 'Mapping political support in the 1990s: a global analysis', in Pippa Norris, ed., *Critical Citizens: Global Support for Democratic Government*, Oxford, Oxford University Press, 1999.

In an earlier study of eleven European democracies, Christopher J. Anderson and Christine A. Guillory found that, in each of these countries, respondents who had voted for the winning party or parties were more likely to be satisfied with how well democracy worked in their country than respondents who had voted for the losing party or parties.[18] Because it is easy to be satisfied when one is on the winning side, the degree to which winners and losers have similar responses can be regarded as a more sensitive measure of the *breadth* of satisfaction than simply the number of people who say they are very or fairly satisfied. The largest difference was in Greece (37.5 percentage points) and the lowest in Belgium (4.7 percentage points). As Table 4.3 shows, the difference in satisfaction is almost 11 percentage points smaller in PR than in non-PR systems. The correlation is significant at the five per cent level.

The final two variables can be used to test the following key claim that is often made on behalf of majoritarian systems: because in the typical two-party system the two major parties are both likely to be moderate, the government's policy position is likely to be close to that of the bulk of the voters. John D. Huber and G. Bingham Powell compared the government's position on a ten-point Left-Right scale with the voters' positions on the same scale in 12 Western democracies in the 1978–85 period.[19] One measure of the distance between government and voters is simply the distance between the government's position on the Left-Right scale and the position of the median voter; this measure is called 'government distance' in Table 4.3. The other measure is the percentage of voters between the government and the median citizen, called 'voter distance' in the table. The smaller these two distances are, the more representative the government is of the citizens' policy preferences. Government distance ranges from a high of 2.39 points on the ten-point scale in the United Kingdom to a low of 0.47 in Ireland; voter distance was found to be the greatest in Australia, 37 per cent, and the smallest in Ireland, eleven per cent. Contrary to the majoritarian claim, both distances are actually smaller in PR than in majoritarian systems. Both correlations are significant at the five per cent level.

The general conclusion is that PR has a much better record than majoritarian democracy on all of the measures of democratic quality, and that, as the previous section showed, majoritarian systems do not have a better record of governing. This means that there is no trade-off and no difficult choice to make in electoral engineering: PR systems clearly outperform non-PR systems.

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[18] Christopher J. Anderson and Christine A. Guillory, 'Political institutions and satisfaction with democracy: a cross-national analysis of consensus and majoritarian systems', *American Political Science Review*, vol. 91, no. 1, March 1997, pp. 66–81.

[19] John D. Huber and G. Bingham Powell, Jr., 'Congruence between citizens and policymakers in two visions of liberal democracy', *World Politics*, vol. 46, no. 3, April 1994, pp. 291–326.

5

Accountability Versus Government Control: the Effect of Proportional Representation

Harry Evans

There are two ways of evaluating proportional representation (PR), and they are usually not brought together.

First it can be evaluated as an electoral system that produces a more representative and therefore more democratic legislature, because it awards representatives in proportion to shares of votes. Few outside the ranks of those dedicated supporters appreciate this virtue. A long history of simpler systems has ingrained the idea that someone should win elections and everybody else lose. We ought, however, to be particularly conscious of the virtue of representativeness in recent times. We have had one general election (1996) in which the incoming government secured an overwhelming majority of seats in the House of Representatives with less than a majority of votes (47.3 per cent), and the most recent general election in which the same government was returned with a comfortable majority of seats in the House with less than 40 per cent of the vote (39.7 per cent) and less than its major rival (40.05 per cent). In each case, the Senate, elected by PR, provided a more accurate reflection of the electors' votes. Yet the government, with little fear of ridicule, claimed a mandate arising from the support of the electors and began to call for reform of the unfair Senate.[1] The psephologists and political scientists may demonstrate the bogus character of this 'reform', but the rest of us are at least partly taken in.

Second, proportional representation can be evaluated in terms of its effect of depriving governments of control of proportionally-elected houses, and thereby

[1] Figures supplied by the Australian Electoral Commission. The government case for 'reform' appeared in a paper by Senator Helen Coonan, 'The Senate—safeguard or handbrake on democracy?', *The Sydney Papers*, vol. 11, no. 1, Summer 1999. The sources to which she refers in her notes are nearly all hostile to her kind of 'reform', a fact not apparent from her paper.

providing a legislative safeguard. From bitter past experience, we know that governments with the total power conferred by complete control of the legislature tend to become arrogant, overbearing and corrupt, and that an upper house not under government control can provide an antidote to this disorder.

A failure to synthesise these two ways of evaluating proportional representation leads to internally contradictory attitudes. We like someone to win elections and run the country, but we complain when we are the recipients of their high-handedness. We regard proportional representation as a nuisance, but we do not want dictators riding in on 40 per cent of the votes. Because discussion of governance is usually dominated by clichés, this contradiction can be disguised by the simultaneous adherence to contradictory propositions represented by such clichés.

Contradictions and clichés

A very good example of this was provided recently by the Egan affair. The Treasurer in the New South Wales government, Michael Egan, is a member of the Legislative Council and a firm believer in his and his party's right to govern through winning a plurality of votes at an election. When the Council, elected by proportional representation and not under a government majority, sought information about allegedly nefarious government activities, Egan refused to produce it. The Council demanded the information and, when Egan persisted in his refusal, imposed a penalty on him by suspending him from the sittings of the Council. His response was to take the Council to court in an attempt to establish that the Council does not, as a matter of law, have the power to require the production of documents. Although he spent a great deal of the taxpayers' money in legal costs, he singularly failed in this endeavour. Both the NSW Court of Appeal and the High Court found that the Council had the power to act as it did,[2] and the Court of Appeal found that claims of legal professional privilege and public interest immunity do not protect the government from the exercise of the Council's power.[3]

One would have thought that Egan would be subjected to severe criticism for spending so much public money in attempting to establish that the public's representatives in parliament do not have the right to information about government activities. One would particularly expect that the Press, in accordance with its usual support for open government and availability of information, would be hostile to Egan's enterprise. On the contrary, at least in the initial stages of his legal battles, the media's attitude was ambiguous. It did not like Egan's secretiveness, but nor did it like the 'undemocratic' Council interfering with the 'democratically elected government'.

This contradiction was concealed by the use of two dominant clichés: the government must be allowed to govern, and the government must be accountable. These two truisms run through political discussion, academic and profane. When they are used with any meaning, they signify that a government should be allowed to pass all its legislation without tiresome parliamentary processes that are difficult to follow and report, but that governments should not be allowed to keep secrets, particularly where

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[2] *Egan v Willis & Cahill* (1996) 40 *NSWLR* 650; (1998) 158 *ALR* 527.

[3] *Egan v Chadwick and others* (1999) *NSWCA* 176, 10 June 1999.

they are up to no good. That there might be some incompatibility between these propositions is usually not detected.

An exemplar of this mode of thought was provided by an editorial in the *Sydney Morning Herald* at the height of the affair, which said that Egan should hand over the documents and that the Legislative Council should be reformed to stop its interfering with governments.[4] It did not seem to occur to the editorial writer that 'reform' of the Council would mean that the Egans of the world would never hand over any information unless it suited them and that the quality of governance would deteriorate accordingly.

Governments' view of government

This editorial was particularly foolish in that it did not seek to put forward Egan's own defence of his conduct. He and his legal advisers were well aware that an internally contradictory argument might pass muster in a newspaper editorial, but would not go down well in court. His case in court had to be rather more sophisticated. It rested on his own theory of responsible government, which is that governments are responsible only to the lower houses, which they normally control, and not to upper houses. This argument was given very little consideration by the courts, and the Court of Appeal, while expounding the judicial recognition of the principles of responsible government, explicitly held that governments' accountability to parliament does not exclude the Council.

Other audiences, also less susceptible to clichés, required a different treatment of the question. At a parliamentary conference, I asked Egan whether the public had the right to see documents relating to the Fox Film Studios/Showground agreement, which he denied to the Legislative Council. His unusually frank answer was to the effect that the public did not have the right to see the documents, and that the government, having been elected to govern, had the right to determine which documents should be made public. When it was pointed out that the electors had also chosen the Council, he responded that the electors should be confined to choosing a government at election time and should not be allowed to elect a second chamber with the means to call the government to account.[5] This, though not often stated, is the current theory of the system of government held by our governors. It amounts to a denial of accountability, that is, the right of the public to have the information required for an informed electoral choice.

In order to appreciate how we have arrived at a situation in which ministers can tell us that we do not have the right to know what they are doing, it is necessary to realise that the concept of accountability, which our commentators support even while supporting Egan's power to undermine it, itself represents a significant constitutional slippage.

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[4] 'Release the Egan papers', *Sydney Morning Herald*, 2 December 1998, p. 18. For a change in the tone of the press, see 'Government must be accountable', *Australian*, 11 June 1999, p. 10.

[5] This exchange was not recorded, but Egan's theory of government is expounded in the submissions put to the courts in the first case cited in footnote 2.

Constitutional slippage

The framers of the Australian Constitution adopted a set of institutions that they called responsible government. At that time, this meant that the executive government, the Cabinet, was responsible to the lower house of the legislature in the sense that the executive could be removed from office by that house if that house considered that the executive no longer merited the house's confidence. Even at that time there were dissenting voices who warned that responsible government no longer worked as supposed. Since then, we have become familiar with their thesis in an updated form: the Executive controls the lower house through a disciplined party majority, and the house no longer removes governments or installs new ones, except in times of great political crisis involving splits in the government party, which are now highly unlikely to occur. Responsible government has disappeared, or at least developed into something different.

We now no longer speak of responsible government in that sense. Instead, we settle for something less, called accountability. Governments should be accountable to parliament, that is, obliged to give account of their actions to parliament and through parliament to the public. Governments are then responsible to the electorate at election time.

The problem with this picture is that the system of government has continued to develop, and has moved on again in a way that requires a further reassessment. Governments now expend a large part of their time and energy suppressing parliamentary accountability, seeking to ensure that they are not held accountable by parliament, that old accountability mechanisms do not work and that new ones are not introduced. Just as the party system developed to ensure that governments formed by the majority party are not responsible to parliament, so that governments are never overthrown by parliament, the system has developed further to ensure that governments are not held accountable by parliament, so that they are less likely to be overthrown by the electorate at the next election.

In that context, PR, by denying governments control of upper houses, has prevented the virtually complete suppression of accountability that occurs when governments have that control.

This is demonstrated by a history of the accountability of government to parliament at the federal level.

Accountability measures: history

It is well known that the Senate, over many years, has developed measures to require greater accountability on the part of governments. Some of the more significant measures are:

- As early as 1932, the Senate established a committee to scrutinise delegated legislation, laws made by the executive government, with independent advice and in accordance with criteria related to civil liberties and proper legislative principle. We thereby avoided at the federal level the situation in some other jurisdictions in which delegated legislation has escaped parliamentary scrutiny. In conjunction

with the establishment of the committee, the Senate developed legislative measures to ensure parliamentary control of delegated legislation.

- The Senate established in 1970 a comprehensive standing committee system to allow regular inquiries into, and the hearing of public evidence on, matters of public concern, including proposed legislation.

- The Senate established in 1981 the Scrutiny of Bills Committee, which is described below.

- The Senate has increasingly used orders for production of documents to require governments to produce information on matters of public concern. (A particular example may be mentioned: the Senate requires all government departments to place lists of their files on the Internet, to guide people making freedom of information requests.)

- The Senate has frequently amended legislation to include provisions for the appropriate disclosure of information (into this category falls the Freedom of Information Act itself, which was extensively amended in the Senate).

- The Senate adopted in 1989 procedures for the regular referral of bills to committees, so that any bill may be the subject of a public inquiry with opportunity for public comment. (In this connection reference may be made to the fact that the government initially resisted the reference of the goods-and-services tax legislation to a committee, even though, as was pointed out, such a complex legislative change merited close scrutiny and public comment.)

- The Senate conferred on its standing committees 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.

- The Senate has continued and improved the twice-yearly estimates hearings, which are opportunities for senators to inquire into any operations of government departments and agencies. There is now the ability to have follow-up hearings on particular matters.

- The Senate established deadlines for the receipt of government bills, so that governments cannot introduce 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 are an attempt to remedy the ‘end-of-session rush’ and ‘sausage-machine legislation’.

- The Senate has taken steps to ensure that governments explain any delay in proclaiming acts of parliament duly passed by the two houses.

- The Senate has amended retrospective taxation legislation 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).

- Many other lesser measures have been taken, such as requiring governments to respond within a limited time to parliamentary committee reports, and placing time limits on answers at question time, so that ministers cannot give 20-minute speeches when they are supposed to be answering questions.

These measures are generically described as accountability measures because they are all founded on the requirement that governments explain what they are doing and why.

It would be difficult to discover anybody who would question the merits of these accountability measures, except ministers currently in power (ministers out of power usually claim to have invented them). Such measures would, I suspect, universally be accepted as meritorious. The significant fact about them, however, is that historically most of them were resisted by the government of day, and accepted only when required by a difficult numbers situation in the Senate. Governments have to be forced to be accountable; they resist accountability and have to be compelled to explain themselves. If this has not always been true, it is certainly true now at least.

The resistance of governments to accountability measures explains, and is also demonstrated by, the conspicuous lack of those accountability measures in lower houses. Where such measures are adopted, they are rigorously controlled by government; an example being the control exercised by governments over committee systems in lower houses. An enormous amount of mental energy has been expended in recent decades over the subject of parliamentary reform, but the fact is that reforms have taken place only in houses of parliament not under government control.

To take a particular example from the list, the Senate established in 1981 the Scrutiny of Bills Committee to scrutinise legislation, with independent advice, to ascertain conformity with criteria related to civil liberties and proper legislative principle. The government opposed the Senate's establishment of the committee and most government senators voted against it. Some government senators were extremely embarrassed by the government's decision to oppose this new measure of accountability, and some of them crossed the floor to support the establishment of the committee. If a similar issue were to arise now, there would be no embarrassment and probably no dissidents. Governments now regularly oppose all accountability measures, and can rely on their backbenchers' unwavering support in doing so.

Another example is provided by the frequent passage by the Senate of orders for production of documents. These orders require ministers to produce relevant documents about matters of significant public concern and controversy. Most of these orders are complied with, for reasons that I will give later. The significant points are that nowadays senators have to resort to these orders because mere requests for documents can be assumed to be ineffective, and it is assumed that governments will resist the passage of the orders in the Senate and will probably not produce, on various well-worn grounds, at least some of the documents ordered.

Legislative powers and accountability

So proportional representation is favourable to accountability of government. Yet we have that underlying belief that governments must be allowed to govern, that is, must

be able to pass their legislation. This leads to a more sophisticated version of the governments must govern/governments must be accountable contradiction. The solution to the dilemma, it is said, is that proportionally elected upper houses should not have any power to amend or reject government legislation, but should concentrate on holding governments accountable through committee inquiries and so forth. This is a well-worn track in the political literature.[6] Unfortunately, it rests on ignorance about how legislatures actually work. 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 of upper houses: as a last resort, an upper house with legislative powers could 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 not a theoretical construct, but a practical, every-day factor in the operations of the Senate. I am frequently asked by senators for advice on what can be done when governments refuse to provide information. I respond by drawing attention to the spectrum of remedies available. At one end of the spectrum is criticism of the government for failure to provide the information; at the other end is refusal to deal with all or some government legislation until the information is produced. The first is usually seen as inadequate, while the other is seen as too drastic in most circumstances. There is then the middle way: initiate a debate in the Senate so that government time that would otherwise be spent on government legislation is expended on the matter in contention. This is the hold that the Senate has over governments: if they do not produce appropriate information when required, their legislative program will be disrupted. Ultimately, there is the threat that legislation will not be dealt with at all. Governments then have to weigh the embarrassment that may be caused by the disclosure of awkward information against the disruption of their legislative program. Usually they decide that the avoidance of embarrassment is not worth the trouble in the Senate. When information is very embarrassing, they opt for the trouble in the Senate. The end result is that much information is made available that would not otherwise be known to the public, while the government may keep its most embarrassing secrets and allow the public to form its own judgment about its motives.

Proportional representation and the Australian solution

A coherent evaluation of government in Australia today must begin with a closer examination of the concept represented by the cliché that governments must be allowed to govern. This notion is really based on an avoidance of the foundation problem of government: how to allow governments sufficient control to ensure the continuance of civil society while in turn subjecting them to sufficient control to ensure that their power to preserve does not become a power to destroy.

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[6] See Senator Coonan's paper cited in footnote 1. Also R. Smith and L. Watson, eds, *Politics in Australia*, 2nd edn, St Leonards, NSW, Allen & Unwin, 1993; G. Maddox, *Australian Democracy in Theory and Practice*, 3rd edn, Melbourne, Longman Australia, 1996.

No system of government provides a foolproof solution to this foundation problem. Perhaps we could come to a realisation that the Australian system provides a solution that may be as good as any. Lower houses elected by single-member constituencies, with an executive dependent on control of those houses, provide relatively stable and strong executive governments, while upper houses possessing legislative powers and elected by proportional representation provide a better reflection of the voters' opinion, a democratic quality control on legislation and a means of ensuring that governments do not entirely avoid public accountability.

6

Can the Senate Claim a Mandate?

Murray Goot[*]

In the course of the 1996 election campaign for the House of Representatives and half the Senate, the Liberal-National Coalition committed itself to the partial privatisation of Telstra and to putting part of the proceeds of the sale into an environmental fund. The then Labor government campaigned against this proposal; so, too, did the Australian Democrats, the Greens and an Independent who, between them, were to hold the balance of power in the new Senate. Having won the election, the Coalition claimed a mandate to legislate for the part-privatisation of Telstra. The Labor Party, however, insisted that the government had won no such mandate. The Australian Democrats, going one step further, claimed that the opposition parties in the Senate had secured a 'counter-mandate'—an electoral mandate to oppose the privatisation of Telstra.

The government based its claim on the fact that, since its plans for Telstra had been made known in advance of the election, voters had been afforded an opportunity to pass judgment on them. Having won what the new Prime Minister, John Howard, called 'a huge mandate'[1]—the majority (93 out of 148) of the seats in the House of Representatives, a plurality (46.9 per cent) of the first preference vote and the majority (53.6 per cent) of the 'two-party preferred'[2]—the government was entitled to expect that the policies on which it had gone to the people would be allowed a safe passage not only through the lower house, but through the upper house as well.

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[*] For comments on an earlier version of this paper, I am grateful to Bob Goodin and John Kilcullen and to the participants in an ANU seminar on the paper in the Research School of Social Sciences, especially Geoffrey Brennan and Richard Mulgan.

[1] *Australian Financial Review*, 5 March 1996.

[2] *Electoral Pocket Book*, Canberra, Australian Electoral Commission, 1996, p. 73.

After an early by-election saw the government strengthen its hold on the seat of Lindsay, won from Labor at the general election, the Prime Minister called again on the opposition forces in the Senate to let the Telstra legislation through. 'One of the messages coming out of [the by-election] loudly and clearly,' Howard told the Liberal Party's Federal Council, 'is "we didn't make a mistake, we wanted a change and for those who would endeavour, unreasonably, to frustrate that change get out of the way and let the new crowd have a fair go." '[3]

The Democrats, by contrast, focused on the fact that while the Coalition had won a clear victory in the House of Representatives, it had not done so in the Senate; and the parties in the Senate threatening to block the government's Telstra Bill had stated their opposition to such legislation every bit as clearly as the Coalition had stated its support. The difference in the balance of forces in the two chambers could best be understood, the Democrats argued, in terms of voters hedging their bets. Public opinion polls not only showed that most voters were opposed to the sale of Telstra, they suggested widespread support for the Senate's right to block the sale. According to Senator Cheryl Kernot, the Democrats' leader, the electorate had taken out 'insurance'. It had 'deliberately provided two competing mandates: one for the government to be changed and one for a balance of power check on that new government in the Senate.'[4]

The result of the Lindsay by-election, Kernot insisted, reflected nothing more than the electorate's desire to give the Liberal candidate (forced by Labor to re-contest her seat) a 'fair go'; it didn't give the government a 'blank cheque'.[5] Similarly, Senator Brian Harradine (the Tasmanian Independent whose vote on Telstra would be crucial) said: 'Let me see any exit poll that says that the one-third sale of Telstra was the uppermost thought in the minds of the electors' at the by-election.[6] None of the polls, however, had made much attempt to find out what was 'in the minds of the electors'.[7]

What can be said about these diametrically opposed positions? In what sense can a government be said to have a mandate? Under what conditions, if any, might the Senate legitimately impose its own policies on a government? And to what extent might the answers given to these questions today differ from those given in the past?

Mandates, bicameralism and the meaning of the vote

In coming to grips with these questions, this paper starts by arguing the need to consider: the distinction between a government's claiming a specific mandate and its claiming a general mandate; the peculiar difficulties that strong bicameralism creates for any theory of mandates; and the means of validating key assumptions about the meaning of the vote that mandate theories generally make.

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[3] *Sydney Morning Herald*, 21 October 1996.

[4] *Australian*, 21 March 1996.

[5] *Sydney Morning Herald*, 22 October 1996; *Age* (Melbourne), 21 October 1996.

[6] *Age* (Melbourne), 22 October 1996.

[7] *Weekend Australian*, 12–13 October 1996, for Newspoll; *Sydney Morning Herald*, 21 October 1996, for AGB McNair.

Mandates: specific and general

A government which argues that its election signifies the electorate's endorsement of at least some of the policies on which it campaigned appeals to a *specific* mandate. In its most plausible form, such a claim revolves around one issue, and in these circumstances, elections are sometimes described as referendums. But appeals to specific mandates can involve claims about several policies, even entire programs. As Gough Whitlam recalled, 'We took the view that we had been given a specific mandate to implement each part of the program set forth in the 1972 policy speech.'[8]

By contrast, a government which argues for the legitimacy of its actions simply on the grounds that it won the preceding election seeks to found its authority on the idea of a *general* mandate. Associated famously with Joseph Schumpeter, what elections determine on this view is not what policies are to be pursued, but who is to govern.[9] That Australian governments have a general rather than specific mandate is, Don Aitkin believes, precisely the view of the electoral process that voters themselves take: 'their job', as they see it, 'is to put governments in and let them get on with the job; if a government does its job badly they will eventually "turf it out" and put the other lot in.'[10]

Unicameralism and bicameralism

If the Australian parliament were unicameral, the question of whether the government had a specific mandate or a general one would be a relatively minor matter. Provided it had a majority in the House of Representatives (something all Australian governments have enjoyed since 1941), a government would dominate the parliament through sheer weight of numbers.

But the parliament is strongly bicameral and for much of the recent past the governing party of Coalition in the House of Representatives has found itself in the minority in

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[8] E.G. Whitlam, *The Whitlam Government 1972–1975*, Ringwood, Vic., Viking, 1985, p. 24. The most sustained discussion of Whitlam's ideas on mandates is in C.J. Lloyd and G.S. Reid, *Out of the Wilderness: the Return of Labor*, North Melbourne, Cassell,. 1974, pp. 197–210; but cf. the uncritical account in Jenny Hocking, *Lionel Murphy: a Political Biography*, Cambridge, Cambridge University Press, 1997, pp. 147–48. For descriptions of the mandates claimed by other post-war leaders, see Paul Corcoran and S.A. Rowland, 'The People on Probation: Rhetorical Images of the Australian Electorate', in G. Crowder et al., eds, *Australasian Political Studies 1997*, Adelaide, Department of Politics, Flinders University of South Australia, 1997, vol. 1, p. 234ff. In New Zealand, in the 1970s, Labour's Norman Kirk and the National's Sir Robert Muldoon also displayed a Whitlam-like 'obsession' with their election policies; see Richard Mulgan, *Democracy and Power in New Zealand*, 2nd edn, Auckland, Oxford University Press, 1989, pp. 64–65.

[9] J.A. Schumpeter, *Capitalism, Socialism and Democracy*, London, George Allen & Unwin, 1943, chapter 22; see also, S.I. Benn and R.S. Peters, *Social Principles and the Democratic State*, London, George Allen & Unwin, 1959, p. 345 and J.P. Plamenatz, *Consent, Freedom and Political Obligation*, 2nd edn, London, Oxford University Press, 1968 (first published 1938), p. 21. For a critique of Schumpeter's distinction between 'men' and 'measures', see Jack Lively, *Democracy*, Oxford, Basil Blackwell, 1975, pp. 39–40; but for the view that this distinction needs to be maintained if we are to understand English voters prior to the emergence of mandates, see C.S. Emden, *The People and the Constitution*, London, Oxford University Press, 1933, chapter 8.

[10] Don Aitkin, 'Foreword', in David Hamer, *Can Responsible Government Survive in Australia?* Canberra, Centre for Research in Public Sector Management, University of Canberra, 1994, p. vi.

the Senate.[11] Strong bicameralism—where the powers of both chambers to initiate or block legislation are roughly the same, where the compositions of the two chambers are constituted under different sets of rules and where the dominant party or parties in one is generally not the same as the dominant party or parties in the other—is likely to make a government's claim to any sort of mandate much more difficult to sustain.

Those who defend the pre-eminent position of the lower house in matters of legislation do, of course, have a case. Where upper houses are unelected, the case for giving them any sort of veto over legislation is likely to be especially weak. But it is misleading to claim, as Arend Lijphart does, that second chambers that are not directly elected necessarily 'lack the democratic legitimacy, hence the real political influence, that popular election confers.'[12] In Australia, for much of this century, state upper houses elected on a property franchise—or, in the case of New South Wales pre-1978, not elected on an extra-parliamentary franchise of any kind—wielded powers largely identical to those enjoyed by lower houses.[13] Where public opinion itself supports, or at least acquiesces in such an arrangement, second chambers that are not subject to popular election can be as influential as any others.

There are two other conditions under which the claims of upper houses are also likely to be weakened. One is where malapportionment is greater in the upper house than in the lower house. The other is where elections for the two chambers are held at quite different times, so that the lower house finds itself confronted by an upper house elected several years earlier.

The Australian Senate, at first glance, appears to fail the first test: each state, whatever its number of electors, sends the same number of senators to Canberra; and the fact that a senator from New South Wales represents roughly 12 times as many voters as a senator from Tasmania not only violates the ideal of one vote, one value, but does so to a much greater extent than any present—or past—malapportionment in the House of Representatives. Those intent on upholding 'sound democratic principles' and defending the primacy of a government's mandate have traditionally made much of this, especially from the Labor side.[14] But closer scrutiny shows something quite different. If one calculates election results on a national rather than state basis (so that all votes count equally regardless of where they were cast) and then compares the votes cast with the seats won, it is the Senate that better mirrors the nation's mind

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[11] See Rodney Smith, 'Parliament', in J. Brett, J. Gillespie and M. Goot, eds, *Developments in Australian Politics*, South Melbourne, Macmillan, 1994, p. 112, for data on the federal and state parliaments since 1960; and G.S. Reid, 'Parliamentary-Executive Relations: the Suppression of Politics', in Henry Mayer, ed., *Australian Politics: A Second Reader*, Melbourne, F.W. Cheshire, 1969, p. 518, for federal data covering the period 1901–1968.

[12] A. Lijphart, *Democracies*, New Haven, Yale University Press, 1984, p. 97.

[13] See, H.R. Anderson, 'The Constitutional Framework', in S.R. Davis, ed., *The Government of the Australian States*, London, Longmans, Green, 1961, p. 7; Ken Turner, *House of Review? The New South Wales Legislative Council 1934–1968*, Sydney, University of Sydney Press, 1969, pp. 43–44, 125; and Murray Goot, 'Electoral Systems', in D. Aitkin, ed., *Surveys of Australian Political Science*, North Sydney, George Allen & Unwin, 1985, pp. 187–88.

[14] See, for example, L.F. Crisp, *Australian National Government*, 5th edn, Melbourne, Longman, Cheshire, 1983, pp. 149, 349; but compare Geoffrey Sawer, *Federation Under Strain: Australia 1971–1975*, Carlton, Melbourne University Press, 1977, pp.110–11, who stresses, correctly, the varying rationales underlying the electoral systems for the two chambers.

almost always—not the House of Representatives; in 1996, for example, Labor, the Democrats and the Greens won 50.2 per cent of the votes and 50 per cent of the seats in the Senate while in the House of Representatives they won 50.7 per cent of the vote but only 33 per cent of the seats.

It is on the second test that the Senate has, on occasion, truly been found wanting. The Whitlam government, for example, elected at the end of 1972, was rightly affronted by the fact that the senators who obstructed its early legislation and forced it to the polls in 1974 had been elected in 1970 or 1967. On that occasion the Senate was not, in E.T. Brown's words, 'less than half fresh and more than half stale'; it was entirely stale.[15] After a double dissolution, the composition of the Senate is as fresh as the composition of the House; after a half-Senate election, held (as in 1996) in conjunction with an election for House, the in-coming Senate is at least half as fresh. And since there is no reason to suppose that, where a half-Senate election is held in conjunction with an election for the House of Representatives, the parties' share of the vote would be any different to the share they would gain at an election for the full Senate, the distribution of votes for the two chambers can be regarded as equally fresh and directly compared.

After the 1996 election, the Democrats were careful to ground their claim to a mandate on the share of the votes won by opposition parties in the Senate, not on their share of the seats; 'where mandate [sic] is concerned', Cheryl Kernot cautioned, 'count the votes not the seats.'[16] The caution was well advised. According to David Butler, had there been a full Senate election, the Coalition would have won at least 38 of the 76 seats, and 'almost certainly' picked up a seventh seat in Queensland to give it a majority of 39.[17] In effect, the support of Harradine (Independent, Tasmania) and the decision by Senator Mal Colston (Queensland) to quit the Labor Party for the cross-benches gave the Coalition, in highly unusual circumstances, what the electoral system might have delivered as a matter of course.

The meaning of the vote

Neither a general nor a specific mandate, Richard Mulgan insists, depends 'on any conscious intention on the part of the voters'. Just as the general mandate follows automatically from the government's control of the lower house, so the convention of a specific mandate 'follows from the inclusion of a policy in the government's election program, regardless of whether any voters knew of it, let alone whether their votes were determined by it.'[18] But most academic commentators would disagree. As

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[15] E.T. Brown, *Bread and Power*, London, William Hodge, 1940, p. 78.

[16] *Australian*, 21 March 1996.

[17] David Butler, 'Six Notes on Australian Psephology', in C. Bean, et al., eds, *The Politics of Retribution: The 1996 Federal Election*, St. Leonards, Allen & Unwin, 1997, pp. 237–38.

[18] Richard Mulgan, 'The Australian Senate as a "House of Review" ', *Australian Journal of Political Science*, vol. 31, no. 1, 1996, p. 196; 'The concept of mandate in New Zealand Politics', *Political Science*, vol. 30, 1978, p. 91. See also, A. Schedler, 'Introduction: Antipolitics—Closing and Colonizing the Public Sphere', in A. Schedler, ed., *The End of Politics?*, London, Macmillan, 1997, p.12.

Stanley Kelley has put it: 'To suggest that a mandate exists for a particular policy is to suggest that more than a bare majority of those voting are agreed upon it.'[19]

When the idea of a government winning a policy mandate first took hold, after the Reform Act of 1832, there was no clear way of knowing the electorate's state of mind. A century later, this began to change as first pollsters and then political scientists brought the methods of survey research to bear. On the question of whether issues determined election results, political scientists were damning. In Australia, a 1958 by-election study reported that issues played a 'relatively small part in the choice of the majority of voters'; another study, finding voters 'almost incredibly ignorant', suggested that 'most people support a party not because it favours a particular policy but because they think it is made up of particular types of people ... people like themselves.'[20]

But surveys did not necessarily damage the idea that a party's policies might have majority support. Some policies appeared to enjoy this support; others did not. Increasingly, polls that point to a government's policies being widely supported have strengthened its legislative position. The power of the polls is evident not only when the policies in question are those on which the government has sought an electoral 'mandate', but when the policies it proposes run counter to those on which it campaigned. Consider, for example, the Howard government's decision to introduce a 'work-for-the-dole' scheme, after Howard himself appeared to have ruled it out during the campaign. A Morgan poll, which reported 72 per cent in favour of the dole scheme, suggested an electorate that either did not know or did not care about the original promise. And the legislation passed the Senate after Labor, influenced by this and other survey research, shifted its position from opposition to support.[21]

Equally, polls have been used to undermine a government's legislative position by suggesting that its parliamentary majority may have been achieved despite its commitment to certain policies. In 1996, the Opposition's 'counter-mandate' on Telstra was said to have been made manifest not only by the election results for the Senate, which went against the government, but also by opinion polls.

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[19] S. Kelley, *Interpreting Elections*, Princeton, Princeton University Press, 1983, p. 128. See also, for example, G.M. Pomper, *Elections in America*, New York, Dodd Mead, 1968, p. 247; H.F. Pitkin, *The Concept of Representation*, Berkeley, University of California Press, 1967, esp. p. 146 and Turner, op. cit., pp. 81–2. It is precisely the possibility that politicians might fail to act as 'instructed' that explains the demand, at various times, for citizen's initiative and representatives' recall.

[20] Creighton Burns, *Parties and People: a Survey Based on the La Trobe Electorate*, Parkville, Vic., Melbourne University Press, 1961, p. 126; D.W. Rawson, *Australia Votes: the 1958 General Election*, Parkville, Vic., Melbourne University Press, 1961, p. 165.

[21] *The Bulletin* (Sydney), 25 February 1997, for the Morgan poll; *Sunday Age* (Melbourne), 9 November 1997, for Labor's research. Howard's defence of his decision—that the statement issued under his name during the campaign was actually written by the federal director of the Liberal Party, after consulting with the relevant shadow minister rather than with him—may raise questions about what should count as a promise, but it hardly deflects from the point at issue here. For Howard, see *Australian*, 12 February 1997, and *Age*, (Melbourne), 13 February 1997.

Evidence from the polls

The message from the Lindsay by-election, the Prime Minister had insisted, was that the Senate should not 'unreasonably' frustrate the new government. But how was the 'reasonableness' of the Senate's behaviour to be judged? Thirty years earlier, a student of the Senate had suggested that '[i]n the final analysis, the view of the public' was 'the best measuring stick to determine the reasonableness of the Senate's record'. And the record clearly showed an electorate capable of siding with, or at least not punishing, opposition parties whose actions in the Senate precipitated another election. In 1913, for example, the Cook government met its demise after the Senate, controlled by Labor, forced it to the polls; in 1931, the defeat of the Scullin Labor government followed a long period of Senate obstruction; and in 1975, Labor was again swept away when a stalling Senate persuaded the Governor-General to demand a new election.[22]

The idea that 'key' government legislation ought to be passed by the Senate, as a matter of principle, is not one to which most voters appear to subscribe. Polled in 1997 about whether the present method of electing senators, which 'some believe ... makes it too easy for smaller parties to control the balance of power in the Senate', was 'a bad thing because the elected government can't be sure of getting key policy changes approved in the Senate' or 'a good thing because the Senate can keep a check on government policy', few of those interviewed were prepared to write a blank cheque for either side: only 10 per cent agreed that 'when the government does not have a majority in the Senate' it is 'always a bad thing'; nearly twice that number (18 per cent) thought it 'always a good thing'; while two-thirds (67 per cent) said it was 'sometimes good and sometimes bad depending on the circumstances'. Nearly three-quarters (72 per cent) thought the electoral system 'should stay the way it is' rather than be changed 'to make it easier for the coalition or the Labor Party to have a majority in the Senate.'[23] Asked, after the most recent election, whether it was 'better' when the 'federal government has a majority in both the House of Representatives and the Senate or when the federal government in the House of Representatives does not control the Senate', only four in every ten respondents thought it 'much better' (20 per cent) or at least 'better' (19 per cent) when the government controlled both; nearly half thought it 'better' (38 per cent) or 'much better' (10 per cent) when the government did not control both.[24]

In 1996, the willingness of voters to hedge their bets was quite marked. The outward sign of this was the gap between the Democrats vote in the House (6.8 per cent) and its vote in the Senate (10.8 per cent). A difference of four percentage points was higher than at any election since 1983—another election at which a widespread expectation of a change of government may have encouraged voters to pull on the

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[22] Anthony Fusaro, 'The Australian Senate as a house of review: another look', *Australian Journal of Politics and History*, vol. XII, 1966, reprinted in C.A. Hughes, ed., *Readings in Australian Government*, St. Lucia, Qld, University of Queensland Press, 1968, p. 128; C.A. Hughes, 'The Machinery of Government', in H. Mayer and H. Nelson, eds, *Australian Politics: a Fifth Reader*, Melbourne, Longman Cheshire, 1980, p. 203.

[23] Morgan Poll Finding No.2991, *The Bulletin* (Sydney), 10 June 1997.

[24] Clive Bean, David Gow and Ian McAllister 'Australian Election Study, 1998: User's Guide to the Machine-Readable Data File', SSDA Study No.1001, 1999, p. 21.

reins.[25] According to one post-election poll, 17 per cent in 1996 voted for one party in the House and a different party in the Senate—two-thirds because they did not want one party to control both. The corresponding figure for 1990, as estimated by the Australian Election Study, was 11 per cent; and for 1987, 15 per cent.[26]

For Kernot and the Democrats, the polls introduced two distinct, if related, kinds of evidence that bolstered the Party's stand: first, evidence of support for the Democrats' substantive position—that is, evidence against the government's claim that it had secured a specific mandate for Telstra's partial privatisation; second, and more importantly, evidence of support for the Senate's right to block the government's Telstra Bill.[27]

Evidence of the first kind came from three polls conducted during the course of the campaign and one after it. In two of the campaign polls, undertaken by AGB McNair, respondents were told that 'Mr Howard' had 'announced that $1.1 billion of the proceeds from the sale of one-third of Telstra' would 'be used to fund his environment protection package' and then asked whether they would 'support the sale of one-third of Telstra if some of the proceeds' were 'used to fund environmental protection'; 49 per cent, in the first, and 41 per cent, in the second, said they would. In the third, conducted in between by Newspoll, respondents were asked whether they 'personally' favoured or opposed 'the Coalition's proposal to spend $1 billion on the environment funded by the partial sale of Telstra'; no more than 39 per cent said they favoured it. Some months after the election, AGB McNair told respondents that the government, as it had 'announced during the campaign', had 'introduced legislation into parliament to enable the sale of one-third of Telstra'; but the Coalition's victory notwithstanding, the level of support (51 per cent) for 'the sale of one-third of Telstra if some of the proceeds are used to fund environmental protection' hardly represented a clear-cut endorsement.[28]

It does not follow automatically that those opposed to the Telstra sale would have thought the Senate within its rights to block the move. Before the 1998 election, for example, the number opposed to a goods-and-services tax exceeded the number who

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[25] Hiroya Sugita links the 1983 and 1996 results to special efforts by the Democrats' leaders to get electors to hedge, but in the absence of more information about the Democrats' strategies at these and during the intervening elections, one has to suspend judgment; 'Conflicting mandates: the Australian Democrats and the Howard government', *Policy, Organisation and Society*, no. 13, 1997. For data on the Democrats' performance in the House and Senate, 1977–1996, see, Clive Bean, 'Australian Democrats: Electoral Performance and Voting Support', in John Warhurst, ed., *Keeping the Bastards Honest: the Australian Democrats' First Twenty Years*, St. Leonards, NSW, Allen & Unwin, 1997, p. 70; Bean, however, does not seek to explain the differences between the Democrats' House and Senate votes.

[26] S. Bowler and D. Denemark, 'Split ticket voting in Australia: dealignment and inconsistent votes reconsidered', *Australian Journal of Political Science*, vol. 28, 1993, p. 25.

[27] *Age* (Melbourne), 26 February 1996.

[28] *Sydney Morning Herald* and *Age* (Melbourne), 5 February, 27 February and 4 June 1996 for AGB McNair; *Australian*, 14 February 1996 for Newspoll. For a wider discussion of how the Coalition negotiated the shoals of public opinion on Telstra, see Murray Goot 'Public opinion, privatisation and the electoral politics of Telstra', *Australian Journal of Politics and History*, vol. 45, no. 2, 1999, pp. 214–38.

thought the Senate should block it.[29] But this was not the case with Telstra. Told, after the 1996 election, that both 'Labor and the Democrats in the Senate' had 'said they will refuse to pass the legislation enabling the sale of one-third of Telstra', a clear majority (56 per cent) of those interviewed by AGB McNair agreed that 'irrespective' of whether they supported the sale, the Senate should have 'the right to block' it. During the campaign, a similar proportion (64 per cent) of those polled by Morgan agreed that if Labor and the Democrats held 'the balance of power in the Senate', they should have the right 'to prevent the coalition from selling part of Telstra.'[30] Most (52 per cent) of those polled after the election rejected the Coalition's threat of an early double dissolution 'if the Senate fails to pass important laws such as the one allowing for the partial sale of Telstra.'[31] Asked about the Prime Minister's view that the Liberal's by-election victory 'means that the Senate does not have the right to stop the passing of legislation to sell part of Telstra', only a third of those polled agreed; more than half (54 per cent) disagreed.[32]

Support for the Senate's right to block government legislation—even budgets—was hardly new. In 1975, at the height of the most (in)famous stand-off between the House and the Senate, the majority (52 per cent) of those polled by McNair Anderson disagreed that the Constitution 'should be changed so as to remove from the Senate the right to reject money bills', though nearly two-thirds (64 per cent) agreed that the coalition parties were 'wrong in attempting to block the money bills in the Senate at the present time'.[33] In 1993, two-thirds (63 per cent) of those polled by AGB McNair Anderson supported the Coalition's attempt to block the Budget in the Senate; two-thirds (67 per cent) of those interviewed by Newspoll wanted the Labor government to 'make further changes to the Budget', to overcome a parliamentary 'deadlock', rather than having the two Green senators who were 'delaying the budget' agree 'to support the Budget as it is currently proposed'; and only a third (36 per cent) of those interviewed by Morgan about how they would vote in a referendum to remove the Senate's power to block supply said they would vote Yes.[34] In 1993, three-quarters (74 per cent) of those polled by Saulwick thought the actions by the Democrats and minor parties to 'force changes in the budget' were 'proper' rather than 'not proper' and in 1995, a similar proportion (71 per cent) of those interviewed by AGB McNair—at a time when the Coalition, the Democrats and the Greens had 'blocked certain aspects of the government's Budget'—agreed that 'the Senate should be allowed to block parts of the Budget as it sees fit.'[35]

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[29] Morgan Poll Finding No. 3089, *The Bulletin* (Sydney), 2 June 1998; and AC Nielsen, 'Election '98 Issues Report', 30 September 1998.

[30] Morgan Gallup Poll Finding No.2858, *The Bulletin* (Sydney), 20 February 1996.

[31] Morgan Poll Finding No.2912, *The Bulletin* (Sdyney), 18 June 1996.

[32] Morgan Poll Finding No.2942, *The Bulletin* (Sydney), 5 November 1996.

[33] Cited in T.W. Beed, 'Opinion polling and the elections', in H.R. Penniman, ed., *Australia at the Polls: the National Elections of 1975*, Washington, D.C., American Enterprise Institute for Public Policy Research, 1977, p. 244.

[34] *Sydney Morning Herald*, 23 August 1993, for AGB McNair Anderson; *Australian*, 22 September 1993, for Newspoll; and Morgan Gallup Poll Finding No. 1072, *The Bulletin* (Sydney), 31 May 1983.

[35] *Age* (Melbourne), 7 September 1993 for Saulwick; *Sydney Morning Herald*, 5 July 1995 for AGB McNair.

Evaluating the arguments

The first stone

One objection to the Opposition's attempt to block the Telstra legislation in the Senate was that it was hypocritical: Labor in office, it was observed, had railed against the Senate—the Prime Minister, Paul Keating, calling it 'an unrepresentative swill'.[36] The point, though valid, was easily countered. Labor's leader in the Senate, John Faulkner, noted that after the 1987 election (triggered by the Senate's rejection of the Labor government's Australia Card Bill), John Howard himself, then Leader of the Opposition, had scorned the very idea of an electoral mandate.[37] According to Howard, any suggestion that Labor had won a specific mandate for its Australia Card legislation was 'invalid not only in terms of the number of votes cast [fewer for the government than for the opposition] but also on the simple proposition that when people vote at an election they do not vote on only one issue.' Subjected to 'proper analysis', he insisted, 'the mandate theory of politics' had 'always been absolutely phoney'.[38]

Expectations and obligations

Another objection hinges on the argument that there is a reciprocal relationship between the electorate's expectation that governments will keep their promises and the obligation of opposition parties to respect a government's mandate. Responding to the argument that a government could claim a mandate only for policies electors both knew about and voted for, Richard Mulgan insisted that on this reasoning governments could choose to 'break any election promises'—something, he was sure, voters would not want them to do.[39]

But this line of argument overlooks the fact that voters sometimes do want promises broken—and not just (as mandate theorists readily concede) when circumstances facing governments change in unexpected and adverse ways. One reason why Mulgan sets so much store by the idea of a mandate is that he assumes that if governments 'depart from their election policy, the political consequences in terms of unpopularity and damage to their credibility will be very great.'[40] But this is not necessarily so.

The argument also misconstrues the relationship between mandates and accountability. In politics, promise-keeping is a political act; it is not a question of morality or of logic. Charges of 'inconsistency' or 'hypocrisy' against a government for, say, keeping its promise on Medicare but not on Telstra are unlikely to carry much electoral weight. No opposition is ever likely to be blamed by voters for

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[36] *CPD* (*Commonwealth Parliamentary Debates*), 2 November 1992, p. 2549.

[37] *Australian*, 4 December 1996.

[38] *CPD*, 15 September 1987, p. 2. See, John Warhurst 'The ALP Campaign', in Ian McAllister and John Warhurst, eds, *Australia Votes: The 1987 Federal Election*, Melbourne, Longman Cheshire, 1988, pp. 37–38, 53, for the double dissolution campaign. Although Ewart Smith is correct in observing that during 'the election campaign hardly a word was said about the ID card', Howard's argument did not rest on that; *The Australia Card: the Story of its Defeat*, South Melbourne, Sun Books, 1989, p. 95.

[39] *Australian*, 15 April 1996, for the argument about the pre-conditions for a mandate, advanced by Donald Horne; *Australian*, 23 April 1996, for the counter-argument by Mulgan.

[40] Mulgan, *Democracy and Power*, op. cit., p. 64.

blocking an unpopular policy while badgering the government to deliver on a popular one.

And the argument ignores the reasons why parties make promises and why parties that lose often—but not always—try to ensure that promises are kept by the party that wins. Typically, parties promise things that they have reason to believe will win them support. If what is promised has wide support, opponents will not disparage the promise, but attempt to cast doubt on the likelihood of it being delivered—or at least on it being delivered without it exacting an unacceptably high price. Any party that wins on the basis of a popular promise comes under pressure to deliver from opponents wary lest the party has 'cheated' its way into office by making pledges that it cannot or will not redeem.

Where a government attempts to legislate a policy that does not have widespread support, opposition parties have two options. Typically, they try to thwart the government, so as to keep faith with their current supporters and win the adherence of others; hence the pressure on the government not to deliver on Telstra. But oppositions can opt for a quite different line of attack. Before the 1993 election, the Coalition declared that if elected it would introduce a goods-and-services tax. The Labor government, led by Keating, was not particularly popular, and the coalition's promise of a GST—not a particularly popular promise—seemed to offer the government a lifeline. The lifeline, however, was also a rope with which Labor might hang itself. What Keating feared was voters trying to have it both ways—handing the Coalition a majority in the House while relying on Labor and the minor parties to block the GST in the Senate. Keating decided that Labor's chances of winning would be much enhanced if he deprived voters of this choice; he may also have reasoned that if Labor lost the election, its chances of winning next time would be greater if it were trying to defeat a government that had introduced a new tax rather than one that had been prevented from doing so. So he announced that if Labor did lose the election, it would not oppose the GST in the Senate.

The tactic was as audacious as it was unusual. Far from being anticipated as the normal price of defeat—the acknowledgement of a specific mandate—the decision not to oppose a GST, as one biographer put it, 'stunned those on both the government and opposition benches.'[41] Keating assumed that voters might be prepared to elect a government whose main policy they did not support, and that they might do this precisely because they did not subscribe to the theory that governments could claim mandates for unpopular policies.

Four years later, under Kim Beazley, Labor repeated Keating's GST pledge. In effect the party was saying that the next election, too, would be different from earlier elections: it would be 'a mandate election'.[42] In May 1998, however, during the Budget debate, the party resiled from Keating's position: if the Coalition ran on a GST and won, said Beazley, Labor would oppose the legislation in the Senate. The reason for the turnaround is as significant as the turnaround itself. Labor's research indicated that its initial decision to respect the Coalition's 'mandate'—to oppose the

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[41] Michael Gordon, *Paul Keating*, new edn, St. Lucia, Qld, University of Queensland Press, 1993, p. 193.

[42] *Australian Financial Review*, 27 August 1997.

tax on the hustings, but to allow it to pass through the parliament, if the Coalition were returned—had left the electorate in considerable doubt about whether Labor's opposition to the GST was genuine.[43]

Responsible parties

Ultimately, the argument about expectations and obligations feeds into a wider set of arguments about responsible party government. In the standard view, parties compete for office on the basis of distinctive sets of policy proposals. Whichever party wins office is expected to implement its policies. Parties that do not win not only respect the right of the government to implement the policies on which (as the saying goes) it was elected, but to make sure that these policies are implemented.

In a critique of the Democrats' attempt to frustrate the government on Telstra one proponent of the responsible party model, Hugh Emy, linked 'the growing practice' among parties 'of making promises they have no intention of keeping', with the declining esteem in which politicians appear to be held. Unless governments keep to the straight and narrow on 'mandate doctrines', he argued, 'it is difficult to see what can help to arrest the growth of cynicism'—not just in Australia, but throughout the capitalist world.[44] But why link political cynicism to the breaking of electoral promises only by governments? Might not respect for the system also be undermined by opposition parties promising to do one thing, but doing another? A situation in which every party sticks to its guns might do more to reduce electoral cynicism than a situation in which only the government does.

Emy points to research in Britain, the United States and Australia which suggests that governments 'take their manifesto commitments seriously' and infers from this that 'mandate' is a term that 'describes the way parties behave in countries which contain a responsible party model.' Even if he is right about governments feeling obliged to carry out the policies on which they campaigned, this tells us nothing about what oppositions feel obliged to do. Respect for a government's mandate may be part of the explanation for the way oppositions behave. Support for the substance of what a government promises may be another. But a government's 'mandate' may also prevail because the opposition lacks the power to prevent it. What is relevant to any test of mandate theory is not just the proportion of the promises made by governments are kept, but how opposition parties respond to legislation embodying such promises when they are both pledged to oppose them and in a position to block them. The main reason why the British Conservatives were more successful than the Republicans in fulfilling their 'mandate' was that in Britain, Thatcher faced quite limited institutional constraints, whereas in the United States, 'if another party controlled one or both Houses of Congress, it too claimed and acted upon a separate mandate.'[45]

Leaders of Australia's major political parties are under no illusion that winning office gives a prime minister total control of the parliament. During the 1996 campaign, Howard acknowledged that the Coalition might win government but not win control

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[43] *Sunday Telegraph* (Sydney), 17 May 1998.

[44] Hugh Emy, 'The mandate and responsible government', *Australian Journal of Political Science*, vol. 32, 1997, p. 73.

[45] T.J. Royed, 'Testing the mandate model in Britain and the United States: evidence from the Reagan and Thatcher eras', *British Journal of Political Science*, vol. 26, 1996, pp. 45–80; Emy, op. cit., p. 69.

of the Senate. But, Howard assured voters, he had 'no doubt' of his ability 'to persuade those who hold the balance of power' that there was 'a public benefit in selling one-third of Telstra'.[46] Presumably he said this to protect the credibility of his promise from environmentalists who were doubtful that the sale of Telstra and hence the environmental fund would ever be delivered. Since he realised he would almost certainly not control the Senate and that those likely to control it were promising to prevent the Telstra sale, Howard was gambling that his powers of persuasion would work. What if they did not? Asked why voters should not believe that the Greens and the Australian Democrats would block the sale, the Coalition, as one newspaper put it, had 'no answers'.[47]

In the course of the campaign, only one of the serious dailies was prepared to concede the conundrum produced by a bicameral system. In an editorial published on the day of the election, the *Age* argued that if the Coalition were elected it could 'reasonably claim to have its Telstra blueprint endorsed by the electorate.' But if the Democrats were 'returned to the Senate', Kernot could 'also claim a mandate *against* the disposal of Telstra.' Even so, the *Age* warned the Democrats about 'overplaying their hand'—a warning which ignored the fact that without Labor, the Greens and at least one Independent, the Democrats would have no hand to 'overplay'.[48]

Conclusion

Conjuring a 'huge mandate' out of his 1996 victory, Howard sought to privilege seats over votes and the prerogatives of the House of Representatives over the very real powers of a popularly elected Senate. In terms of seats, the result in the House was a landslide, but like most governments before it, the Coalition did not win even half the votes cast. In the Senate, it fared worse in terms of seats and in terms of votes.

Howard, however, was hardly the first person to interpret the outcome of an election for two chambers as if it were an outcome for just one. Editorial writers and others who insisted that 'the mandate should be seen as the linchpin of democratic practice', and that parties need to 'obey the will of the people', or 'respect the democratic process',[49] not only ignored the complex relationship between voters' party choice and their policy positions, but were oblivious to the fact that the election was for two chambers—each of them endowed with more or less equal powers—not one. In principle, voters are just as capable of bestowing their 'mandate' on one chamber as on another and equally able to express their 'will' vis-a-vis the Senate as they are in respect of the House. Or they may bestow their mandate on neither chamber, leaving it to the parties themselves to 'enter into negotiations'[50]—a possibility the survey research did not explore.

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[46] *Daily Telegraph* (Sydney), 3 February 1996.

[47] *Australian*, 28 February 1996.

[48] *Age* (Melbourne), 2 March 1996; emphasis in the original.

[49] *Age* (Melbourne), 11 November 1997; *Sunday Telegraph* (Sydney), 17 May 1998; *Age*, 16 May 1998.

[50] Campbell Sharman, 'The Senate and good government', *Papers on Parliament*, no. 33, May 1999, p. 154.

Certainly, the Howard government could not claim a mandate for its Telstra legislation, if by mandate we mean clear evidence that it had won government on the strength of Telstra or that a partial privatisation of Telstra, with or without the proposed trade-offs, enjoyed wide electoral support. In terms of a specific mandate, the opposition parties in the Senate were on stronger ground than the government. They had campaigned against the Coalition's proposal and won a greater share of the vote; they could point to surveys that supported their position on the Telstra Bill; and there was evidence that backed their right to block it—evidence that suggested (*pace* Aitkin) that the electorate did not think that a government, once elected, should just 'get on with the job.'

It may be objected that survey evidence ought to be discounted either because many respondents may have given the issues little thought or because small changes in the wording of items can lead to substantial changes in results.[51] That the data are fragile cannot be gainsaid. But the conclusion drawn from this is hardly decisive. First, because no one has produced a set of questions and answers on Telstra that are as defensible as those generated by the polls but better able to shore-up the government's case. Second, because (short of embracing Mulgan's position) one would need to defend some alternative measure of popular opinion—one that no one, in this context, has proposed.[52] Third, and most strikingly, because in the afterglow of the election victory no member of the government directly sought to dismiss the polls the Democrats cited or that Harradine sought.[53]

Acceptance of the data supporting the Senate's right to block the part-sale of Telstra goes some way to settling the debate about whether parties with a relatively small share of the vote 'abuse' their power if they join with others to defeat government legislation.[54] It marginalises the question of whether those who voted for the opposition parties, especially for the Democrats, were or were not particularly concerned about the Telstra issue—a matter of keen dispute between the Democrats, on the one side, and the Liberals and political commentators like Malcolm Mackerras, on the other.[55] And it makes nonsense of the *Australian*'s forecast that if the Democrats joined forces with Labor and opposed 'the key bills of the Howard Government' they would be treated with 'little relevance as far as voters are

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[51] See, most recently, D. Walton, *Appeal to Popular Opinion*, University Park, Pennsylvania State University Press, 1999, chapter 1.

[52] But cf. Julianne Schultz, *Reviving the Fourth Estate*, Cambridge, Cambridge University Press, 1998, p. 152 for the views of Australian journalists, and Susan Herbst, *Reading Public Opinion*, Chicago, University of Chicago Press, 1998, for the views of American staffers, political activists and journalists.

[53] Compare J.R. Nethercote's assertion that 'it is unlikely that (polls) could be invoked authoritatively to settle a constitutional or even a political point'; 'Mandate: Australia's current debate in context', Research Paper, Department of the Parliamentary Library, Canberra, no. 19, 1988–89, p. 32.

[54] This view was espoused by, among others, the former Liberal minister and founder of the Democrats, Don Chipp, after the election; *Sydney Morning Herald*, 25 March 1996. Compare the view, expressed by only 39 per cent of respondents in a 1993 post-election study, that it 'is better when the Federal Government has a majority in both the House of Representatives and the Senate'; Roger Jones, et al., 'Australian Election Study, 1993: User's Guide for the Machine Readable Data File', Canberra, Social Science Data Archives, Australian National University, 1993, p. 7.

[55] See *Australian*, 27 March 1996, 20 May 1996, 16 December 1996; *Sydney Morning Herald*, 28 May 1996.

concerned'.[56] Voters usually find opposition attempts to block unpopular legislation more persuasive than governments appealing to their 'mandate'. More abstractly: voters' judgments about the substance of legislation are likely to trump countervailing notions of correct parliamentary form.

In the end, the government carried its legislation by winning over the two independents—each of whom bargained long and hard before deferring (without the slightest sense of irony) to what they were then happy to call the government's 'mandate'.[57] What was unusual about all this was not the fact that the government won; governments almost always get their legislation through in one form or another.[58] Nor was the hard bargaining or brinkmanship odd. What was unusual was the size of the stakes and the publicity that the conflict engendered.

Governments have long realised that winning a majority of seats in the House of Representatives is only the beginning of their task when they lack a majority in the Senate. To get their legislation through the Senate, governments have sometimes had to second-guess what opposition parties might do and trim their sails accordingly. They have frequently had to initiate amendments of their own or accept those forced on them by the Opposition. And they have had to horse-trade[59]—though to characterise the minimum winning coalitions that result from such bargaining as a victory for 'consensus' over 'majoritarian' politics[60] is surely to gild the lily.

Where all else has failed, governments have had to rely on public support. Nothing in its immediate response to Telstra contradicts the view, articulated by the Clerk of the

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[56] *Australian*, 6 May 1996.

[57] *Australian*, 13 May 1996, for Harradine; *Sydney Morning Herald*, 21 August 1996, for Colston. Apart from extracting what was reported by two different papers to be $53 million or $250 million for his constituents in Queensland, Colston was said to have persuaded the Prime Minister to approve a substantial pay rise for a member of his staff; *Age* (Melbourne), 13 February 1997, *Sydney Morning Herald*, 13 February 1997, *Age* (Melbourne), 15 February 1997. Harradine was credited, variously, with winning $58 million, $100 million, $150–$170 million and $180 million in cash and jobs for Tasmania, the *Sunday Examiner* in Launceston declaring: 'Harradine joins ranks of greats'; *Sydney Morning Herald*, 1 February 1997 and *Age* (Melbourne), 15 and 19 February 1997.

[58] In 1976, the Fraser government (which enjoyed a majority in the Senate) secured 94 per cent of its program, while in 1995 the Keating government (which lacked a Senate majority) got 96 per cent of its program through the parliament; C. Elliott, 'Less than optimal outcomes. Fraser and Keating without the numbers', *Legislative Studies*, vol. 11, no. 2, 1997, pp. 61–82. See also the discussion in Gwynneth Singleton, 'Independents in a multi-party system: the experience of the Australian Senate', *Papers on Parliament*, no. 28, November 1996, p. 161 and the critical evaluation of 'obstructionism' in Liz Young, 'Minor parties and the legislative process in the Australian Senate: a study of the 1993 Budget', *Australian Journal of Political Science*, vol. 34, no. 1, 1999, pp. 7–27.

[59] Harry Evans, 'Government and Parliament', in G. Singleton, ed., *The Second Keating Government: Australian Commonwealth Administration 1993–1996*, Canberra, Centre for Research in Public Sector Management, University of Canberra and the Institute of Public Administration Australia, 1997, pp. 32–33. The best discussion of the Democrats' performance is in Hiroya Sugita, 'Parliamentary Performance in the Senate', in J. Warhurst, op. cit., chapter 9.

[60] Campbell Sharman, 'Parliamentary federations and limited government: constitutional design and redesign in Australia and Canada', *Journal of Theoretical Politics*, vol. 2, no. 2, 1990, p. 225. As Geoffrey Brennan points out, it would require the active involvement of the opposition party to turn the system into a quasi-consensual one; 'The "unrepresentative swill" "feel their oats" ', *Policy*, vol. 14, no. 4, 1998–99, p. 9.

Senate, that the Senate is 'unlikely to resist legislation in respect of which a government can truly claim explicit electoral endorsement'.[61] On the contrary, it is at least arguable that the presence of Democrat senators has 'saved' both Coalition and Labor governments at various times from a 'massive voter backlash'.[62] Ultimately, minorities in the Senate may be more inhibited about flouting public opinion than are governments with large majorities on the floor of the House.

[61] Harry Evans, ed., *Odgers' Australian Senate Practice*, 7th edn, Canberra, Australian Government Publishing Service, 1995, p. 13; see also R.B. Scotton and C.R. McDonald, *The Making of Medibank*, Kensington, NSW, School of Health Services Management, University of New South Wales, 1993, p. 75.

[62] Sugita, 'Parliamentary Performance', op. cit., pp. 174–75.

7

Dilemmas of Representation

Marian Sawer

Different concepts of representation have shaped Australia's evolution as a parliamentary democracy. Currently there is renewed debate over both principles and practice of representation coinciding with a loss of faith by many citizens that their views are being represented in Australia's parliaments. Some citizens are attracted to forms of plebiscitary democracy, such as Citizen Initiated Referenda or CIR, that sideline the role of the representative and solve in this way the perceived gap between the policy preferences of policy elites and of the public. Others advocate quotas for women, reserved seats for indigenous Australians, increased representation of Australians from non-Anglo backgrounds or of those with disabilities, to make parliaments more representative.

In this chapter, I examine changing concepts of representation, the ambiguity of discursive claims of 'under-representation' and dilemmas concerning increased emphasis on the embodiment of diversity within representative institutions. I conclude by discussing how parliamentary institutions such as the Senate may become more responsive to diversity as well as reflective of it. I suggest that the Senate is well positioned to become a guardian, as well as an exemplar, of more inclusive forms of representative democracy.

Changing concepts of representation

The Senate, like other parts of the Australian political system, is formally based on principles of geographical representation. There is an assumption that state boundaries define communities of interest. Australia has little history of representation based on other than territorial principles, apart from brief experiments with university seats in New South Wales and with separate seats for railway employees and public servants in Victoria. We did not follow New Zealand, a pioneer of the separate representation of indigenous people.

Geography has, however, become less relevant to political identity, despite the role of federal political structures in sustaining differences based on it. It was largely supplanted early in the century by the strong party identification that became characteristic of Australian politics. These long-established party loyalties have

themselves weakened markedly over the last 20 years. There has been a decline in voter identification with the major parties, with less than one in five having strong partisan attachment.[1] In other words, we have arrived at a postmodern era where political identities are contingent and fragmented, where social movements have mobilised new identities alongside and cutting across the old party cleavages.

Our parliamentarians themselves articulate the ways in which these multiple identities inflect party allegiance and representational roles. One only has to look at the first speeches of senators Aden Ridgeway, Brian Greig and Tsebin Tchen this year to see how relevant embodiment has become to the way new senators perceive their roles. The Senate has become an important forum where multiple political identities are represented in addition to party and geography. It is striking that senators Ridgeway and Greig barely alluded to their party or their state constituencies in their speeches. Senator Ridgeway told the Senate: 'I come to this place as a Gumbayynggir Goori, but also as a reconciliationist.' Senator Greig said: 'I stand here today, on this first day of spring and in the dawn of a new Century, as a representative of the last generation of gay and lesbian people who will tolerate the injustices of the past being carried into the future.'[2]

When I interviewed members of the federal parliament in 1996, about half of those in my sample mentioned the importance of representing a constituency related to some aspect of their identity other than their political party or geographical constituency. Such constituencies related to age, gender, sexuality, ethnicity and so on and were nation-wide rather than restricted to one state.[3]

Perceptions by the major political parties of the significance of embodiment are nicely illustrated by the case of the NSW state seat of Bligh, which includes the gay heart of Sydney. Both Labor and Liberal parties have run gay candidates in Bligh in an attempt to wrest the seat from the prominent Independent who has held it for many years.

The relevance of embodiment to representation has been a matter of controversy. Political scientists have been inclined to dismiss what they call the mirror or microcosmic view of representation, arguing it has little relevance to how representation is performed. 'Standing for' is not the same as 'acting for', we are often reminded, and we cannot assume that those who embody group characteristics will necessarily act in the interests of that group. Margaret Thatcher is often used as an example of this—a woman who did not support measures to promote equal opportunity for other women.

On the other hand, some of these arguments concerning the irrelevance of embodiment can clearly be seen as self-interested. As the late Clare Burton pointed out, discrimination research shows that dominant and subordinate groups inhabit

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[1] Ian McAllister and Clive Bean, 'Long-term electoral trends and the 1996 election', in Clive Bean et al., eds, *The Politics of Retribution: the 1996 Federal Election*, Sydney, Allen & Unwin, 1997.

[2] First speech of Senator Aden Ridgeway, *Commonwealth Parliamentary Debates (CPD)*, 25 August 1999; first speech of Senator Brian Greig, *CPD*, 1 September 1999.

[3] See Marian Sawer, 'Mirrors, mouthpieces, mandates and men of judgement: concepts of representation in the Australian Federal Parliament', *Papers on Parliament*, no. 31, June 1998.

different cognitive universes. Dominant groups see equal opportunity and merit-based progression where subordinate groups see patterns of discrimination and bias.[4]

The dominant group in society (from which political scientists have usually been drawn) has always tended to suggest that their gender, race or class is irrelevant to how they perform their roles. Those who bear the markers of difference, on the other hand, have been perceived as lacking in objectivity or in other ways unsuited to acting as representatives of the community as a whole. Their identity as a member of a marginalised group results in their views being deemed inherently particularistic; indeed this expectation means, as Senator Kathy Sullivan discovered, that parliamentary colleagues can save time by not even listening.[5]

The idea that those who represent difference are unable to transcend their identity in order to pursue the common good clearly serves the interest of the status quo. It suggests that to undertake advocacy from the standpoint of a marginalised identity is a disqualification for public service, which can only be undertaken in a disinterested way by the dominants.[6]

Representatives who are not from the dominant group are also much more likely to have attention drawn to their embodiment by the media. One would be unlikely to see a newspaper headline about a male-dominated ministerial conference, such as the Premiers' Conference, drawing attention to their parental status. A newspaper story about the Commonwealth-State Ministers' Conference on the Status of Women, however, was headlined: 'The mums and grannies who speak for women.'[7]

Recent political philosophy has placed new emphasis on embodiment and its relationship to representation. These newer approaches are epitomised by Anne Phillips' work on the politics of presence.[8] These approaches go beyond the idea of the parliament as the 'mirror of the nation's mind'—an idea put forward by John Stuart Mill and subsequent supporters of PR—to suggest that reflection of different forms of embodiment and the life experiences associated with them, particularly experiences of subordination, exclusion and denial, are also important.

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[4] Clare Burton, *Gender Equity in Australian University Staffing*, Canberra, AGPS, 1997, pp. 3–5.

[5] 'The dawning realisation came to me slowly and painfully: many of my male colleagues had not actually heard what I had said in the previous 12 years, whether in Parliament, in the joint party room or in committee meetings. Nonetheless, they all thought they knew what I had said …', Kathy Martin Sullivan MP, 'Women in Parliament—Yes! But what's it really like?' *Papers on Parliament*, no. 22, February 1994, pp. 22–23.

[6] See Linda Trimble, ' "Good Enough Citizens": Canadian women and representation in constitutional deliberations', *International Journal of Canadian Studies*, 17, Spring 1998, p. 149. For a recent Australian example of this kind of thinking see the claim in a recent letter to the *Canberra Times* that an Aboriginal candidate (Mick Dodson) would be unsuitable as the president of Australia because he would only be representing 'a very small sectional interest' making up less than 3 per cent of Australia's population (letter to the Editor, 17 July 1999).

[7] Michelle Gunn and Megan Saunders, 'The mums and grannies who speak for women', *Australian*, 27 March 1998, p. 5.

[8] Anne Phillips, *Politics of Presence*, Oxford, Eng., Clarendon Press, 1995. See also Melissa Williams, *Voice, Trust and Memory: Marginal Groups and the Failings of Liberal Representation*, Princeton, NJ, Princeton University Press, 1998.

This is in part an issue of authenticity of representation—that it is difficult for members of the dominant group to represent perspectives arising from quite different life experiences. Who is entitled to speak, for example for people with disabilities? People with disabilities have been denied a democratic voice of their own and have had infantilising stereotypes imposed on them. They argue that while parents, families, carers and service deliverers may articulate a strong disability rights perspective, they cannot themselves 'represent' the interests of disabled people.[9] Reflecting this concern, the National Disability Advisory Council, established in 1996 to advise the federal government, has a requirement that 50 per cent of members be people with disabilities. Similarly the Australian Federation of AIDS Organisations (AFAO) now has a provision requiring 50 per cent of delegates from state AIDS Councils to be HIV positive.

Apart from authenticity there is also an issue of expectations—we expect that those who share our characteristics will be more likely to understand and be responsive to us. Women politicians are more likely to be approached by women's organisations, non-Anglo politicians by ethnic community organisations and so on. There is an expectation that politicians who are different will feel obliged to represent difference, even if this is not always the case. The degree of exposure to such advocacy is in itself likely to increase awareness and sensitivity to group issues.[10]

Those who argue for the importance of the physical representation of difference are not suggesting that parliaments can mirror all characteristics to be found in the population. Usually they are arguing that characteristics that have been assigned significant social meaning and resulted in significantly different life chances should be present in the legislature if its representative function is to be adequately performed. This is important not only in terms of sensitivity to the distributional effects of decision-making, but also in terms of the politics of recognition, or the acknowledgment of politically salient identities present in the community.

Parliaments will never completely reflect the make-up of society and nor is that proposed. All mirrors distort and the point is not to remove all distortions, only those that produce undesirable effects in terms of representation and responsiveness.[11] The virtues of proportional representation (PR) as used for the Australian Senate are the scope it gives, both inside and outside the major parties, for the representation of other than territorial constituencies and the reflection of both diversity of opinion and social diversity.

Meanings of 'under-representation'

I will now consider briefly the discursive strategies of those who claim to be 'under-represented' in our current political system and the meanings that are bound up in the concept of 'under-representation'. The concept of 'under-representation' is inherently ambiguous, suggesting that the presence of members of a group will also serve the

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[9] C. Newell, 'The disability rights movement in Australia: a note from the trenches', *Disability and Society*, vol. 11, no. 3, pp. 429–432.

[10] See Manon Tremblay, 'Do female MPs substantively represent women? A study of legislative behaviour in Canada's 35th Parliament', *Canadian Journal of Political Science*, vol. 31, no. 3, 1998.

[11] I am indebted to Barry Hindess for this point.

goal of representation of the interests of the group as a collectivity. Political language is often characterised by this kind of ambiguity; it is useful in sending different messages to different audiences and maximising the appeal of the slogan concerned.

I will illustrate how the slogan of 'under-representation' operates in this way by reference to women—the same remarks, however, apply to other groups making claims to greater presence in parliaments.

Women have, in the 1990s in particular, successfully politicised their absence from parliaments. It is perhaps paradoxical that this has occurred at the same time as widespread questioning within academic feminism of the usefulness of the category 'woman'. Despite this questioning of collective identity, and despite the historic ambivalence of the women's movement concerning parliamentary politics, the issue of the representation of women has now been taken up at every level of the political system, whether sub-national, national, regional or international. At the international level, action plans are drawn up by bodies such as the Inter-Parliamentary Union (IPU) as well as by the United Nations (UN) Commission on the Status of Women.[12]

If these plans were couched simply in terms of a justice argument concerning the equal right of women to participate in public decision-making, that would be relatively straight forward and unambiguous. The right of women to participate in public life on an equal basis with men is set out in a number of United Nations instruments, notably Article 25 of the International Covenant on Civil and Political Rights (ICCPR) and Article 7 of the Convention on Elimination of All Forms of Discrimination against Women (CEDAW).

The justice argument does not rely on women making a difference to public life. It simply assumes, like all equal opportunity arguments, that talent is not confined to one gender and that the absence of women from parliamentary positions is a consequence of direct or indirect discrimination. Such indirect discrimination may include factors such as the electoral system. As Arend Lijphart observes in this volume, there is much evidence showing the advantages of PR in achieving the representation of women and minorities as well as a more consensual style of politics. Discrimination may also be built into the structures of political work and political careers, through failure to accommodate family responsibilities or the privileging of specific gladiatorial styles of politics.

As I have said, the justice argument for women having equal opportunity to participate in public life is relatively straightforward. Like most justice arguments it will, however, need to be supplemented by utility arguments to convert power holders to the cause. Such utility arguments may be in terms of doubling the pool of talent from which legislators are recruited or increasing the electoral appeal of parties. Such utility arguments easily move into the terrain of 'making a difference'; that is, providing a new look for parties in the context of voter disenchantment.

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[12] See Fourth UN World Conference on Women, 'Platform for Action', New York, UN Division for the Advancement of Women, 1995, Section G; The Interparliamentary Union, 'Plan of Action to Correct Present Imbalances in the Participation of Men and Women in Political Life', Geneva, IPU, 1994.

Utility arguments also merge into the supposed 'civilising effect' of increasing the numbers of women in legislatures—that is, the relevance of embodiment to the way representation is conducted. So although the justice argument does not entail that the greater representation of women (or of any other group) should make a difference or provide partisan advantage, the suggestion is that it will enhance the appeal of the slogan.

Justice arguments are not only garnished with utility arguments, they also slide quickly into arguments about the relevance of embodiment to what interests, values, experiences and perspectives are represented. For example, the Beijing Platform for Action states that: 'Women's equal participation in decision-making is not only a demand for simple justice or democracy but can also be seen as a necessary condition for women's interests to be taken into account' (para. 181). This is not a claim that the presence of women is sufficient for women's interests to be taken into account, but it is an argument that the absence of women means that their interests will be ignored or overlooked. This is a relatively difficult argument, although it can be approached through a series of steps relating to the gender roles allocated to women, the specific life experiences arising from these roles, the perspectives and values associated with these roles and finally interests deriving from the social and economic consequences of gender roles.

The suggestion that the presence of women (or of other groups) will enhance deliberative democracy by introducing perspectives derived from distinctive experiences and increasing sensitivity to the distributional impact of decisions (in this case their impact perhaps on those with day-to-day caring responsibilities) is less contentious than the direct link drawn between embodiment and representation of interests.

However, at this stage another element of 'under-representation' comes into play, the symbolic effects of presence or absence. In other words, the question of the representativeness of the legislature and the effects of this both on the group concerned and on the political system as a whole. Special arrangements for the representation of indigenous peoples are often seen as an important symbolic recognition of their indigenous status. The presence of women in parliament may also have an important effect on the status of women outside parliament. Whereas the suffragists argued that winning the vote would be sufficient for this purpose, elevating the status of women and increasing respect for them, today the argument has shifted to the need for actual presence in parliament. Such symbolic effects are frequently referred to in terms of the politics of recognition.

Another symbolic effect is the motivational or role model effect—the idea that presence in public life and the visibility that accompanies it will raise the aspirations of other members of the group—the 'girls can do anything' effect. For example, one recent writer in the Adelaide *Advertiser* has described how Senator Natasha Stott Despoja's youthfulness and willingness to engage with media relevant to young people made her 'a role model for me, as she is for many young Australians'.[13] Stott Despoja speaks of how Senator Janine Haines had the same effect on her when she

[13] *Advertiser* (Adelaide), 15 June 1999, p. 18.

was a student and Senator Haines gave a visiting lecture on issues she could connect with, such as the treatment of sole parents.

A very different kind of symbolic effect, but yet another that can be wrapped up in the slogan of under-representation, relates to institutional legitimacy. The idea is that the legitimacy of parliament will be undermined if significant sections of the community appear to be locked out of it.

Such a threat to legitimacy assumes the mobilisation of group identity, like that around the issue of women's 'under-representation'. On the other hand, such mobilisation currently falls short of, for example, denying the legitimacy of laws made by legislatures in which women are largely absent. There is no large-scale campaign of civil disobedience or refusal to pay taxes associated with groups currently said to be under-represented in parliament.

Table 7.1 Meanings of political representation

Representation of	-	interests
	-	ideas/values
	-	perspectives
	-	collectively mediated experiences
	-	corporeal experiences
Representativeness	-	effects on status of group
(symbolic arguments)	-	effects on aspirations
	-	legitimacy of institution
Equal right to represent	-	to participate in public decision-making
(justice arguments)	-	not to be discriminated against by structures of public life
(utility arguments)	-	increase pool of talent
	-	partisan advantage

While the rich ambiguity of the slogan of 'under-representation' has definite discursive advantages, the element that ties representation of group interests to physical presence of members of the group poses problems. As Anne Phillips has observed, there is the danger that if too much emphasis is placed on the relationship between embodiment and interest representation, this will reduce the pressure on all politicians to be responsive to, and to represent, diversity. It may also restrict the role of those with group characteristics to representing their group or bring undesirable pressure on them always to act as a group representative—the token woman or Black, for example.

It was argued, for example by the Royal Commission on Electoral Reform in New Zealand, that while the Maori seats in New Zealand provided a Maori voice in parliament, they had the effect that only the Maori parliamentarians were seen as responsible for representing Maori interests: 'The system of separate representation encouraged the non-Maori majority to regard Maori concerns as the sole preserve of

separately elected MPs.'[14] The same Royal Commission argued that the most effective way of making all parliamentarians responsive to Maori interests was through a form of PR. Responsiveness is enhanced because seats are dependent on maximising votes from all sections of the community.

The stress on the relationship between embodiment and interest representation may have other perverse effects. For example, the image of the Australian Democrats as middle-class teachers or members of the 'chattering classes' has posed a barrier to their being seen as representatives of blue-collar workers or of 'battlers'. Embodiment gets in the way of the Australian Democrats being seen as the representatives of ordinary workers or ordinary mums and dads, regardless of policies. This is a matter of considerable chagrin for Democrat senators, who feel their economic policies are less directed to the 'big end of town' and more concerned with ordinary workers than those of the major parties.

The most effective representatives may indeed be those from outside the group concerned because of the perception discussed earlier that those who bear the marker of difference are inherently self-interested, while the dominants are more disinterested in their advocacy. This has been argued by Dennis Altman in relation to the representation of gay interests.[15] The political risks of visibility are another consideration for non-heterosexual parliamentarians or for parliamentarians disclosing other intimate details of their lives, such as experience as a single mother. However, while effective advocacy may come from outside the group concerned, if we take this argument too far, we may end up privileging the voice of experts over those with lived experience.

From representation to responsiveness

When we identify 'under-representation' as a problem, one of the most important things we are trying to do is to make parliament more responsive to groups in the community that have been ignored or overlooked in the past. While physical presence of members of these groups in parliament may be part of the answer, it is not the whole answer. Structural changes may be at least as important in ensuring that parliamentarians speak to new constituencies, even if they cannot speak for them. Examples of such changes include the standing committees found in European parliaments that help raise awareness of gender issues—for example, committees on women's rights in the Irish, Spanish and European parliaments and on equal opportunities for men and women in the Belgian and Luxembourg parliaments. These committees have varying mandates, including in the case of the Belgian Senate looking inwards at the working of the parliament and issues such as family-friendly sitting hours and the gender balance of expert witnesses.[16]

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[14] *Towards a Better Democracy: Report of the Royal Commission on the Electoral System*, Wellington, Electoral Commission, 1986, pp. 90–93.

[15] Dennis Altman, 'Representation, public policy and AIDS', Paper to Academy of Social Sciences/ Reshaping Australian Institutions Workshop on Representation, Canberra, Australian National University, December 1998.

[16] See the *Repertory of Parliamentary Committees Responsible for Equal Opportunities for Women and Men in the EU Member States and the European Parliament*, published by the Advisory Committee on Equal Opportunities for Women and Men of the Belgian Senate, 1997.

Parliaments more responsive must also include broadening community access to the parliamentary process. Sections of the community lacking in direct parliamentary representation, or groups only just evolving a group identity, may thus achieve presence and voice in the deliberative process. As Elaine Thompson and Ian Marsh also discuss in this volume, the Australian Senate has played an important role in broadening the participation in the deliberative process of those whose lives will be affected in specific ways by legislative proposals. It is crucial to ensure that those who will be disproportionately affected by legislation have an opportunity to voice their concerns rather than simply being at the mercy of majoritarian decision-making.

Senate committees have the potential to take the lead in what the OECD calls 'strengthening government-citizen connections'. This does not mean the way governments relate to citizens as clients or consumers of services, as in the now fashionable citizen charters, but rather how governments interact with citizens in the development and design of policy.[17]

Parliamentary committees hold hearings around the country, enabling less mobile sections of the community, including women with family responsibilities, to participate without the costs of travel. When a Senate committee inquired in 1995 into outworking in the garment industry, where most employees are women from non-English speaking backgrounds, advertisements were broadcast on ethnic radio stations and submissions were taken through the telephone interpreter service. This is not to say that the committee system always works as it should. Recently, such as during the inquiries into the new tax system, we have had a number of reported instances of senators speaking at, rather than speaking to, community representatives—that is, engaging in partisan point-scoring rather than community dialogue.

Parliaments will never mirror all elements of the community, particularly given the complexity of modern society, so building the capacity of citizens to represent themselves to parliament is an important element of the practice of representative democracy. The public funding of advocacy organisations, as developed in Australia over the last 20 years, is intended to strengthen weak voices, the voices of those who would otherwise lack the resources to make themselves heard.[18] We need to take these forms of extra-parliamentary representation, particularly community-based peak bodies, much more seriously as institutions of representative democracy.

This means paying much more attention to issues of representation and accountability within such bodies as well as to the process of community dialogue over policy development. It means more attention to the methodology of consultation and to the accountability of government for the relationship between policy consultation and policy decisions. It also means government acknowledging its responsibility for

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[17] See the Summary Record of the OECD Working Group Meeting on 'Strengthening Government-Citizen Connections', Paris, 17–18 June 1999.

[18] Another thing that can serve to enhance responsiveness of government to 'have nots', and that has long been part of the Australian political system, is compulsory voting. Where voting is voluntary there is unequal turnout that is 'systematically biased against less well-to-do citizens'. See Arend Lijphart, 'Unequal participation: democracy's unresolved dilemmas', Presidential Address, American Political Science Association, 1996, in *American Political Science Review*, vol. 91, no. 1, pp. 1–14.

ensuring that policy consultation does indeed contribute to representative democracy by expanding the range and inclusiveness of deliberative forums.

Gianni Zappalà, a former Parliamentary Fellow, has written about how multicultural organisations have served as a bridge to ensure the responsiveness of political representatives (regardless of ethnicity) to the needs of their ethnic constituents.[19] They also serve to enhance access by ethnic Australians to broader deliberative structures through the representational role they play in policy consultation and committee hearings.

If the funding of community-based peak bodies is to achieve its purpose, of ensuring effective representation of community interests to government and to parliament, governments need to exercise restraint and to tolerate criticism. They also need to tolerate an inconvenient plurality of representative bodies, reflecting diverse perspectives within each community sector. Unfortunately community-based representative bodies have been under increased pressure to conform to government convenience and government agendas rather than to represent their constituents. If governments try to control what is said by such organisations they end up hearing only what they want to hear, not what they need to hear if all elements of the community and of community concerns are to be represented.

There is at present little accountability for how consultation processes are used and how they feed into final decision-making. We do not have a requirement that Cabinet submissions specify views presented during community consultation processes and how they relate to final recommendations. Nor do we require feedback to community groups concerning the use made of their contributions. The failure to set up adequate processes for community dialogue over policy development has led scholars such as John Uhr to suggest that there should be parliamentary oversight to ensure consultation remains meaningful as an institution of representative democracy.[20]

The Senate should play a leading role both in modelling inclusive forms of deliberation over policy development and in overseeing their adequacy across government. The Senate has been evolving in important ways as an institution of representation and is well positioned for further changes. These must reflect the changing nature of an electorate no longer defined simply by geographic location or party loyalty, but by multiple identities and claims for recognition.

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[19] Gianni Zappalà, *Four Weddings, a Funeral and a Family Reunion: Ethnicity and Representation in Australian Federal Politics*, Canberra, AGPS, 1997.

[20] John Uhr, *Deliberative Democracy in Australia: the Changing Place of Parliament*, Melbourne, Cambridge University Press, 1998.

8

‘Survival of the Fittest’: Future Directions of the Senate

Helen Coonan

The future direction of the Australian Senate and Senate reform continues to excite enormous public interest if measured by column inches in editorials and opinion pieces in the press. As Robert Manne wrote recently:

> No political question matters more in contemporary Australia than the composition of the Senate. No constitutional question is more fraught with complexity than the relations between Government in Australia and the Upper House.[1]

If the questions are complex, two underlying facts are starkly simple:

- With proportional representation as the chosen voting method to elect senators, together with the 1984 increase in the number of senators from 10 to 12 per state, neither of the major parties in the Senate will have a workable majority in the foreseeable future, if ever again; and

- With the major party in opposition largely dealing itself out of the game by wholesale opposition to a government’s agenda, the casting vote on important national legislation will remain with the minor parties.

What do these facts mean?

At the very least, these facts mean delay and, at times, an inhibition on the part of government to respond in necessary and effective ways to matters requiring both international and national attention. At worst, they mean policy gridlock with no effective constitutional means of resolving entrenched conflict, short of dissolving both houses of parliament and sending the country to a general election.

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[1] Robert Manne, *Age* (Melbourne), 5 July 1999.

Of course, prudential politics usually prevail, so that depending on who in the minor parties is prepared to deal with the government, compromises are made that allow some version of the contentious legislation to pass.

But what are the consequences of this deal-making?

Eleventh hour deals over Wik, Telstra and the goods-and-services tax raise fundamental questions for governance of the country quite apart from political expediency. Certainly it can be argued that such compromises represent a harmonisation of diverse views and show representative democracy at work. Others would say that better legislation results from consensus building even if, on occasions, it may reflect some highly idiosyncratic personal agendas.

But were these the best possible outcomes in terms of the national interest or do these 'compromise agreements' represent special interest pay-offs and deliver third-best outcomes? And importantly, what message does this send to an already disillusioned and disenchanted electorate? Does the electorate accept that politics is the art of the possible and that the Senate has a pivotal role in finding a political solution, or is the will of the electorate frustrated by a government's inability to deliver substantial policy outcomes that have been promised?

Underpinning policy gridlock in the Senate is another serious policy issue—the inadequate constitutional mechanism for resolving deadlocks. But a Senate deadlock has far more profound political implications. Unless a government is prepared to accept substantial modification to its policy positions, the only constitutional option for resolving deadlocks requires a double dissolution and a fresh election.

One particularly adverse consequence is that a government may be tempted to give up on the promises it took to an election rather than put the nation through another election. Worse still, experience in the Senate indicates that necessary reforms may be rejected if unpopular, regardless of their merits. Hard decisions made in the national interest are liable to be sacrificed to populism and political opportunism, whatever political spin may be put on it.

Clearly, a modern parliamentary democracy needs more than one possible means by which deadlocks can be resolved. I will return to this later.

Another institutional problem with the Senate and more broadly with the Australian political system is that it was designed to meet the requirements of a different age. The fledgling Federation, in which communication across a vast land with scattered populations took weeks, required both gradualism and compromise to take account of distance and regional differences. These obstacles no longer determine how and when Australia does business, the speed of communication or how effectively individual states and territories can be represented.

Speaking at the Australia Unlimited Conference, the *Australian*'s international editor Paul Kelly pointedly observed, 'Compared to the speed of decision-making in the market-place, parliamentary democracy is hopelessly old-fashioned.'[2]

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[2] Paul Kelly, 'The New Social Glue', Australia Unlimited Conference, 4 May 1999.

Globalisation, including the ability to move capital and to choose the most favourable tax environment at the click of a mouse, have weakened the power of national governments. The future lies in international and regional co-operation on matters as diverse as trade to the protection of intellectual property rights on the Internet. Our future prosperity is dependent on our competitive advantage in the global environment that will make it an attractive place to invest, and provide jobs and security for our citizens.

What has this got to do with future directions of the Senate?

The Senate processes—and in particular the need to stitch up a negotiated coalition for every contested bill—are simply not designed to meet the requirements of the information age. For example, legislation concerning digital communication can be close to obsolete before it is passed, with technological advances outstripping the legislative time frame.

Although not given much media attention, the business community was understandably up in arms about the long delays to the Howard government's financial reform timetable. Key measures such as relaxing off-shore banking unit regulations, a tightening of thin capitalisation rules, and changes to withholding tax arrangements were stuck in the Senate for just over two years, with passage on the last day of the winter sittings under the guillotine. The introduction of rules on superannuation choice have still not been passed.

As it happened, many of these measures when finally debated were relatively uncontroversial.

The problem is that legislative traffic in the Senate is so slow, the static and posturing so loud, and the delaying tactics so time consuming that sensible, necessary reforms get pushed into the background. In my view, Australia cannot afford such a leisurely and haphazard approach to decision-making. To quote Kelly again, 'We need to ensure that parliamentary democracy survives globalisation. It may be a close-run thing.'[3]

So, what are the obstacles to a more forward looking and responsive Senate?

Leaving aside for a moment the constitutional constraints on reforming the Senate, the last few months of debate have crystallised what I think is the most cogent argument advanced against Senate reform. That is, that if the government controlled the Senate, it would be reduced to little more than a rubber stamp for the executive.

Implicit in this argument are the assumptions that the Senate provides the only effective check on the executive and restraint is only possible because the executive does not control it. Further, that if the Senate's powers were modified, or if it were controlled by the executive, it would be pointless to retain it.

While plausible, in my view these assumptions are unsustainable.

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[3] Kelly, op. cit.

Australia is the only country in which the upper house has such constitutional power, yet representative democracy survives and thrives in many other countries. Every other broadly comparable parliamentary democracy has managed to put into place transparent and accountable processes, without a controlling upper-house gatekeeper. For example, there are few indications that the House of Lords stands as the only bulwark between the Labor government and tyranny of the British people. The democratic right to throw out a government via the power of the ballot box is not the only check on the British government.

In fact, only 15 Commonwealth members have upper houses at all and many of these, including Britain, are searching to ensure sufficient popular legitimacy to avoid redundancy.

This raises the question of whether an institutional design that challenges the conventional rule—that in a bicameral parliament one chamber has primacy and the government cannot be responsible to two[4]—is absolutely necessary. The experience of other parliamentary democracies without a constitutional gatekeeper suggests that ultimately little useful purpose is served by a system requiring a double majority for the passage of all legislation when conflict is its mode of operation and policy gridlock is almost an inevitable consequence.

Unlike many upper houses, the Australian Senate has a powerful popular legitimacy derived from its voter base and demonstrated by the 25 per cent support for non-major parties at the last election. The fact that some 9 per cent of that vote remains largely unrepresented in the Senate is another issue.

The relevant question is how a popularly elected upper house fulfils its constitutional function without making it impossible or at least highly problematic for a government elected in the lower house to govern in the national interest.

Even a passing familiarity with what the Senate actually does is sufficient to conclude that not only does the Senate do invaluable work, but it has an indispensable role in our parliamentary system quite independent from second-guessing the government of the day. Although by no means an exhaustive list, the following functions justify the role of the modern Senate:

- As a scrutineer and reviewer of bills, the Senate has an invaluable role. Bills get knocked into shape in the Senate and many amendments are not only justified, but clearly necessary. Many amendments are, in fact, government amendments. Some bills manage to pass through the House of Representatives with seemingly scant attention to detail. The Senate does the hard work of refining and of improving the quality of legislation.

- The Senate has a unique role as the overseer of delegated legislation. The Senate Standing Committee on Regulations and Ordinances (which is the oldest Senate standing committee, dating back to 1932), operates essentially on a bipartisan basis and provides critical oversight of the Executive's regulation-making powers.

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[4] Alan J. Ward, 'Australian and Parliamentary Orthodoxy: a Foreign Perspective on Australian Constitutional Reform', Senate Occasional Lecture Series, Canberra, 18 June 1999.

Disallowance of regulations made by the Executive government is not uncommon. There has been an enormous proliferation of regulation making by the Executive and the Senate provides the only scrutiny of such actions. Since 16 July 1997, this committee has scrutinised 3559 disallowable instruments of delegated legislation and detected 502 apparent defects and matters worthy of mention under its principles.[5]

- The Senate committee system is capable of, and often does, very good work. Senators from all parties make significant contributions. It allows community groups, interest groups, industry, business and individuals to have access to their elected representatives both on bills and broader issues. However, a significant drawback of the committee system is that the process is usually hijacked for partisan purposes and inquiries tend to reflect party positions. This subverts the objectivity of the inquiry. Committees are also often used to delay and obfuscate rather than genuinely to inquire into the bills or subject matter.

  In this volume, Ian Marsh makes constructive suggestions as to how the Senate committee system might be used more productively at an earlier stage of policy development similar to the early Senate inquiries in the decade after Federation. There is much to be said for this. However, the raw politics of disciplined parties in the Senate suggests that his model may run into difficulties.

- The Senate is undoubtedly the guardian of human rights and individual liberties and has carved out a specialised role, not mirrored in the House of Representatives, to examine bills for infringement of rights.

- In theory at least, the Senate provides a broader and more diverse representative base than does the House of Representatives.

The upshot of this list is that the Senate does have a valuable role in representative parliamentary democracy—one that should be both valued and enhanced.

How can this valuable role be achieved?

I have previously advocated the need for a vigorous public debate on the question of Senate reform and have suggested a range of options for discussion.[6] In this paper, I want to concentrate on just two: one involves a new direction for multi-party decision making, and the other requires constitutional change.

It has been said that the problem with the Senate is not so much its design, but rather the uncompromising exploitation of its processes by disciplined political parties. After all, balance-of-power politics is only possible if the major parties are implacably

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[5] The Regulations and Ordinances Committee, *Annual Report* 1996–1997, 105th Report, June 1998. The Regulations and Ordinances Committee, *Annual Report* 1997–1998, 106th Report, March 1999. Statement of Work of the Committee During The Spring Sittings 1998, *Commonwealth Parliamentary Debates* 9 December 1998, p. 1588. Statement of Work of the Committee during the Autumn and Winter Sittings, 30 June 1999, p. 6942.

[6] Senator Helen Coonan, 'The Senate: safeguard or handbrake on democracy', Address to the Sydney Institute, 3 February 1999.

opposed. But such politics in the Senate need not always be characterised by conflict. As Marsh suggests, there may be some mutation in party politics to allow opportunities for consensus building on policy before legislation is developed. Earlier consensus building may see the major political parties negotiate and declare coalitions of interest with balance-of-power parties *before elections* rather than negotiating a coalition of support for contested legislation on a piecemeal basis after elections. This would both better inform the electorate and have the potential to avoid the kind of entrenched conflict that has characterised a great deal of the Senate's operation in recent years.

The other change that is logical, if difficult to achieve, is an additional constitutional means for solving genuine deadlocks. The 1959 Report of the Joint Committee on Constitutional Review[7] included in its recommendations dealing with disagreements between the Senate and the House of Representatives, the option to convene a joint sitting to resolve a deadlock. This would be an alternative to the present requirement for a double dissolution and general election before holding a joint sitting.

Obviously one size does not fit all situations. It was thought that the joint sitting option without a double dissolution would be appropriate where a deadlock arose early in the term of a new government. The double dissolution route might still be required if a joint sitting did not resolve the disagreement. Forty years later, there is a compelling case to revisit these recommendations. A joint sitting is simply a special mode of passing legislation. Interposing a double dissolution and a general election does not alter the ultimate constitutional intent that in the event of deadlock, the wishes of the majority of representatives of the people voting as a whole will prevail. It is the clearest possible indication that despite the Senate's unique co-equal powers in a bicameral parliament, those powers may be subordinated to the national interest.

Whether or not the Senate (or the parties represented in the Senate) adopt any of these reforms remains to be seen. My point is that a model that institutionalises conflict as its mode of operation is hardly representative of the new directions for dispute resolution that have otherwise shaped the evolution of our courts, tribunals, workplaces and neighbourhoods in recent years. Why should parliament be the exception?

To adopt the words of the distinguished former Senator Fred Chaney, we senators need to observe what he describes as a 'degree of enforced reasonableness',[8] or good governance in the future will be impaired. This will require a very different style of politician and party politics. Self-preservation should be a strong enough motive for change, as 50 years from now, only institutions that can adapt will have survived.

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[7] Joint Committee on Constitutional Review, *Report*, AGPS, 1959.

[8] Fred Chaney, 'Bicameralism Australian style: governing without control of the upper house', *The Parliamentarian*, vol. 69, 3 July 1988, p. 170.

9

A Squeeze on the Balance of Power: Using Senate 'Reform' to Dilute Democracy

Andrew Bartlett

The Democrats' achievement in regaining the balance of power in the Senate in the 1998 election prompted a new round of government spin about the need to reform the Senate voting system so that the ruling party could control it. But despite government claims, the Senate is not 'hostile' and it cannot realistically be claimed to have been hostile at any time since the Whitlam era. Statistics on the passage of legislation clearly support this. It is the House of Representatives' voting system, not the Senate, that is in urgent need of reform, and the overriding objective of any electoral reform should be swinging the pendulum back towards vesting power in the parliament. The House of Representatives currently operates simply as an arm of the Executive. It is left to the Senate to perform the function of the parliament as set out in the Constitution.

The proposal recently put forward with gusto by Government Deputy Whip, Senator Helen Coonan is the latest in a long and inglorious line of attempts by the major parties to suggest that they should be granted total power. Nearly one quarter of the population supports smaller parties and independents. Coonan proposes a Senate voting system in which the votes of those people would have less worth than the votes of those who supported the big parties.

The constant refrain about the supposedly unrepresentative and obstructive Senate conveniently ignores a few facts that go to the heart of our democracy:

- Any party can gain a majority of seats in the Senate under the current system if they get a majority of votes from the public. Despite having the support of only about 40 per cent of the public, the Coalition appears to think it should have total control of the parliament.

- Many people regularly vote differently in the Senate than the lower house specifically to ensure the government does not have a tame parliament that will lamely acquiesce to the prime minister's every wish.

- The Senate has never operated as a so-called states' house and has never operated in a way that enabled the government of the day to pass its legislation *unless it had a majority of seats in the Senate* as well as the lower house.

- The Senate is clearly more representative in its composition than the lower house, and therefore more accurately reflects the diverse will of the people.

- The Senate in recent years—indeed since the Democrats initially gained the balance of power after the 1980 election—has operated in a far less hostile manner than any Senate in the past that has been controlled by the opposition party (best demonstrated by the Coalition's behaviour during the Whitlam years). Attempts to paint the Senate as obstructionist ignore the fact that more than 99 per cent of the legislation put to the Senate is passed. In the last parliament, 427 pieces of legislation were passed and only two were ultimately rejected.

- The Democrats alone are unable to pass or knock back legislation. Every decision of the Senate requires a majority to pass, which requires the support of at least one of the major parties.

The fundamental question has to be asked: do Australians want a parliament that performs its functions or not? If electing a government is supposed to mean giving an automatic right for all its legislation to be passed without question or amendment, then we may as well save the public's money and abolish the parliament. We could then all just vote for the prime minister directly and leave him or her to do what he or she feels like for three years. On the other hand, if we actually want to remain a democracy, then the parliament should be expected to perform its traditional democratic role, a significant part of which includes legislating. It is not just for effect that people in the United States call their politicians 'legislators'. That is a major part of what members of parliament are supposed to do—examine proposed laws and, where appropriate, pass them in a form that they believe will make good and fair law.

Most major party proposals to 'reform' the Senate would simply return parliament to the two-party playground that is being rejected by more and more Australians. Smaller parties and independents are now a permanent fixture on the political landscape, with support from nearly one quarter of the population. Aggressive moves by the Executive to remove them would be tantamount to a return from colour to black-and-white television.

We do need electoral reform

Many Australians believe our electoral system needs to change. I am one of them. There *are* problems with our democracy, and the eve of the centenary of Federation is an appropriate time to address them. We can work to make it better, but we should not throw the baby out with the bath water. As a general principle, we can be guided by the words of a former governor of New York—Alfred E. Smith—who said: 'All the evils of democracy can be cured by more democracy.'

The recent New South Wales state election offered an opportunity for the public to express their concern at upper houses acting in an excessive and inappropriate way and impeding effective government. This election included widespread publicity about a plethora of 'micro-parties', with unknown candidates and unknown policies, generating the infamous 'tablecloth' ballot paper for the Legislative Council. It was well known that at least some of these micro-party candidates quite deliberately set about arranging a series of cascading preferences to enable their election with a minuscule vote. It was a clear case of people seeking to use the electoral system to be elected despite having no public confidence—hardly something likely to generate public support in the role of the upper house as a serious house of review, or to build public support for non-major party candidates.

Despite this, there was an unprecedented level of support for non-major party candidates in the upper house. Around 35 per cent of voters chose a candidate from outside the Australian Labor Party or the Coalition. Indeed the 'minor/micro party' vote exceeded that for the Coalition. About half of this was for 'micro-parties'—that is, parties other than the established minor parties (Democrats, One Nation, Greens, Fred Nile and the Shooters Party).

The ALP was widely expected to win well in the election, so when people were casting their votes for the upper house, they did so knowing what government they were likely to have. Surely if the public ever had a chance to say 'we want the upper house to get out of the way and allow the government to govern', it was in this election.

What is government?

We have to establish our definitions at the outset before we can have a constructive community debate. We have to be clear as to what we mean by phrases such as 'stable government', 'responsible government' or 'representative government'. This question of what we mean by 'government' is at the very heart of the current debate on electoral reform.

When Coalition MPs talk about government, they mean the prime minister and his ministers and themselves having all power, and making all decisions, irrespective of the parliament. However, the federating fathers talked of government as something completely different. An outline of the Constitution published by the Parliamentary Education Office describes it this way:

> How may the Constitution be summed up? Its most important feature is that it establishes a government consisting of three branches—the legislative, the executive and the judicial branch, and it provides that the legislative, executive and judicial powers are to be exercised by these three branches.

By virtue of this definition, the Australian Democrats are part of the government in Australia. A former Democrat Leader, Janine Haines, made this point well during a debate in the Senate a decade ago when she said:

> In fact, we are part of the governing body of Australia. This Parliament consists of two chambers. Both of them have equal rights—or virtually equal rights—over legislation, and amending government legislation is as integral a part of being in government as taking the benches opposite is. We are as answerable for our actions as any other member in this chamber. We are part of government by dint of power and the position we hold in the Senate and we are prepared to stand on a daily basis and accept that.

What Coalition MPs call 'the government' is, in the strictest sense, the executive: the prime minister and his senior ministers. Not government in the sense meant by the founding fathers. This confusion serves the executive well in its never-ending quest for absolute power.

A recent article by Laurie Oakes, who writes often on the age-old battle between the executive and parliament as it is played out in contemporary Australia, quotes Clerk of the Senate Harry Evans on this point:

> In Evans' view, the talk of Senate reform emanating from the Coalition at the moment is easily explained. 'Governments always want to remove any obstacles to their power, and the more power they've got, the more they try to remove the residual obstacles. … Governments just naturally drive for absolute power, and people just have to be awake to that and resist it, because unless you have checks on power then you go down the slippery slope.'

In the current federal sphere, the House of Representatives has already been captured by the executive. The executive, however, cannot 'capture' the current Senate so it seeks to discredit it before attempting to dismantle its powers. This 'natural drive' for absolute power has also seen members of this government launch some of the most blatant—and blunt—attacks on the judiciary that Australia has seen. Judges are in no real position to respond. In another article, in November last year, Oakes looks at one of the ways in which the executive has captured the House of Representatives. He notes that, since Federation, the number of parliamentarians has doubled while the number of ministers has quadrupled.

The House of Representatives is no more than an echo chamber for the decisions of the executive. We need go no further than the recent tax debate to prove the point. For example:

- Although there were some 17 pieces of legislation in the initial part of the package—and the government freely admitted that it was the biggest change in taxation law since Federation—the House of Representatives was allowed a paltry 20 hours to debate these bills.

- Also, it was left up to the Democrats in the Senate to force a public parliamentary inquiry into a new tax system—without which there would have been not a single opportunity for the community to have open input into the process as Australia changed from one tax system to another. Nor would there have been the

opportunity to look at how the package would affect different Australians, in different income groups.

While Prime Minister John Howard, Peter Costello, Peter Reith and the rest of them railed against the Democrats in the Senate, they were very careful never to attack Senator Brian Harradine or Senator Mal Colston. Nor do they attack the Nationals, who despite wielding considerable power, are a minor party existing on a very low vote. Indeed, they have just lost party status in the Senate. Of course, once the Democrats became pivotal to the survival of the tax package, the attacks stopped, at least temporarily. Not long after the passage of the amended tax package, the attacks on the Senate were renewed, with Liberal Party state divisions once again calling for electoral changes to gut the power of the Senate. The Nationals have much more power to alter Liberal policy than the Democrats ever will—more is the pity. The party has exercised this power, most recently, on issues such as Telstra and Wik, but it is only the Democrats—not Harradine or Colston, or the Nationals—who are attacked.

The continuing battle for control between the executive and the parliament is a struggle as old as parliamentary democracy itself. It is the executive's battle for unfettered power that fuels the current push for so-called 'reform' of the Senate. Despite what Howard and his ministers constantly claim, it is not a 'hostile' Senate. However, the Coalition spin doctors have been very successful in building a strong public perception that this is the case. They have done this through highly disciplined repetition and they started on day one of Howard's administration. Even senior political journalists who, frankly, should know better, quite happily pepper their articles with the adjective 'hostile' without stopping to think whether or not it is true. The simple, undeniable fact is that the Senate has passed all but two bills during the Howard years, and this is in line with the historical average. Hardly evidence of 'hostility'.

It is my view that the objective of any electoral reform should be swinging the pendulum back towards vesting power in the parliament. In discussing the merits of major electoral reform, the Democrats have highlighted the case for reform of the House of Representatives' voting system. Quite clearly, the House of Representatives currently is not as representative as it should be.

There are six main problems, (or 'evils', as A.E. Smith called them), with the current House electoral system, which can be cured with more democracy:

- It denies representation to more than one in five Australians.

- It provides a huge electoral advantage to incumbent governments, which are able to use their power to hold marginal seats in very tight elections despite not attracting the majority of the vote.

- It reduces the role of the House of Representatives to that of an echo chamber for the government of the day.

- It restricts voters' effective choices to just two similar major parties, even though 20-25 per cent would prefer another party to represent them. Indeed, 93 of the 148

members chosen at the last election were not the first preference choice of the majority of voters in their electorates.

- It results in major parties focusing on the 20–30 marginal seats that will decide the fate of government. Governments largely ignore the other 120–130 electorates, particularly the 30–40 safe Opposition seats.

- It creates political 'ghettos', with large areas having representation from only one party. Sydney's North Shore, with eight safe Liberal electorates of 80,000 voters, denies representation to 120,000 Labor voters. Sydney's West has 10 safe Labor seats and 200,000 unrepresented Liberal supporters. And with a two-party preferred vote of around 43 per cent, Labor won only one of the 16 non-metropolitan seats in Queensland, and the Liberals none of the five seats in Tasmania.

These facts and figures hardly support an argument for our current electoral system delivering a 'representative' House of Representatives.

As part of an agreement with the British Liberal Democrats, the British government has recently tackled the issue of the unrepresentative nature of the House of Commons. It established a Royal Commission, headed by Lord Jenkins, to recommend a new electoral system**.** The Australian Democrats have looked to the Jenkins Royal Commission report to inform our own proposals for the reform of Australia's electoral system.[1]

As a party, we have long supported the introduction of proportional representation (PR) in all houses of parliament in Australia. We are, however, realistic enough to recognise that the major parties would never accept such a change. In the face of declining support, the two old parties are hardly likely to hasten their own demise. However, the Jenkins model offers a good, practical compromise between the competing principles of local representation and fair representation.

We recommend a similar mix of local seats being 'topped up' from a party-based vote to make the House of Representatives more democratic. Under our proposal, 80–85 per cent of members of the House of Representatives would continue to be elected based on single-member constituencies and preferential voting. A further 15–20 per cent of members would be elected based on a second vote by electors for the *party* of their choice. These seats would be allocated in each state to the most under-represented parties. This second category of members would provide the pool to 'top up' the representation of each party until the number of MPs accurately reflected voter support in each state.

This is not a radical proposal. It is practical and reasonable. Most importantly, it would ensure that a party with a minority of the two-party vote never accidentally 'won' an election again—as the Howard government did last October. Howard enjoys a 12-seat majority in the House of Representatives having attracted only 48.7 per cent

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[1] See *Report of the Independent Commission on the Voting System (Jenkins Report)*, London, TSO, 1998.

of the two-party preferred vote. If democracy can be defined as a situation wherein the will of the majority prevails, then Labor Leader Kim Beazley should have formed government after the October election. Worse still, this outcome was not exceptional. In one in four Australian elections, the electoral system delivers government to the 'wrong' party. It is worth noting that in other, less politically stable countries, similar outcomes have led to popular revolution.

The Jenkins model, however, could well lead to a rejuvenation of the House committee system—as has occurred in the Senate over the last two decades since the Democrats arrived. It could lead to all seats being, in effect, marginal seats. Apart from placing real power back into the hands of the voters, it would mean that the national political agenda was no longer determined by polling in a mere handful of swinging seats. The Jenkins model could rescue the House of Representatives from the clutches of the Executive.

What hostile Senate?

From May 1996 to July 11, 1998, 427 bills were passed. Two bills were negatived, four bills were passed by the Senate but were laid aside or discharged by the House of Representatives, and one bill passed by the Senate but laid aside by the House of Representatives was later recommitted and passed. Two other bills that were negatived in the Senate were later recommitted and passed. So, of 427 bills, only two remain negatived—the Workplace Relations Amendment Bill and the Telstra Privatisation Bill. The others were either passed after recommitting or laid aside by the House of Representatives. In other words, 99.54 per cent of bills were passed.

Coonan claims the Senate is a 'handbrake on progress', but there may be a good reason for this. It is dangerous enough now on the political highways, with the Coalition in reverse gear, pressing the accelerator firmly to the floor, and the Opposition vainly pumping the brake. The Democrats are focusing on the steering and keeping an eye out for safety ramps. Coonan proposes jumping in a steamroller, driving straight over the will of the people and building a bypass around parliament so that the Coalition can bulldoze through whatever laws it wants. The Senate may need to be a handbrake because the government is often going the wrong way.

Even if you accept the straw man argument put up by proponents of Senate 'reform', most of the proposed solutions would not work. For example, Senator Coonan's proposed threshold quotas—which are more properly known as exclusion quotas—would *not* deliver a majority in the Senate to the government of the day.

Campbell Sharman, a professor at the University of Western Australia, had the following to say about Coonan's proposals:

> Senator Coonan's proposals would not solve the problem which she points to. There is no way, given the current composition of the Senate—that is 12 senators for each state and PR—with or without thresholds—that the Government will ever, is ever likely to get a majority in the Senate. Because it means that the governing parties have to get 50% or more of the Senate vote and no government has been anywhere near that since early in the days that proportional representation was passed.

And proportional representation has been in use in the Senate for 50 years now.

Nor would proposals to shrink the Senate back to 10 senators per state (instead of the current 12) deliver control to the government of the day. Had the Coalition not split on this issue in 1983 when the vote was taken to increase the size of the Senate, and if there had consequently been only 10 senators per state throughout the last 15 years—then it is probable that the Democrats would have held the balance of power outright throughout the entire period. The bottom line is that, without completely removing the proportional nature of the Senate voting system, a party is unlikely to be able to hold a majority of Senate seats unless it receives a majority of the primary vote—surely this is how it should be.

Many commentators argue that it is the revulsion of the electorate from the Senate's behaviour in 1975 that underpinned the initial success of the Democrats in 1977 and 1980. In a way, the Liberals created the perfect environment for the Democrats to get off the ground. But, however unpalatable the fact may be to the major parties, the Democrats have enjoyed enduring voter appeal since the late 1970s on the basis of performance. The Democrats do not dictate terms to government. If we did, then frankly, Australia would be a much better place. There are real restraints in place: some practical and some, importantly, that are self-imposed. For instance, every generation of Democrat senators has pledged not to block supply. We have been remarkably consistent in approach to our role over 22 years.

The Australian Democrats are happy to participate in a debate about electoral reform, but the debate will be productive only if Australians realise the motive of the major parties is the drive of the executive to secure for itself absolute power. The most recent attacks on the Senate—and the Democrats—were generated by the government, deliberately and strategically, in the context of debates on tax, unfair dismissals and Telstra.

The objective of any electoral reform should be to swing the power pendulum back towards the parliament—and thereby the ordinary men and women of Australia. Electoral reform should not push the power pendulum any further towards the executive. The Coalition and its vocal supporters fail to accept that Australians do not want the government of the day to have a majority in both houses. Simply put, if Australians wanted Howard to have a majority in the Senate, they would have given him one. They did not—and they are not likely to next time either.

If we really are serious about electoral reform, then we should start where the need is most urgent—in the House of Representatives. The electoral system for the House of Representatives must be overhauled before it can be truly called 'Representative', and the model put forward by Lord Jenkins provides a suitable practical plan for reform in Australia. Reform is also necessary in the political culture in Australia. Given that the public repeatedly refuses to give one party control of both houses of parliament, perhaps it is time for politicians to take a less combative approach. If a party does not have the numbers, maybe it should put more energy into cooperation, negotiation and consensus rather than attempting disenfranchisement?

10

A Labor Perspective on Senate Reform

John Faulkner

In calling this paper 'A Labor Perspective on Senate Reform', I have deliberately left myself considerable latitude. As part of a more general case concerning the importance of our voting systems to the strength and stability of our institutions of government, I will both revisit the 1948 reform and canvass the need for further reform. In doing so I will discuss three specific proposals for future reform: a change to the procedures for allocating short- and long-term senators after a double dissolution election, the introduction of four-year terms, and a limitation on the Senate's power to block appropriation bills.

Political parties bring a partisan perspective to any analysis of voting systems and consideration of proposals for change. It is in the nature of a political party that it will seek whatever advantage it can gain from 'electoral reform'. But this does not mean that our perspective is *exclusively* partisan. Far from it. The vast majority of politicians would agree with the observations of a recent Research Note of the Parliamentary Library:

> Electoral systems have a number of functions which need to be held in balance for the effective operation of the democratic process. An electoral system needs to be representative of geographic regions, political beliefs and the societal and cultural aspects of the population. The system must be fair and must not discriminate in favour of one group against another … Other functions of and criteria for an electoral system include the promotion of stable government, the facilitation of viable and effective opposition, that seats won should as far as possible be in proportion to votes received, and that power exercised should bear some relationship to the vote received. [1]

[1] Margaret Healy and Gerard Newman, 'An Electoral Threshold for the Senate', Research Note Number 19, 1998–99, p. 1.

Voting systems must be fair and have integrity. Whatever the defects of the systems we employ, both for the House of Representatives and the Senate, I am confident Australians would agree they meet these criteria. I also believe that the Australian Labor Party has a very strong record of promoting and defending the fairness and integrity of our electoral system.

In assessing the Senate voting system, we must also be mindful of the constitutional requirement that all states have equal representation. This was part of the price of the constitutional settlement that led to the establishment of the Commonwealth, and political realities are such that it is unlikely that this provision will ever be changed. This requirement does, of course, distort, or more accurately subvert, the 'one vote, one value' principle. It is in the nature of a congenital defect if you like. It produces the current situation, for example, where 12 senators represent 330,000 electors in Tasmania and the same number represent more than four million electors in NSW. As I have argued before, whatever else this system might be, it is hardly a model of representativeness.

But the Senate system does produce a result that accurately reflects the voting strengths of parties within state and territory boundaries. This could not be said for the systems that preceded the introduction of proportional representation (PR) in 1948: the original first-past-the-post system and the post-1919 preferential voting system. The first system produced results such as that in 1910, when all 18 Senate seats were won by Andrew Fisher's Labor Party; 1914, when, after a double dissolution, the ALP won 31 of the 36 seats; and 1917, when Billy Hughes' Nationalists won all 18 seats. These results became even more bizarre under the preferential voting system. In preparing this paper, I found an interesting letter—on an archived file—from a proponent of proportional representation, Senator Burford Sampson (Lib, Tasmania). Writing to Ben Chifley in 1945, he declared, 'The purpose of this letter is to emphasise the general opinion that the present method of election of members of the Senate is about as bad a voting system as such can be.' He went on to describe such 'grotesque and unfair results' as in 1925, when Labor had 45 per cent of votes but did not have a single senator, while the Nationalists, with 55 per cent, had 22. And in 1943, when Labor under John Curtin won all 19 seats with 55 per cent of the vote. These winner-take-all voting systems are simply not appropriate for multi-member electoral constituencies such as we have in Senate elections.

The historical record shows that Sampson was not the only one who believed that something had to be done. In 1915, the Royal Commission on the Commonwealth Electoral Law and Administration recommended the adoption of a system of proportional representation for the Senate. Earle Page succeeded in having a motion to introduce PR in the Senate adopted in the House of Representatives in 1922. Joe Lyons committed his United Australia Party (UAP) government, in 1934 and again in 1937, to establish a Select Committee 'to investigate and report on the method of election of the Senate'. The debate on this motion, which took place in the House of Representatives in May 1939, is instructive. [2] Were we to debate a similar motion now, in 1999, I am sure that very similar views would be expressed. It was the

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[2] *CPD* (*Commonwealth Parliamentary Debates*), 3 May 1939, pp. 57–70.

conservative parties that then argued the need for change. Thomas Paterson, Country Party Member for Gippsland, said:

> Anyone who gives a moment's thought to the subject must realize that something should be done to improve the present system, under which a party which gains not more than 51 per cent of the total votes cast throughout Australia may win the whole eighteen seats at any normal election, whereas a party which may obtain 49 per cent of the total votes cast may be left entirely without representation.

Josiah Francis, UAP Member for Moreton, also made the case in terms of democratic legitimacy:

> I have heard nobody express satisfaction with the way in which the Senate elections are now conducted. After every election the press teems with criticisms of the present system, which is condemned by leader writers, newspaper correspondents, and public bodies alike. The present method does not give the community confidence in this Parliament, and without such confidence this Parliament cannot function as it should.

The then Labor Opposition roundly condemned the government for political opportunism. Eddie Ward, Labor Member for East Sydney led the charge:

> I do not deny that for many years there has been dissatisfaction with the present method of election to the Senate ... what amazes me is the fact that for that long period the Government was unmindful of that dissatisfaction and that it has taken heed of it only after a general election which indicated that the fortunes of the Labor party are improving ... We believe that the Government is making these proposals at this stage in order to destroy the advantage which the Labor party now holds.

He was backed up by H.P. Lazzarini, Labor Member for Werriwa:

> Whenever governments comprised of honourable members opposite in this or any other parliament of Australia have received a thrashing at the hands of the electors, they have always sought a way to thwart the popular will … Now that the United Australia Party and the Country party are fighting as independent bodies, each, I suppose, feels that it is entitled to proportional representation. Possible the Country party believes that it can win one or two more Senate seats.

While support for PR in the Senate waxed and waned from as far back as the constitutional conventions in the late 1890s, and moved back and forth across party lines, it was Ben Chifley's Labor Government which finally took action. As John Uhr has observed in his paper, the historical record of the background to Chifley's 1948 decision is sketchy. This prompted me to have a look at the Cabinet records of this period and some other relevant files at the National Archives. These show that the Chifley Cabinet considered a proposal to increase parliamentary representation on 3 July 1947, but deferred further consideration until a more thorough analysis of the results of the 1947 Census was undertaken.

The historical record makes it clear that dissatisfaction with the Senate voting system had been building for many years as had pressure for change to a system of proportional representation. Concern had also been growing about the gradual erosion of representativeness in the electoral system. At the time of the first federal elections in March 1901, each member represented approximately 20,000 electors. This number had grown to almost 60,000 by the time of the 1947 Census. My own reading of the primary sources suggests to me that it was the combination of these pressures coupled with the need for the Chifley government to respond to the results of the 1947 Census with redistributions in five of the six states that tipped the balance in favour of change.

Undoubtedly, the keen political instinct for self-preservation also played an important role. Uhr is correct to draw attention to Labor's interest in the 'smaller, more stable and hence more secure seats for the Labor backbench' that the increase in the number of Members of the House of Representatives would bring. And there is no question that Arthur Calwell—who, according to Fred Daly,[3] was the 'architect and enthusiastic sponsor of the enlarged parliament and proportional representation'—played this card successfully in persuading caucus to accept his proposed formula for change.[4] The interpretation that the Senate changes were designed to bolster Labor's majority in that House in the event of a victory by the Menzies Coalition is less convincing. After all, these proposals were formulated and approved a little over one year into Chifley's second term of office, when general elections were still some two years off.

While the system adopted in 1948 was a massive improvement, it was by no means perfect. There were serious defects. One was the treatment of casual vacancies, which was largely remedied by referendum in 1977. Not only could state governments appoint a senator who was not a nominee of the relevant party, but the filling of any casual vacancy in a subsequent election changed the quota for the election of a senator. Another defect, which can also lead to distortion of proportional representation, is the continuing possibility of non-simultaneous House of Representatives and half-Senate elections. Experience shows that separate half-Senate elections are treated as nation-wide by-elections, so as well as being inordinately expensive, they tend to favour a protest vote. This may explain why one has not occurred since 1970.

The prediction in 1948 by Attorney-General Herbert Evatt that proportional representation would enhance the status of the Senate has proved to be correct. PR has given the Senate a popular legitimacy it had previously lacked. It is not surprising that that legitimacy has in turn fortified the Senate's sense of independence, consciousness of its powers and preparedness to exercise them. PR created a situation where government control of the Senate became increasingly rare (governments only having majorities in the Senate after the elections of 1951, 1953, 1958, 1975 and 1977) and, since 1984 when Senate numbers were increased from 10 to 12 per state, almost impossible. Minor parties and independents have become a feature of the Senate,

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[3] Fred Daly, *From Curtin to Hawke*, Melbourne, Sun Books, 1984, pp. 51–52.

[4] Daly claims Calwell won over Caucus by convincing Labor senators they would be re-elected in 1949 'and that the new voting system favoured them in the future.'

since the advent of the Democratic Labor Party in 1955, with their numbers gradually increasing from two in 1955 to the current 12. They have held the balance of power for 32 of those 44 years.

At no stage was the Senate's assertion of its sense of independence more apparent than in the years of the Whitlam government, from 1972 to 1975. During this period, the Opposition rejected a record 93 government bills, 25 more than the total number of rejections in the previous 71 years of the Senate's history. Having lost government for the first time in 23 years, the Opposition, displaying all the characteristics of a sore loser, announced in April 1974 that it would vote against the Supply bills in the Senate. Whitlam sought a double dissolution and was returned to government. Again, in October 1975, the Opposition announced that it would not pass the Budget bills in the Senate 'until the Government agrees to submit itself to the judgment of the people.' The rest, as they say, is history. The country was catapulted into a constitutional crisis the like of which it had not seen before and has not seen since.

Malcolm Fraser and Doug Anthony campaigning ... "the issues are important."

National Times, October 27–November 1, 1975

Fred Chaney was the Liberal Opposition Whip at the time. He wrote last year that he

> saw at close quarters the ultimate exercise of Senate authority when it denied the Whitlam government supply. It did this on the basis of a fiddled majority produced by the shenanigans of the state governments in NSW and Queensland. Nevertheless, this did not deter the conservative forces from the view that the Senate had a right not only to amend government legislation but to bring a government down.[5]

[5] *Australian*, 29 December 1998.

I do not believe the Senate should have that right. Nor does the Labor Party. Our platform supports 'constitutional reform to prevent the Senate rejecting, deferring or blocking appropriation bills'. I will return to this issue shortly.

The flip side of the Senate's greater assertiveness and the growing influence of minor parties and independents has been the increasing frustration of governments. Generally they have displayed what I regard as the knee-jerk reaction, and I include both Labor and Coalition governments in this observation, and that is to propose amending the Electoral Act to alter the electoral system in such a way as to reduce the likelihood of non-major party representatives being elected. This reaction is at once an acknowledgment of the impossibility of achieving such an outcome by constitutional means and an appeal to the shared interests of the other major political party to join forces to enhance the prospects of both parties of enjoying at least occasional control the upper house. Paul Keating made this appeal quite explicit in 1994, during one of his periodic bouts of frustration with the Senate, when he told the front bench of the Liberal Party that it had to 'think beyond your nose and the next election'. He noted that 'the essential robust element of our democracy is the representative nature of the Australian ballot. The Senate is not a representative ballot; it is a proportional ballot.' [6]

Keating and Gareth Evans were both extensively reported in the early part of 1994 as canvassing a proposal to divide each state into 12 electorates, with senators being elected by preferential rather than proportional voting. The idea is certainly not a new one. A variant of this proposal was debated in the House of Representatives in 1939. Similar proposals have emerged regularly from the Coalition since it gained office in 1996 and developed a radically different view of the tactics it had employed in the Senate under Labor governments. We have had calls and proposals for 'Senate reform' from Andrew Robb, Tony Staley, Wilson Tuckey, David MacGibbon, Tony Abbot, Peter Costello, Peter Reith and most recently, Helen Coonan.

What all these proposals have in common is that they involve an amendment to the Electoral Act, which would almost certainly require the support of both of the major parties. They are also designed to produce a particular outcome from Senate elections; that is, enhanced representation for the major parties at the expense of the minor parties. But it is highly unlikely that any of the proposals currently being put forward by Coalition representatives would have produced a Coalition majority in the Senate from the 37.7 per cent of the vote that it obtained in the last election, its lowest percentage in Australian federal history. As Malcolm Mackerras has pointed out[7], this is the reason why John Howard will not use the mechanism available to him under the Constitution to resolve a deadlock with the Senate. This is the reason why he will not contemplate a double dissolution and is instead seeking to manipulate the electoral system to reduce the prospect of such deadlocks. As the Proportional Representation Society of Australia has observed recently, 'Deliberately distorting voters' wishes by electoral artifice simply cannot produce fairer electoral outcomes.' [8]

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[6] Laura Tingle, 'Showdown at the Senate', *Weekend Australian*, 5 March 1994.

[7] Letters, *Canberra Times*, 13 July 1999.

[8] *Quota Notes*, March 1999.

Proposals for Senate reform that rely on radical change to the electoral system are no longer realistic in the Australian political context. Australians just will not buy them. Minor parties in the Senate are here to stay. They are a permanent consequence of the change to proportional representation and now account for some 25 per cent of the vote. Voters are not swayed by government complaints about Senate obstruction. In June 1997, after months of government protests about the Senate, a *Bulletin* Morgan poll showed 72 per cent of voters opposed any electoral change designed to make it easier for major parties to control the Senate. The poll found 18 per cent of voters preferred to see minor parties hold the balance of power in the Senate to keep a check on government policies. Seventeen per cent said they would vote for one party in the House of Representatives and another in the Senate. Only 10 per cent of voters thought it was a bad thing for the government not to control the Senate while most people (67 per cent), felt it could be good or bad, depending on the circumstances.

If there *is* a problem with Senate powers, and the behaviour of the Senate from 1972 to 1975 demonstrated conclusively that there is, then we should look for a remedy at the heart of the problem: the Constitution that sets down those powers. The Senate's power to reject, amend or fail to pass what might be termed ordinary legislation does not pose a threat to our system of responsible government. Yes, it often constitutes an irritant to governments, but there are remedies available. A government can either swallow its pride and set the bill aside or use the s. 57 deadlock process.

The real problem arises with regard to the Senate's power to deny financial sustenance to a government, particularly when such power is exercised not because of any objection to the content of the legislation appropriating the funds, but to bring down the government. This flies in the face of one of the basic principles of our system of government, that a government is responsible to the House of Representatives and continues in office only so long as it has the confidence of that House. This was very much a live issue at the constitutional conventions that led to the framing of the Constitution. Aficionados should consult the Final Report of the 1988 Constitutional Commission[9] and Brian Galligan's chapter in *Responsible Government in Australia*[10] for a detailed treatment of this issue. I have drawn on these sources extensively for the following historical account.

The problem of combining the traditional concept of responsible government centred on the people's house with a bicameral legislature comprising two almost equally powerful chambers dominated the Conventions and almost undid the whole Federation project. Interestingly, though, the battleground was the Senate's power to amend tax bills, rather than its power to block them. It was the larger states that argued that the traditional form and practices of responsible government would be placed in jeopardy and government become unworkable if both houses had the power of amending money bills. The small states wanted a powerful states' house in which to promote and defend their interests. They played down the risks to responsible government. The South Australian Chair of the Judiciary Committee at the 1897 Convention, Josiah Symon, argued that the Senate's right to amend tax bills would not threaten responsible government because they could 'trust to the good judgment

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[9] Constitutional Commission, *Final Report*, vol. 1, AGPS Canberra, 1988.

[10] 'The Founders' Design and Intentions Regarding Responsible Government', in P. Weller and D. Jaensch, *Responsible Government in Australia*, Richmond, Vic., Drummond Publishing, 1980.

and conscience of the Senate', which would be comprised of 'eminent men who will not readily or wantonly put difficulties in the way of the government of the country.'

The settlement of this argument in favour of the large states turned the attention of Convention delegates to the problem of deadlocks between the houses. Richard O'Connor proved to be particularly prescient. He distinguished between two types of deadlocks: ordinary ones that could be solved by compromise, and dangerous ones that required some special mechanism for resolution. He included all policy matters and even taxation bills in the first category and only appropriation bills for the ordinary annual services of government in the second. These latter deadlocks were dangerous because they would stop the whole machinery of government. For such deadlocks he proposed a joint sitting of the two houses if the Senate refused to pass a Supply Bill for the second time.

Ultimately, after extensive debate, the s. 57 double dissolution mechanism was adopted. It was acknowledged that this would only be suitable for handling ordinary deadlocks, given that the timing requirements were obviously too drawn out for supply deadlocks. But it seemed that only O'Connor saw this as a real problem. Most delegates considered his dangerous deadlocks as so serious as to be unthinkable. According to Patrick McMahon Glynn, a deadlock over an appropriation bill would 'open up the way to a revolution' and the fear of such a thing occurring would 'operate as a sanction to prevent it.' William McMillan suggested that the blocking of supply would throw the whole finances of the Commonwealth into confusion and 'would mean revolution'. Another delegate—William Trenwith—agreed that this was 'inconceivable'.

As Galligan points out, the founders recognised that deadlocks that could occur between a government centred in the House of Representatives and the Senate 'would be avoided primarily by the good sense of those who worked the system, or alternatively resolved by the cumbersome 'mechanical' method of double dissolution'. However:

> the founders did not anticipate the rapid rise of disciplined, class based parties soon after federation, nor did they envisage the degree of partisanship and reckless brinkmanship that characterised 1975 … The founders had provided no adequate mechanical means for breaking supply deadlocks because they never envisaged politicians would engineer such dangerous things for short run gains.

In a very real sense, then, the Senate's power to block supply and the delineation of this power in the Constitution is unfinished business. It is a circumstance not anticipated by our founders and therefore not provided for. There is, perhaps, a unique opportunity for us, as a country, to address this problem and take action to prevent a recurrence of the 1975 constitutional crisis.

As far as the principal parliamentary parties are concerned, Labor is committed to constitutional reform to prevent the Senate rejecting, deferring or blocking appropriation bills. The Democrats have given an undertaking not to use the Senate to block supply. And the Coalition is publicly casting around for ways to prevent the Senate from being 'an obstructional competitor, frustrating or substantially delaying

urgently required responses to national problems.'[11] Surely there is some convergence among these positions. I am not in any sense suggesting any form of collusion between the major parties to remove an irritant to both. This is not a matter to be settled between the two, or for that matter, the three main parliamentary parties. Ultimately it is a matter for the Australian people, who would have the final say via a constitutional referendum. But, as we all know, there is little use going to a referendum if the major parties take opposing positions on the question.

A useful starting point would be the Constitution Amendment (Legislative Council) Act which the NSW parliament passed in 1933. That Act amended the NSW Constitution by adding the following section:

> 5A (1) If the Legislative Assembly passes any Bill appropriating revenue or moneys for the ordinary annual services of the Government and the Legislative Council rejects or fails to pass it or returns the Bill to the Legislative Assembly with a message suggesting any amendment to which the Legislative Assembly does not agree, the Legislative Assembly may direct that the Bill with or without any amendment suggested by the Legislative Council, be presented [to the Governor for Royal Assent] notwithstanding that the Legislative Council has not consented to the Bill.
>
> (2) The Legislative Council shall be taken to have failed to pass any such Bill, if the Bill is not returned to the Legislative Assembly within one month after its transmission to the Legislative Council and the Session continues during such period.
>
> (3) If a Bill which appropriates revenue or moneys for the ordinary annual services of the Government becomes an Act under the provisions of this section, any provision in such Act dealing with any matter other than such appropriation shall be of no effect.

Senate reform via constitutional change has long been regarded as impossible given the poor success rate of referenda in our country. But the upcoming referendum on the Republic and the imminence of the millennium and the centenary of Federation will create a climate in which Australians will be more prepared to contemplate other possible changes to our Constitution. As Kim Beazley has said, it 'may well crack open this century's constitutional conservatism.'[12] In such a climate, Labor would be prepared to discuss with other interested parties, other aspects of the Senate's constitutional powers and join in a public debate.

There are at least two other proposals Labor would advocate in such a context: changing the current system for rotation of senators and introducing four-year terms. I spoke about the first proposal in the Senate on 13 May last year[13] and subsequently moved a motion to give it effect. That motion was passed by the Senate on 29 June

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[11] Helen Coonan, 'Dysfunctional Senate a handbrake on democracy', *Sydney Morning Herald*, 4 February 1999.

[12] Kim Beazley, Address to the Local Constitutional Conventions Forum, Canberra, 28 April 1999.

[13] *CPD*, 13 May 1998.

1998. This may seem an obscure issue to many, but it is an important reform that will ensure that the allocation of short- and long-term places after a double dissolution election is conducted according to democratic principles.

The Constitution provides that senators should have six-year terms and that half the Senate should retire at each ordinary Senate election. In the event of a double dissolution under s. 57, the ordinary rotation of senators is disturbed and, following the election, the Senate is required to divide itself into short- and long-term senators. The method of division is left to the discretion of the Senate. Traditionally, the method that the Senate has settled on has been to divide senators on the basis of the order in which they were elected. But, while the proportional representation system accurately distributes representation, it is a poor method of ranking senators according to their voting strength. Any Senate candidate reaching a quota is ranked ahead of a senator elected by the distribution of a surplus from a candidate higher on the ticket. Thus, this arrangement favours minor parties. It ensures that they will receive a long-term senator as soon as they receive a quota. In a double dissolution election, this means that, provided they get over 7.69 per cent of the vote, they will receive a long-term senator, whereas a party that attracted 44 per cent of the vote may receive only two long-term senators. Such a result is inconsistent with the principle of proportional representation.

In 1984, parliament passed an amendment to the Commonwealth Electoral Act to provide for the allocation of short- and long-term senators after a double dissolution based on a recount with the quota that would have applied had a half Senate election been held. Labor's view is that this represents the fairest method of allocating places. Order of election and voting strength are different concepts. Order of election simply reflects the order in which successful candidates reach quota. Voting strength more closely resembles proportional support for parties contesting the election. Although the half Senate recount method is not perfect, it is a more accurate measure of voting strength and a more accurate measure of the will of the electorate. Hence it is more democratic.

At the time of the debate on the 1984 amendment, Senator Robert Ray, on behalf of the then government, stressed that, if this procedure were to enter into use, it should be agreed in advance of any double dissolution election. This remains Labor's view. If it is not agreed in advance, then parties will adopt a wait-and-see approach until after the election, when they will advocate the method that brings them most political advantage. It is my hope that the resolution of the Senate of 29 June last year will have sufficient force to ensure that the method that was approved by parliament in 1984 will be employed after the next double dissolution election, whenever that may occur. The Democrats should not interpret this proposal as simply a move by the major parties to disadvantage the minor parties. This proposal is supported by the Proportional Representation Society of Australia and Malcolm Mackerras has written, 'The motion should be seen as a correct statement of democratic principle which may help major parties at this election, minor parties at that election.'[14]

The final issue I want to raise briefly is the evergreen of four-year terms. The logic in favour of such a change is overwhelming, coupled with a requirement for

[14] Letters, *Canberra Times*, 25 May 1998.

simultaneous House of Representatives and Senate elections. Three-year terms are the maximum under our Constitution. In fact, the average term of government since the introduction of proportional representation in 1948 has been precisely two years. This mitigates against stability and maximum productivity. It is wasteful, both of energy and dollars. We can ill afford such constant change. The vast majority of countries with democratic systems of government have four- or five-year terms. All state legislatures, with the exception of Queensland, have changed to a four-year system. The 1988 Constitutional Commission was just the latest expert body—the first being a Royal Commission in 1929—to recommend the extension of the three-year term to four years. It is time we revisited this issue.

I would submit that the Australian system of government, including the electoral system that supports it, is generally regarded as fair, effective and acceptable. The system of proportional representation introduced in 1948 largely reconciles the conflicts between democratic representation and the institutional design of the Senate, as a states' house with powers almost equal to those of the people's house. The important thing, in contemplating any change to these systems is, as I have noted, whether any adaptation of the system can preserve the benefits while alleviating problems. I am confident that all three proposals that I have put forward meet this test.

11

Should Parliament be Abolished?

Fred Chaney

I am indebted to Professor Campbell Sharman for the title of this paper, which is extracted from a Senate Occasional Lecture he delivered in December 1998, called 'The Senate and good government'. He gave an impressive catalogue of the intellectual scams used to attack the role of the Senate whenever it gets in the way of a government proposal, and which support the notion of an elected dictatorship, or an executive government untrammelled by parliamentary interference in the legislative process.

While not directly addressing the issue of proportional representation (PR), Sharman's paper dealt with attacks on the Senate that flow from the powerful role the Senate has developed, made possible by the effect of proportional representation on the party balance in that chamber. This effect, combined with the increase in the number of senators from each state to 12, and the increasing support for minor-party candidates in elections (or the decreasing support for the major parties, as you will), has meant that governments will seldom command a Senate majority.

One argument against Senate intransigence (so-called) is that 'the Government is elected to govern'. What Sharman said about this, in part, is as follows:

> **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 pre-empt 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.[1]

Sharman is correct in his judgment that the response to the question, 'Should parliament be abolished?', will be, 'Of course not'. Unfortunately, arguments about the Senate and the exercise of its powers will not generally be seen in that context. Instead, attitudes to the Senate, what decisions it should make and even how it should be constituted are much more coloured by immediate responses to specific issues in political contention at a given point in time. This is seldom, if ever, accompanied by any assessment of the desirability of ensuring a spread of powers in our democracy, including an effective scrutiny of government actions and a legislative function that is not totally under the heel of the executive government. This reflects the simple reality that practical issues loom larger in voters' minds than theories about the separation of powers.

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[1] Campbell Sharman, 'The Senate and good government', published in *Papers on Parliament* no. 33, May 1999, pp. 152–170.

It is indicative of the problem of having a serious debate about institutional issues that I did not hear of Sharman's paper until he wrote to me about an article I had published in the *Australian* on 29 December, but which I wrote, coincidentally, on 11 December, 1998, on the day he was delivering his paper. My article was something of a cry from the heart, and started as follows:

> This is a fascinating period in Australian politics. Where are the defenders of the institutions which protect our democracy? Australians who label themselves as conservatives seem to have abandoned the role.
>
> Fundamental issues, such as the importance of the rule of law, its sister issues of the independence of the judiciary and the separation of powers, seem to be slipping out of public debate and perhaps public consciousness. The role of the Senate, a conservative keystone of our Constitution, is denigrated even by some serving senators.

I was a member of the Senate from 1974 to 1990, and was Opposition Leader in the Senate from 1983 to 1990. After one term in the House of Representatives, I did not contest the 1993 election and assumed the more comfortable role of an active private citizen. After the (to me) welcome election of the Liberal and National Coalition government in 1996, I took no more than a layman's interest in what was happening in Canberra, happy to leave it to those who have undertaken the arduous and, in my view, noble task of political life.

As a citizen, however, I experienced an increasing sense of discomfort at what I saw as the blurring of some important principles. My concerns arose in a number of areas. I have never had any difficulty in accepting the right to criticise the decisions of judges. The decisions of appeal courts are, after all, a constant reminder that judges do get things wrong. It puzzled me, however, that little distinction seemed to be made between defence of individual decisions and defence of the role of the courts and the importance of the rule of law and of legal institutions.

Other incidents caused me alarm. For example, I heard an ABC Radio interview with Senator Helen Coonan, who seemed to be advancing propositions that would lead to a significant reduction in the ability of the Senate to challenge the measures of the government of the day. From distant memory, I think it was a variation to the method of election of senators, the imposition of some minimum quota of first-preference votes before a person could be eligible for election. I remember being disturbed enough to ring the ABC in an endeavour to speak to the journalist who had conducted the interview in what I thought was an incompetent manner. It is perhaps fortunate that I was listening to the program from Western Australia so that the interviewer had long gone by the time I rang, but I thought there were at least half a dozen questions that any person with a reasonable knowledge of political history would have asked a Liberal Party senator advancing the views put by Coonan.

So, a series of incidents left me with the question buzzing around in my head, 'Where are the defenders of our conservative institutions?' As I wrote in the *Australian* last year,[2] our Constitution contains intentionally conservative elements. The staggered

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[2] The text here follows substantially my article in the *Australian*, 29 December 1998.

election of senators is one of those elements. The Senate is not meant to reflect the most recent electoral changes in the House of Representatives. Short of a double dissolution, the Constitution has designed the Senate to have half of its membership one election behind. Yet government senators rail against the Senate exercising its role as a brake on the impetuosity of the House of Representatives. They demand the execution of the mandate of the most recent House of Representatives election. Their contempt for their own mandate is puzzling.

As Opposition Whip during the 1975 confrontation between the Senate and House of Representatives, I saw at close quarters the ultimate exercise of Senate authority when it denied the Whitlam government supply. It did this on the basis of a fiddled blocking majority produced by the shenanigans of the state governments in New South Wales and Queensland. The appointment of Albert Patrick Field to the Senate vacancy caused by the death of a Labor senator, Bertie Milliner, did not deter the conservative forces of 1975 from the view that the Senate had a right, not only to amend government legislation, but to bring a government down.

It will serve Australia badly if the pursuit of short-term political objectives clouds the importance of fundamental institutions to maintaining our free and democratic society, and a parliament that does not merely support an elected dictatorship.

What of the rule of law? Few Australians would want a dispute they had with the government of the day, with the taxation office, with the police force, or indeed with their neighbours, to be determined on the whim of a bureaucrat or still less a politician. The fundamental protection we all enjoy is that if we disagree with powerful forces in the community we are entitled to the protection of our legal rights through an independent judiciary which acts in accordance with law without fear or favour. The theory is that we cannot be oppressed by the illegal conduct of others because independent courts are there to protect us.

There is much that is wrong with the courts, and their processes. The courts themselves are vigorously debating these matters, including the affordability of justice. Whatever the problems with the judicial system, the ability of unfettered governments and wealthy corporations to oppress us is so obvious that there must be some independent restraint.

A current controversy is the role of the Attorney-General in the defence of the courts. What has not been made clear is that there is a distinction between debate, discussion and criticism about and of particular judgments of the courts, and the need to defend the institutional arrangements that make the courts independent of the executive government. If the current federal Attorney-General’s view is correct, then it still seems to me incumbent on him and indeed the whole government, to explain and defend the role of the courts as a fundamental part of our constitutional structure and a fundamental element of our freedom. It would be good to hear that explanation from government and opposition alike.

The Senate is given almost co-extensive powers with the House of Representatives under the Constitution. At the same time its composition and method of election ensure that it more truly represents the voting of the people of Australia than does the outcome of the single member electorates in the House of Representatives. Those

people who like to see governments with unfettered power to create whatever their vision of the moment dictates will see Senate power as a restraint on efficiency. True conservatives, who think that the error might have been too much legislation in the past rather than too little, conservatives who can see that the fashions of the moment are often not the fashions of tomorrow and indeed are often sadly wrong, would see restraints on legislative and executive power as of great value. Where are the proponents of these conservative views today?

I have had experience in the Senate as a member of a government majority, as a member of an opposition with a blocking majority, and as a member of a government with the opposition having the numbers. By the time I left the parliament in 1993, it was my firm conviction that good government was served by the government of the day not having control of the Senate. That view may have been coloured by the fact that by then I had been in opposition for 12 years, but governments of all persuasions are arrogant in their belief that they know best. An upper house not controlled by government is now my preference.

The public cannot afford to rely on politicians' arguments alone in these matters. Politicians necessarily use the arguments available to justify what they want today. A good recent example comes from Western Australia. For the whole history of that state, until 1997, conservative forces enjoyed a majority in the Legislative Council. Until that change, conservative politicians argued that the powerful Legislative Council was an appropriate fetter on the potentially damaging wilfulness of the lower house. Now that there is a Coalition government and Labor and small parties have the majority of the Legislative Council, there is a change of tune.

This is, of course, a change of tune based on political convenience. The question that needs to be considered is whether there is a good, solid argument in the public interest for maintaining a circumstance where governments are subject to checks.

In the current political climate much is made of the fact that a single senator may be determining the fate of government legislation. That argument is, of course, fallacious. No single senator has any power to affect the outcome of the legislative program unless he or she is taking a position that is in common with enough of the rest of the Senate to make a majority. Senators Brian Harradine and Mal Colston have a critical role only when the ALP, Greens and Democrats are united in their opposition to a government measure. The united opposition group in such circumstances represents a democratically elected majority against the government measure. In the current controversy over the goods-and-services tax, it is clear that both Colston and Harradine will have no influence at all if the government is successful in achieving a rapprochement with the Democrats. The government will then have achieved majority support, and Harradine and Colston will be irrelevant.

The thing to remember is that any single Liberal, National or Labor senator could be pivotal in the case of a close vote. In the 1970s, when senators on the conservative side were less bound by party discipline, they often used their power across the floor to achieve the same apparent dominance in the decision making process as Colston and Harradine. There seems to me nothing undemocratic or indeed undesirable in that circumstance.

Nothing that has occurred since I wrote the above has lessened my concerns; indeed, they have heightened. I referred in the article to the position in Western Australia with respect to its upper house of parliament. Recently, in an interview published in the *Australian* on 29 June 1999, the Deputy Leader of the Liberal Party in Western Australia, Colin Barnett, was quoted as saying that he wanted to abolish the Western Australian upper house. His reported view was that two houses of parliament were probably a luxury the state parliament could not afford in the context of growing financial pressures and increasing battles with the federal government. Coming from a member of the state parliament in Western Australia who has my respect, this is a sobering reminder of how the exigencies of day-to-day politics and changes of political fortune can affect judgments about institutions.

This report in turn reminded me of another Western Australian example of how structural issues are construed in straight political terms. In my pre-parliamentary days, I remember discussing what I saw as the gross gerrymander of the Legislative Council with one of the Western Australian Liberal Party members I most respected, subsequently a fine state Attorney-General. I asked, 'How do you justify these electoral arrangements?' The reply, seriously delivered and I am sure seriously meant, was, 'Fred, it stops socialism.' I suppose the unspoken text was 'whether the people want it or not.'

If you are trying to find out what sort of institutional structures best serve the national interest, to whom do you listen? Do you listen to someone who at one point claims that a constitutional amendment to require simultaneous elections for the Senate and House of Representatives would make the Senate 'a rubber stamp' of a socialist, centralistic Labor government[3] and less than three years later supports the same amendment as central to good government? I suspect not.

Would you take any notice of someone who in 1974 supported the proposition that the real effect of such an amendment was to juggle with the terms of office of the senators in order to make the Senate a rubber-stamp of the House of Representatives? Someone who suggested that such a dangerous law would vitally affect the parliamentary system, cut out the constitutional independence of the Senate, and open the way for progressive reduction of its powers,[4] yet who claimed, after three short years, that such a change was 'a simple matter of commonsense'?[5] You would probably treat that person's views with caution.

And would you be satisfied with an explanation that included saying 'if we all are to be men of absolute consistency it seems to me that we will never make progress with constitutional change and reform?'[6] Probably not.

If I have correctly judged your response to my rhetorical questions, there is no point in my proceeding further, as the person I am referring to is me. I am one of the majority of Liberal and National senators and members of the House of

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[3] The Case for No, Constitution Alteration (Simultaneous Elections) 1974, p. 5.

[4] ibid., p. 6.

[5] The Case for Yes, 1977, p. 3.

[6] *Commonwealth Parliamentary Debates (CPD)*, 24 February 1977, p. 426.

Representatives who, between 1974 and 1977, performed that backflip. As the late Senator Ian Wood put it in 1977, 'I have come to the conclusion that there must be sufficient acrobats on the Government side of the chamber today to make a really first class circus.'[7] This description of my own gyrations on a significant constitutional issue illustrates the central problem in this debate about proportional representation. The arguments of those actually undertaking the critical and difficult task of providing good government are arguments of time and circumstance. In their proper anxiety to achieve currently perceived good ends, any institutional constraint seems an obstruction of good government—their good government.

This reality clouds any debate about institutional structures and places a special responsibility on non-participants in the political side of the parliamentary process to separate out the permanent issues from the issues of the day. It also suggests that there are techniques and tools beyond immediate partisan political debate that must be used in the pursuit of truth. In the case of my own cited inconsistency, and that of most of my colleagues of that time, the Constitutional Convention that operated in the interval between 1974 and 1977 enabled the examination of issues away from the immediate hurly burly of adversarial politics, and produced a cross-party recommendation against our 1974 position. That Convention reflected the judgment of my morally upright older sister who, in response to my attempt to explain my change of advocacy, told me not to bother as she had always thought my 1974 position was wrong. One can only conclude that while serving politicians deserve our respect, if not our gratitude, we should maintain a healthy scepticism about their immediate views on issues of constitutional and institutional reform.

Further examples abound. In the endlessly contentious area of the Senate's role in dealing with money bills, there are striking examples of shifting political judgments. As Opposition Whip in the Senate when the Senate delayed the Appropriation bills in 1975 and brought about the dismissal of the Whitlam government, I was aware of how wickedly unprincipled and even unconstitutional many Labor Party supporters thought that Senate action to be. For me, that period in the Senate ranks with the confrontation between the Western Australian state government and the Aboriginal people at Noonkanbah in the late 1970s as the time of greatest social soul-searching and examination of principle. Yet what were the precedents set by those who were most offended by our actions? The answer to that question can be found in *Odgers' Australian Senate Practice*, which records that:

> … on 18 June 1970 (SD, p. 2647) the then Leader of the Opposition in the Senate (Senator Lionel Murphy, QC, Australian Labor Party) said:
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> The Senate is entitled and expected to exercise resolutely but with discretion its power to refuse its concurrence to any financial measure, including a tax bill. There are no limitations on the Senate in the use of its constitutional powers, except the limitations imposed by discretion and reason. The Australian Labor Party has acted consistently in accordance with the tradition that we will oppose in the Senate any tax or money bill or other financial measure whenever necessary to carry out our principles and policies. The Opposition has done this over the years, and, in order to

[7] *CPD*, 24 February 1977, p. 414.

> illustrate the tradition which has been established, with the concurrence of honourable senators I shall incorporate in Hansard at the end of my speech a list of the measures of an economic or financial nature, including taxation and appropriation bills, which have been opposed by this Opposition in whole or in part by a vote in the Senate since 1950.
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> Addressing himself to the Appropriation Bill (No. 1) 1970–71, the then Leader of the Opposition in the House of Representatives, Mr E.G. Whitlam, QC, said on 25 August 1970:
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> Let me make it clear at the outset that our opposition to the Budget is no mere formality. We intend to press our opposition by all available means on all related measures in both Houses. If the motion is defeated, we will vote against the bills here and in the Senate. Our purpose is to destroy this Budget and to destroy the Government which has sponsored it. (HRD, p.463.)
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> As foreshadowed by Mr Whitlam, the Australian Labor Party in the Senate voted against the third reading of Appropriation Bill (No. 1) 1970–71 and also against the third reading of the Appropriation Bill (No. 2) 1970–71; the voting on the first bill was 25 Ayes and 23 Noes and on the second bill 24 Ayes and 23 Noes.[8]

My final example of the shifting sands of partisan politics on constitutional issues comes from the Victorian treatment of its Auditor-General. It is well known that because of the changes instituted by the Kennett government, the office of Auditor-General 'is vastly diminished, stripped of its capacity to conduct its own audits'.[9] Yet the Auditor-General had played an important role in exposing the financial mismanagement of the Cain and Kirner governments. After winning the 1992 election, Jeff Kennett said: 'Mr Baragwanath and his officers deserve the full support of the parliament and public of Victoria for having the courage to carry out their jobs without bending to pressure.'

So, where does all this leave us? Clearly proportional representation in the Senate is not an absolutely essential element of Australian democracy. We had a democracy before it was introduced. Whether we keep proportional representation requires a judgment about whether we have a better functioning democracy with or without it.

No-one is likely to advocate the return to a virtual winner-takes-all approach. The real issue for today is whether we ought to change the system to restore a legislative duopoly to the Coalition and the Australian Labor Party. The danger is that the traditional duopoly of the political system will use its numbers to legislate away the more diverse representation of Australian viewpoints in the Senate that proportional representation allows. The major parties have the power to do it, and the drift of the latter part of my paper is that, in their own short-term interest, they might combine to do so.

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[8] *Odgers' Australian Senate Practice*, 8th edition, Canberra, AGPS, 1997, p. 96.

[9] Peter Barber, *West Australian*, 31 July 1999, p. 16.

They will get plenty of support from the constitutionally illiterate if they do. The response of the Australian Chamber of Commerce and Industry (ACCI) to the amendment of the goods-and-services tax legislation is one recent example of the short-termism of most of the participants in the debate. The *Australian Financial Review* reported the ACCI as saying:

> 'Senate reform is something on our agenda, we are looking for constructive suggestions … and we are doing some in-house work,' ACCI chief executive Mr Mark Paterson said. He said the fact that a major party could be elected on a specific reform platform then find itself unable to implement the measure means 'we need to re-examine our processes of government.'
>
> 'If everyone can claim equal and opposite mandates, there is no incentive for a major party to go to an election telling the truth about plans for reform,' Mr Paterson said.
>
> 'The Democrats haven't been a check or a balance, they have fundamentally altered the policy the Government took to the election and as a result we have a second best outcome.'[10]

The icon economy in this new globalised world is, of course, that of the United States. Perhaps the ACCI should ponder on how the United States can succeed in this fast-moving world economy when the legislature is completely independent of the executive government and executive gridlock is often a fact of life.

The saviour of the more democratic Senate, that is, a Senate which is more representative of how Australians actually vote than the House of Representatives, may be the shortness of what is short term for the major parties. Labor in opposition knows that until the next election at least it can be a real player in the legislative process rather than a mere carping critic in the present Senate alignment. A coalition in opposition would know the same. Any opposition, therefore, might decide to maintain support for the status quo along with the minor parties, which can be expected to do so as it is in their interest.

The continued support from a significant proportion of voters for a Senate that is not controlled by a government also suggests there may be a backlash at any attempt to reduce the value of votes cast against a government legislation hegemony. Lots of Australians want to see both John Howard and Kim Beazley, and indeed any prime minister, subject to legislative checks and real parliamentary scrutiny beyond the tired theatre of question time.

Perhaps more of the media will follow the lead of Perth's daily newspaper, the *West Australian* and argue, 'It is not our parliamentary institutions or voting systems that need to change, but the behaviour and attitudes of politicians.'[11]

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[10] *Australian Financial Review*, 8 June 1998, p. 5.

[11] Editorial, *West Australian*, 7 July 1999.

In the end, what senators do with their power will probably determine how vulnerable the present Senate is to gerrymander. A Senate that appears to struggle with the moral basis of tax measures; to struggle with the impact of taxes on families under pressure; that tries to come to grips with the difficult balance between environmental values and economic growth; that offers opportunities for citizen participation in the legislative process; and that offers remedies for those maligned under privilege may well command regard, if not affection, in an otherwise loveless political landscape. With such regard, 'reforms' that are a gerrymander may well be too expensive in terms of electoral support for even the most self-justifying major party.

These comments should not be construed as an attack on political parties. Parties are not an unfortunate graft on to our system of government. The Westminster system depends on a stable party-based majority to form government. In addition, the fundamental democratic element of being able not only to sack a government, but to install a new government, also based on a stable majority, means that unless and until we move to an elected non-parliamentary executive we need reasonably disciplined parties to maintain both the stability of government and the capacity to get rid of a government. These are features of our democracy of which we are properly proud. The electoral disdain for disunity within parties further emphasises the party unity that makes the House of Representatives increasingly irrelevant as a legislative chamber and a chamber that calls government to account.

The Senate's relevance as a legislative and checking body does not arise from the moral superiority of senators over members of the House of Representatives. An examination of the origins of senators would disclose that a large proportion of them are what a critic might call 'party hacks'. Many, including me, entered the Senate after long periods of service to their party organisations. Out of individual dross comes parliamentary gold simply because of the different party structure proportional representation gives the Senate. Change the voting system and we risk having two versions of the House of Representatives, which does not seem an advantage to our democracy.

I conclude this paper with another personal example of how quite proper rules relating to the operation of the Westminster system can inhibit sensible parliamentary action that is in the public interest and in the interests of a free society. It is my final reminder of what we gain by Senate independence—an independence best bolstered by proportional representation. After three years in the Senate in the mid-1970s, I formed the view that there was a generational shift. Older senators, of whom Sir Reginald Wright was an example, read through complex legislation and identified matters needing the Senator's attention. It appeared to me that the new generation of senators was less inclined to this aspect of our work. In a speech in February 1978, then in a formal motion later in the same year, I suggested that we should use the example of the long established Regulations and Ordinances Committee to produce a similar Senate mechanism for examining substantive legislation against a checklist of criteria. A Senate committee undertook consideration of the proposal. Shortly after the committee commenced its consideration, I was appointed to the ministry and as a result left the committee and its deliberations to others. In due course, it reported in favour of my proposition. I then sat in the Fraser Cabinet room as a non-Cabinet minister and participated in the discussions of the proposition that we have this committee. I was put in the embarrassing position of having to go into the Senate to

defend the government's position against the committee I had advocated, on the grounds that it would slow down the legislative process. I was pleased to find that senators were not terribly impressed by the executive government's decision. They took it into their own hands to establish the committee, and did so, not at the behest of, or with the approval of, the executive government, but against its objection. I regard my role in the matter as perfectly honourable, but to any onlooker rather ludicrous. Without Senate independence, such silliness would prevail.

An interesting aspect of the defence of proportional representation is that its maintenance is really dependent not only on the minor parties that benefit from it, but also on support from at least one of the major parties. To adopt Don Chipp's parlance, this is a circumstance where only the bastards can keep the bastards honest. I hope that they will do so, and that a system of proportional representation that permits the diversity of political viewpoints within the Australian community to be adequately represented will be maintained.

12

The Contribution of The Greens (WA) to the Australian Senate

Dee Margetts

The sheer quantity of their Senate contributions gives an indication of the range of issues which the Greens (WA) have had to deal with over the years. The Greens (WA) operate according to four basic principles or 'pillars'. These are ecological sustainability, peace and disarmament, social justice and participatory democracy.

The principle of peace and disarmament indicates that we would take a close interest in both domestic and foreign defence and security issues, which has certainly been the case over time. Contributions have been via committee work, questions, motions and speeches. It surprised me to realise how little foreign policies were questioned between the major parties. With some limited exceptions, the foreign affairs line was accepted, even when many sources within the world community held quite a different view of Australia's position. Defence policy usually has the bipartisan support of the major parties. It is thus of great annoyance to other committee members when someone like me refers to evidence of those who hold a different view or writes a minority report on such issues as the training of overseas forces by the Australian Defence Force because of human rights considerations—or even questions that defence exports should be subsidised to promote growth as an export industry.

Ecological sustainability and social justice have also involved a great deal of committee work, but including these principles in the legislative process has meant analysing the fine detail of legislation to see not only what it contains but what options governments are ignoring. The so-called 'economic rationalist' agenda has put corporate profitability before economic or social sustainability. Tracking through these measures and policy changes has involved an extraordinary frustration when major policy changes are shoved through with almost no debate or scrutiny other than from minor parties. Policies to promote 'free trade', for instance, have had bipartisan support from the two major parties. Once again it shocked me to know how little was

understood or even discussed within Labor or Coalition ranks about the General Agreement on Tariffs and Trade (GATT), the World Trade Organisation (WTO), and the effects of these agreements and international bodies. Very few senators, other than the Trade Minister or Shadow Minister were even in the chamber in 1994 for the debate on the WTO, even though few trade bills have had more effect on Australia's domestic life, as well as the economy.

It was a Labor government which took the first steps to abolish pensions as a right, supported by the Coalition. It was a Labor government which began down the labour-market deregulation road with enterprise bargaining (which quickly moved on to individual contracts and de-unionisation when the Coalition took power). Standing up for the rights of migrants, refugees, Aboriginals or the young unemployed is not, it seems, a populist way to win votes. Over my six years in the Senate I have witnessed a range of measures from either side where basic human rights were subsumed for economic or other reasons. On these occasions, to amend or oppose legislation did not win majority support in the Senate, but it was important, I feel, that the voice of humanity was not totally silenced.

It is, of course, not enough to accept at face value what governments say about their own legislation. Few people take the time to follow the committee stages of legislation, but that is where the content and impacts of legislation begin to become apparent. The fact that governments of either side over the last fifty years have known that their legislation was likely to be scrutinised in some detail meant that they had to take greater care in drafting.

The fourth Green pillar, participatory democracy, is what has driven us to try to open up the Senate process to give greater access to the community. I remember the first meeting Christabel Chamarette and I had with Paul Keating in 1993 after my election. It took about five minutes for the pleasantries to turn to threats. The reason for the outrage? Christabel had put forward a motion to require that the Senate, and thus the community, have time to consider new legislation. Otherwise known as the Senate 'cut-off' motion, it required bills to be automatically adjourned if insufficient time was available for scrutiny, unless a government could provide a good reason for urgency. Keating called it a 'constitutional impertinence' and started talking of double dissolution. We remained unimpressed. The motion was carried, along with a number of other changes that Christabel helped instigate with the support of the majority of the Senate, including the Coalition Opposition at the time. These included changes to ensure committee structures better reflected the make-up of the Senate.

Giving the Senate time provides the community with a valuable window of opportunity. Governments generally do not like this level of scrutiny and we have frequently heard the chant of 'mandate' from governments in recent years when any of the details or unexplained impacts are questioned. Few people in the wider community accept that the party which scrapes over the line on preferences in the House of Representatives has the right to a three-year elected dictatorship. Most people would recognise that even when a political party won an election on a particular platform, the average voter had not handed them a blank cheque for its entire program. They expect members, within their political party principles, to represent their electorates.

Illustration courtesy of Jenny Coopes

The greater democratic outrage is the party block voting system, not the ability of the Senate to amend or indeed reject any aspect of the government's legislative program. Let us suppose that a party went to an election with a particular position on tax or spending. We all know that the gap between platform promises and legislative drafting is often wide. Yet in recent times, we have seen a succession of governments complaining about amendments by the Senate, no matter how poorly considered their actual legislation might be.

The legislative program is not, however, the only problem that the Greens have had to deal with over the years. There is a strong motivation for governments to play their cards close to their chest with the minimum of scrutiny. The Greens have been strong and consistent in issues of the accountability of executive government. There is a particular problem in the context of the increasing privatisation or corporatisation of government functions. Governments are using the excuse of 'commercial-in-confidence' more and more, even where large amounts of public money is involved.

The Administrative Appeals Tribunal has clearly signalled, in recent rulings, that many of these excuses are unsustainable. The Senate estimates process has been very important in bringing forward some of these important accountability issues. We might get to the ridiculous situation where a minister will refuse to answer any questions related to his or her portfolio because of outsourcing. Both of the major parties have moved in this direction—it is the cross-benchers who have been consistent in calling governments to account.

Another related issue is the recent blurring of the separation of powers. This is the principle that the parliament, the judiciary and executive government should remain separate. Budget cuts and corporatisation of government programs and services have threatened this separation. These are not popular or well-worn issues—I mean, who cares if the budget is cut to the parliamentary research service or the parliamentary committees? Parliamentarians are often portrayed as having their snouts in the trough anyway, so who is going to worry? The problem occurs when permanent staff are replaced by departmental personnel (under the control of executive government) or by private contractors (who do not want to ruffle too many feathers as they want more work in the future). Even the independence of the Attorney-General's department was questioned during one inquiry because of outsourcing and the difficulties created with real or potential conflicts of interest.

It is vitally important that committee or research staff have the ability to give advice without fear or favour. Minor parties like the Greens are acutely aware of these problems and I have spoken out about them on a number of occasions. One very specific example I can give of this problem occurred when the Joint Foreign Affairs, Defence and Trade Committee took on a serving military officer to its Defence sub-committee secretariat. General budget cuts and other circumstances led to a situation in which the officer was acting as the secretary of the Defence sub-committee. On one occasion, the officer appeared in uniform during a defence committee inspection visit to a defence establishment. When you see a defence committee secretary saluting other officers, it spells out the problem. Effectively, the secretary was still a serving military officer. I brought this to the attention of parliament and there have been

changes implemented, but only so as to give the official position to another already busy senior secretariat member.

What concerned me was that committee members from the two major parties were unable to acknowledge that a problem even existed. This could relate to the fact that the House of Representatives really does not have a clear separation of powers in its committee system. Ministers can direct or block committee inquiries and staff quite frequently are seconded from departments for seemingly practical reasons. I cannot over-state the importance of maintaining the independence and professionalism of the Senate committee system, and I can only hope there will be others speaking out in future against these kinds of encroachments. When Senate inquiries are one of the few ways left for the community to have a say in the way our country is governed, most people would like to be reassured that outcomes will not be designed simply to please the government of the day.

Another issue I have encountered is the ability of a minor party senator, like myself, effectively to represent a community view even though it may not be the view supported by both major parties. On some occasions, it is best to circulate a minority report. On others, it may be putting yourself and those you represent in a position to be unfairly attacked if you are forced to circulate your report early to all other committee members. I won this one too—in the Senate chamber.

Another area of committee work where the Greens (WA) have played an active role are the Senate estimates. There have been many occasions when Green questions have been met with hostility by the minister of the day and often other committee members. Some of these lines of questioning have later proved to have wider public interest and significance. Examples include money spent on training troops from other countries who later engaged in human rights abuses, such as in Thailand, Indonesia or Papua New Guinea; the Collins Class submarine debacle and other defence spending issues; and, of course, environmental issues like the Regional Forest Agreement.

There are other committee processes where the frequent consensus of the two major parties makes the role of parties like the Greens vital. If I return to my pet topic of trade and competition policy issues, an area in which legislation has just been introduced, it is not unusual for a government to rush through the whole process perhaps before its own party catches on to the details of what it is doing. The WTO bills that I mentioned earlier had only one or two hearings as did the National Competition Policy enabling legislation. On these occasions, if you do not want to be left with just ‘the usual suspects’ giving evidence, you have to get on the phone and advise groups you know will be interested that the process is happening and explain how they can get their views across.

There have even been some occasions when, behind closed doors, Nationals have urged us to stand strongly against the position of the Coalition in committees and support legislative amendments because they had been done over in the party room! The frustration on these occasions has been palpable to all except some of the old party politicians!

Other examples include the nuclear issues that are of concern to a large number of people in the community. Uranium mining and exports, Lucas Heights, nuclear ship

visits, the nuclear alliance with the United States, nuclear testing and nuclear proliferation are all issues that have been given an extra edge over the years by the work of The Greens (WA). Many of these issues would not have been debated at all if we had not pushed for answers.

I have often been asked where the Greens get the depth and extent of the information that we use in our work. The answer is simple. We would not have survived without the wider green community, and a whole range of individuals and groups who would never be identified as part of the Greens' electorate. One way the party operates is to check with those people likely to be most affected by government policy decisions as to their opinions, and to seek specific technical advice from them. You would be surprised how many people have been responsible for speech notes that have been delivered by me at some stage in the Senate! I was asked by a senior DETYA official on a plane one day where we got our information for questions as he had noticed how often I asked about education and training issues. I explained the network system of two-way communication with the wider electorate. He asked how we controlled that flow of information and I replied that we had no intention of controlling it! He blanched. It is not a method of operation that is well understood in politics.

In recent times the Western Australian Farmers Federation (WAFF) was camped in our office working up the details on the wheat bills. We also worked with the WAFF on important trade and competition policy issues. It was not that we did not understand that the WAFF was not our natural electorate and it was not that we did not understand that on a number of other important issues, such as native title, we might take an opposite line. It simply reflected that we have never demanded that lobbyists be Green supporters before we took up a cause that we felt to be just and in line with our own principles.

That is what community participation in decision making has meant to us at the Senate level. It does not mean that we are necessarily going to get re-elected and, of course, I did not (although the Green vote in WA actually increased from the last two elections).

The work in which the Greens (WA) has been involved in the Senate is one example of why we cannot allow the major parties' attacks on minor parties and independents to come to fruition by way of legislative or constitutional attacks to the current system of proportional representation. In my six years in the Senate, I have witnessed many threats to parliamentary democracy. The threat of changes to prevent minor parties and independents being elected who can amplify the voice of the community, which the major parties may not hear, is real. If you value the community voice, you have to stand up to the bullies!

13

The Representation of Small Parties and Independents

Campbell Sharman[*]

The Senate has become the active parliamentary chamber it is today largely as a consequence of the representation of minor parties. While the two large parties have supported major changes to Senate procedures and are the major players in the day-to-day operation of the Senate, it has been the existence of minor party and independent senators that has given the Senate its distinctive role. It is not just that the party or parties in government do not control a partisan majority on the floor of the Senate, but that, for most of the period since 1955, governments have had to gain the support of one or more independent or minor party senators to pass measures through the Senate.[1] From this lack of government control has sprung the independent role of the Senate in scrutinising legislation and in holding governments publicly accountable through the use of an extensive committee system. To the extent that this situation has been created by the system of proportional representation (PR) for the election of senators since 1949, PR has been the agency through which the Senate has been transformed. Quite how PR and minor party representation achieved this feat is the topic of this paper.

If the Opposition party in the lower house, the House of Representatives, had majority representation in the Senate, the government would be denied control of the Senate, but the dynamics of the legislative process would be very different from the situation in which minor parties hold the balance of power. An Opposition-controlled Senate would be heavily influenced by the party strategy of the Opposition in the House of

[*] I am grateful for the comments offered on this paper by conference participants.

[1] On occasion, the government has been supported by the major opposition party but, given the nature of opposition politics in a parliamentary system, this is infrequent. Even when it occurs, neither government nor opposition parties wish to publicise the event.

Representatives. The Senate would be in danger of becoming a pawn in the adversarial and obstructionist politics that characterise the lower house. There would, in other words, be little pressure to support the Senate as an institution with a continuing role in scrutinising government separate from the short-term interests of the Opposition. The periods when the Senate has been controlled by the Opposition—during, for example, the Scullin government from 1929–31,[2] the first post-war Menzies government from 1949–51,[3] and the dying days of the Whitlam government in 1975[4]—strongly support this conclusion.

Minor party and independent senators who hold the balance of power are not more virtuous or more public spirited than other senators, it is just that they have an interest in establishing procedures to enhance the long-term effectiveness—and hence political visibility—of the Senate. In this respect, the interests of minor parties and independents correspond with a broader public interest. The maintenance of a legislative body that has a role to play that is distinct from the partisan struggle to hold or gain government means that a wider range of interests can be involved in the legislative process than those identified with the government or the opposition. Much of the lobbying to influence government legislation is undertaken in private with ministers, advisers, and the Public Service. An active and independent legislative body like the Senate can ensure not only that this advice is made public, but that the views of a much wider range of interests are aired than those within the charmed circle of easy access to government. It also means that, for key areas of legislative policy, there can be informed public debate that can have an effect on the shape of legislation rather than a series of one-sided exchanges with a government that sees no reason to compromise.

The repertoire of Senate procedures together with the experience of using these procedures, has taken a long time to reach the present stage. The Senate debate in 1999 over the goods-and-services tax (GST), for example, represents a good example of detailed legislative scrutiny and creative compromise on legislative policy engendered by the representation of minor party and independent senators, but it also reflects the accumulation of many years of experience in devising procedures, both formal and informal, to cope with the negotiations required. The excellent case study by Liz Young of the passage of the 1993 Budget[5] provides another example of the role of minor parties in the legislative process, together with an examination of the development of the range of strategies open to such parties and independents in the Senate.

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[2] Geoffrey Sawer, *Australian Federal Politics and Law*, Canberra, Australian National University Press, 1963, pp. 1–38.

[3] Graeme Starr, ed., *The Liberal Party of Australia: a Documentary History*, Melbourne, Drummond/Heinemann, 1980, p. 188.

[4] Paul Kelly, *November 1975: the Inside Story of Australia's Greatest Political Crisis*, Sydney, Allen & Unwin, 1995, chapter 6; Alan Reid, *The Whitlam Venture*, Melbourne, Hill of Content, 1976, chapter 16.

[5] Liz Young, 'Minor parties and the legislative process in the Australian Senate: a study of the 1993 Budget', *Australian Journal of Political Science*, vol. 34, no. 1, 1999, pp. 7–27.

Minor parties in the Senate have fundamentally altered the dynamics of the legislative process in the Commonwealth parliament. This is the case whatever the political preferences of the minor party and independent senators involved. The fact that there are players in the legislative process independent of the two partisan blocks that dominate the House of Representatives, coupled with the fact that these players hold the balance of power in the Senate, has meant that the position of the Senate has been transformed since the early 1960s. It is now an independent and highly effective component of the Commonwealth legislative process, and the focus for a wide range of political activities generated by its position to shape legislation and scrutinise government activity.[6]

Both the necessary prerequisites for this change—the representation of minor parties and their ability to hold the balance of power—flow directly from the adoption of PR.

Minor parties and the adoption of proportional representation

As John Uhr has shown, the motives of the Labor Party government in adopting PR for the Senate in 1948 were mixed, and the topic had been in the public domain and debated in Australia since before Federation.[7] But, whatever the intent of the Chifley government in accepting PR for Senate elections from 1949, the creation of a forum for an active role for minor parties was not one of them. This raises the question of whether the effect of PR in enabling the representation of minor parties in the Senate and in creating the likelihood that they would hold the balance of power was simply the result of a massive miscalculation. In other words, was the representation of minor parties a reasonably foreseeable result of adopting PR for the Senate, and could their pivotal role in the control of Senate majorities have been predicted?

The second aspect of the question is easier to answer than the first. Given that support for Australia's two large party groupings, the Australian Labor Party and the Liberal and National parties was, as now, fairly evenly divided across all states, the effect of PR would be to reflect that balanced support with a similar pattern of even representation between these two party groupings in the Senate. If minor party or independent senators were elected, there would be a good chance that they would hold the balance of power. This means that the critical question is whether the election of such senators should have been seen as likely. In the light of the evidence available in 1948, a strong argument can be made that the representation of minor parties in the Senate other than the Country Party (now the National Party) could not have been predicted.

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[6] R.G. Mulgan, 'The Australian Senate as a "House of Review" ', *Australian Journal of Political Science*, vol. 31, no. 2, 1995, pp. 191–204. See also John Uhr, 'Generating Divided Government' in Samuel C. Paterson and Anthony Mughan, eds, *Senates: Bicameralism in the Contemporary World*, Columbus, Ohio, Ohio State University Press, 1999.

[7] John Uhr, *Deliberative Democracy in Australia: the Changing Place of Parliament*, Melbourne, Cambridge University Press, 1998, pp. 108–115. Also note G.S. Reid and Martyn Forrest, *Australia's Commonwealth Parliament 1901–1988: Ten Perspectives*, Melbourne, Melbourne University Press, 1989, chapter 3.

The justification for this conclusion is that the quota required for winning one of the five seats available at each half Senate elections after 1949 was 17 per cent of the vote in each state. This was more than any minor party other than the Country Party had won at Senate elections in any state in the previous twenty years. The two exceptions were a combined vote of 19 per cent for independents in South Australia in 1937,[8] and a vote of 20 per cent for Non-Communist Labor in New South Wales at the 1940 Senate election. A near exception was the 15 per cent vote for Federal Labor in New South Wales in 1931 as a consequence of the split in the ALP in that state. Excepting the Country Party again, the vote for most minor party and independent candidates was far less than 10 per cent and highly variable between elections. There was no evidence of a pool of disaffected voters who might use the Senate to vote for any party other than the established ones. The New South Wales experience might have provided a warning—that a split in a major party might create the circumstances for the threshold of representation to be crossed. But the divisions in the New South Wales branch of the ALP had healed by 1948 and there was no immediate prospect of further splits.

The Country Party provided another possible exception, but one that would not have worried the ALP government in 1948. The Country Party's vote in most states at Senate elections had been well below the quota of 17 per cent, a fact likely to encourage the party to seek joint tickets with the Liberal Party. If one of the incidental effects of PR was to create inter-party tension between the Country and Liberal parties over such joint tickets, this would have been viewed as a bonus by the ALP. And, in any event, the Country Party was a special case since it was a long-established party that usually had a tight coalition arrangement with the Liberal Party. This meant it was not a minor party for the purposes of control of the Senate.[9]

The only problem with this analysis might be that a small party or independent candidate would not need to get the quota or 17 per cent of a state-wide vote in first preference votes. The candidate would have to gain enough first preference votes to stay in the count, but the remainder, perhaps as much as half the quota, could come from the second and subsequent preferences of other candidates. The effective threshold for representation might be closer to 8 per cent of the first preference vote, with the implication that more parties might have a chance of representation under PR.[10] Even so, taking the 20 or so years before 1948, and ignoring the Country Party, only Social Credit in the South Australian Senate election of 1937 and the Protestant People's Party in New South Wales in 1946 would be added by reducing the threshold to 8 per cent. Neither of these parties maintained their vote at anywhere near this level at ensuing Senate elections.

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[8] The sources for electoral data in this article are Colin A. Hughes and B.D. Graham, *A Handbook of Australian Government and Politics 1890–1964*, Canberra, Australian National University Press, 1968 and supplements; and Australian State Government and Politics Project, Political Science Department, University of Western Australia.

[9] There have been occasions when the National Party has voted with an ALP government in the Senate, but these occasions have been few and far between, and have usually dealt with matters of direct concern to the party, such as the changes to electoral laws passed in 1984.

[10] Campbell Sharman, 'The Senate, small parties and the balance of power', *Politics*, vol. 21, no. 2, 1986, pp. 20–31.

Two other pieces of evidence could be mentioned. Tasmania had since 1909 used a PR system for the election of members to the state's lower house, the House of Assembly, that was very similar to the system proposed for the Senate in 1948, and there had not been a proliferation of minor parties.[11] Generalising from the Tasmanian experience might be unwise, but it undercut any simple assertion that the long-term use of PR led inexorably to the representation of small parties. In addition, the brief experience of New South Wales with PR for the election of the state's Legislative Assembly from 1920 to 1925 (three elections) had not led to representation of minor party and independent candidates that differed greatly from the pattern of the ensuing 20 years.[12] All in all, it would have been reasonable to assume that no new minor party and independent senators would be sitting in Canberra after 1949.

Minor party representation after 1949

The question of what explains the emergence and persistence of minor parties is a contentious one in political science, and three elements are involved. The first is broad social and political change and the emergence of new issues that existing parties have not accommodated, thus giving a new party the chance to articulate a distinctive political agenda. The second is the occurrence of political events that trigger the formation of a new party or splits in an existing party. The third is the effect of the electoral system in encouraging the formation or persistence of small parties, by making parliamentary representation an avenue for pursuing influence. It is the contribution of the last of these that is the concern of this paper, since it is the only one that can be anticipated by the designers of an electoral system.

As previously noted, there was reason to believe that the quota for gaining representation under the PR system adopted for the Senate in 1948 was sufficiently high to exclude minor parties except in the special case of the Country Party. The experience of the first three Senate elections with PR in 1949, 1951 and 1953 confirmed this belief. Of the three elections, those of 1949 and 1951 had quotas below 17 per cent—1949 because the enlargement of the Senate which occurred at the same time as the first use of PR meant that seven senators had to be elected from each state instead of the usual five, and 1951 because it was a double dissolution election at which all 10 Senate seats for each state were open for election. Even with the quota reduced to 14 per cent in 1949 and 9 per cent in 1951, no new small party or independent Senate candidate was elected. Indeed, none such minor party gained more than 6 per cent of the state-wide first preference vote in any state for the first three Senate elections with PR.

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[11] W.A. Townsley, *The Government of Tasmania*, Brisbane, University of Queensland Press, 1976, chapter 3.

[12] See *New South Wales State Election Series*, Sydney, New South Wales Parliamentary Library, and Department of Government, University of Sydney, 1995–1998. (Election years from 1920s to 1940s, various authors.)

The 1955 election marked a major change. The split in the ALP led to the creation of the Democratic Labor Party,[13] which gained 18 per cent of the Senate vote in Victoria and the first senator elected from a new minor party.[14] The DLP was not successful in the other states at the 1955 election although it gained 11 per cent of the Senate vote in Tasmania, 9 per cent in South Australia and 6 per cent nationally. But this new party continued to win at least one seat at four of the next five Senate elections between 1955 and 1970, the exception being 1961. It had between one and five senators in the Commonwealth parliament for a continuous period between 1955 and the collapse of the party at the 1974 election.

Whatever the mixture of social and political factors that explain the emergence of the DLP, it is clear that, once it secured representation in the Senate, a major threshold had been passed in the effect of PR on the Senate. Together with a senator who was elected as a member of the ALP and defected to the DLP, the Senate after the 1955 election no longer had a government majority, the balance of power being held by senators from a new minor party. The Liberal and Country parties had 30 of the 60 seats and needed the vote of one of the DLP senators to pass legislation through the Senate and control the business of the chamber. While the governing parties briefly re-acquired a majority in the Senate after the 1958 Senate election, and the Fraser governments of 1975 and 1977 controlled partisan majorities in the Senate, minor party and independent senators have held the balance of power in the Senate since 1955.

What caused this change? While the circumstances of the split in the ALP in 1955 might explain the election of a DLP senator from Victoria, why was there a long-term alteration to the pattern of representation in the Senate? Part of the answer is that the factors leading to the emergence of a new party can be different from those explaining its persistence. The political event of the split in the ALP created the DLP with sufficient support in one state to secure the election of a DLP senator. This gave the new party the ability to use the Senate as a forum for publicising the party's views, and raised the visibility of both the Senate and the DLP. When this was re-inforced by the dependence of the government on DLP senators for the control of the Senate, the DLP had a powerful lever to keep its policy agenda before the public. The conclusion is that, once a minor party had been elected to the Senate and had held the balance of power, a clarion call was sent to parties and voters that PR in the Senate could be used by a minor party with great effect to influence government policy. By the mid-1960s, enough voters were persuaded to view their Senate vote in this way to ensure that a steady stream of minor party and independent candidates were elected to the Senate. Whatever the explanation for the creation of the DLP, the persistence of the party over 20 years had a great deal to do with its ability to use its Senate representatives as a platform from which its message could reach the public.[15]

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[13] Initially under the name Australian Labor Party Anti-Communist.

[14] Robert Murray, *The Split: Australian Labor in the Fifties*, Melbourne, Cheshire, 1972.

[15] P.L. Reynolds, *The Democratic Labor Party*, Brisbane, Jacaranda Press, 1974.

At the same time, the Senate began to expand its repertoire of measures to scrutinise the government and challenge its legislative policy. This was driven in large part by an Opposition that was discovering the opportunities that the Senate provided to embarrass the government. In many respects, the ALP before 1972 was more enthusiastic about the possibilities of using the Senate as a way of enhancing executive accountability than the various minor party and independent senators themselves.[16] But the effect was to establish a symbiotic relationship between minor parties and the Senate—the greater the influence of minor parties in the Senate, the more visible the Senate became to the public and the more publicity minor parties got for their policies. The DLP had started a revolution in the perception of the role of the Senate and the potential of PR for reflecting the views of any minor party that could generate around 10 per cent of the state-wide first preference vote at Senate elections.

The dynamics of minor party representation since the DLP

With the collapse of the DLP in 1974, the polarisation created by the constitutional crisis of 1975 led to a short term decline in the share of the vote gained by minor party and independent candidates in 1974 and 1975 (see Table 13.1), even though there were two such senators elected to the chamber at both of these elections. But the political polarisation itself was a major factor in leading to the emergence of the next party to take advantage of the opportunities for representation in the Senate in 1977. The Australian Democrats claimed to be a centre party aimed explicitly at using their balance of power in the Senate to moderate the activities of government.[17] The demonstration effect of the DLP in the Senate, and the opportunities PR provided for minor party representation were clearly factors in the creation of the Democrats as well as their continuing existence for more than 20 years. Other important components included an awareness of the potential of the Senate electoral system and the role of the Senate in shaping legislative policy.

Over the years that have followed, the Democrats have been a party which, with only one exception,[18] has been represented only in upper chambers and has had no experience of executive power in either state or Commonwealth spheres. This has meant that the Democrats have consistently regarded the legislating and scrutinising functions of parliament as their overwhelming concern. This has distinguished them from the DLP as well as from the major parties. As far as the Democrats are concerned, there is an almost perfect match between their partisan interests and the perpetuation of a strong Senate free from control by either government or opposition majorities.

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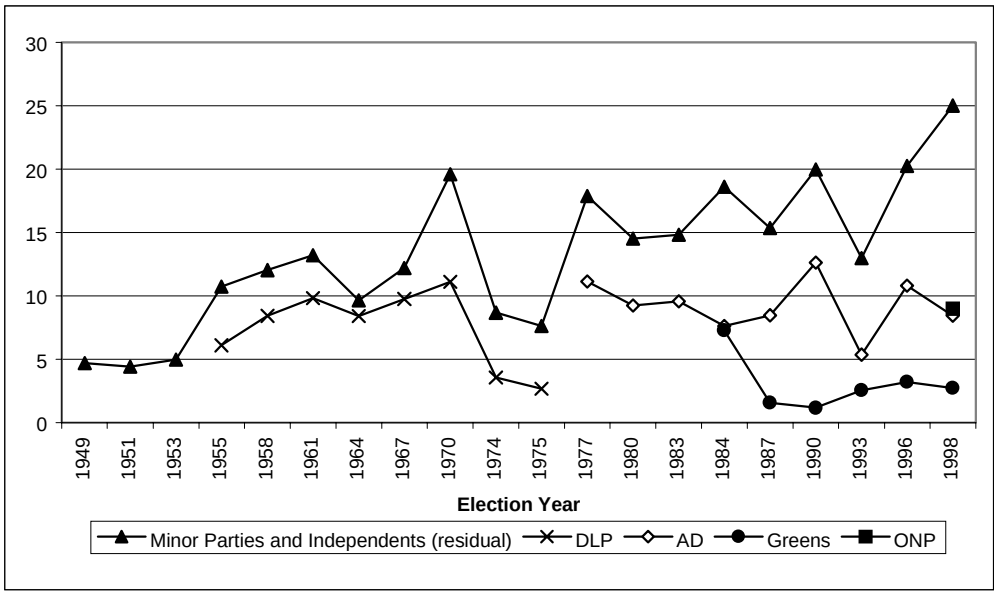
[16] G.S. Reid and Martyn Forrest, op. cit., pp. 178–179.

[17] John Warhurst, 'Don Chipp's New Party', in J. Warhurst, ed., *Keeping the Bastards Honest: the Australian Democrats' First Twenty Years*, Sydney, Allen & Unwin, 1997.

[18] The party won a seat at the 1977 and 1979 South Australian House of Assembly elections.

Senate, minor party and Independent vote, 1949–1998
(percentage of first preference vote)



This has been true of the other minor party and independent senators who have been elected since 1955. But while all would strongly support the role of the Senate as an autonomous legislative body, independent senators, in the nature of their position, have also had to work to maintain their regional and sectional support. Securing particular policy goals has often been as important to such senators as working to enhance the role of the Senate. In a similar way, the special concerns of those senators who have been elected to support green and anti-nuclear policies have required these senators to harmonise their concern to further their particular agenda with the need to participate in the wider work of the Senate.

The Senate has now reached a stage where the procedures for the participation of minor party and independent senators in the work of the chamber are well established. It is now taken for granted that the Senate works in a way that accommodates the fact that neither the governing nor the opposition parties will control a majority on the floor of the house, and that minor party and independent senators will play an important role in all aspects of the functioning of the house. This is not to say that all the battles have been won, but the culture of the Senate is now such that there is a presumption that there will be detailed and independent scrutiny of legislation, and that committees will be able to look into any matter that is politically salient, irrespective of the views of the government of the day. The establishment of such protocols has been possible only through the agency of minor party representation in the Senate.

The longer-term effects

The contribution of minor parties and independents to the revolution in the role and operation of the Senate since the early 1960s has been well documented,[19] but there

[19] R.G. Mulgan, op. cit., pp. 191–204. See also John Uhr, 'Generating Divided Government', op. cit.

are other effects that have attracted less comment. One has been the creation of a different set of partisan choices for electors at House of Representatives and Senate elections. Every state now has at least one minor party or independent senator. While minor party and independent candidates stand for election for the House of Representatives, their chance of success is very small and rests on highly idiosyncratic local factors, the most important of which has been a candidate's recent defection from one of the major parties. It is true that one of the ways in which minor parties can enhance their chance of electing candidates to the Senate is to swap preferences with one of the large parties.[20] This requires minor parties to secure votes in the lower house in order to bargain for Senate preferences, but this does not alter the fact that the contest in the lower house is principally about securing government, whereas the contest in the upper house is over the relative support for major and minor parties. In this respect, federal politics has two party systems, one for the Senate and one for the House of Representatives.[21] Even if the same parties are involved, the dynamics of competition and the pattern of representation are quite different, just as the dynamics of parliamentary politics are different in each chamber.

Another effect has been to inject a stronger regional component into national politics. While the Senate does not behave as a states' house in the sense that all the representatives from a state vote as a block irrespective of party affiliation, minor party and independent senators often have distinctive regional constituencies and use the Senate to bring to national attention their particular state-based concerns. Senator Brian Harradine is an outstanding example of a Senator who has used the Senate to further what he has seen as Tasmania's interests. Looking after their home state is something all senators strive for, but the representation of minor parties and independents has added extra vitamins to this process, and made it more open.

The growth in the visibility of the Senate has also had an effect on state politics. Members of state upper houses can see the Senate as a powerful example of the political potential that second chambers can have in the parliamentary process. It is no accident that, in reforming state legislative councils, PR has been adopted for three of Australia's five state upper houses,[22] and all of these currently have minor party members holding the balance of power.

The final effect is the one that is the hardest to pin down, but may well be the most important. The Senate provides a forum for the discussion of legislative policy and an opportunity for effective scrutiny of the executive that goes beyond partisan politics. This means that the polarisation between government and opposition that characterises most debate in the lower house is moderated in the Senate. This, in turn, can lead to a consensus style of politics in which compromise and the accommodation of different points of view are regarded as the normal way of doing business. This is both effective policy-making and good politics. The abrasive style of lower house politics has done much to bring parliamentary politics into disrepute. The Senate can do much to restore faith in the process of representative democracy. If this is so, the

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[20] Note Narelle Miragliotta, 'Trading Preferences: the Greens, Minor Parties and Representation in the Australian Senate', PhD Thesis, University of Western Australia,1999.

[21] Note R.K. Carty, 'Australian Democrats in Comparative Perspective', in J. Warhurst, ed., op. cit., p. 105.

[22] The Legislative Councils of New South Wales, South Australia and Western Australia.

adoption of PR and the representation of minor parties, whether foreseeable or not in 1948, has done more to enhance the operation of parliamentary democracy in Australia than any institutional change since Federation.

14

Reporting the Senate: Three Perspectives

Paul Bongiorno, Michelle Grattan, Melissa Langerman

Paul Bongiorno

The 31st of May 1990 was a historic day for the media and for the Senate. That was the day that a Liberal backbencher, Amanda Vanstone, managed to convince her own party and party leadership that now was the time to have the proceedings of the Senate televised. I am reliably informed that she was aided and abetted by the officers of the Senate who pointed out that $50 million had been spent on wiring the magnificent new building for television, and it seemed that the politicians or, more to the point, the government of the day, were extremely reluctant to use it.

I have no doubt that this historic day owed everything to the fact that proportional representation (PR) had succeeded in delivering real power to the non-government parties in the Senate. To my mind, it was a major advance in transparency and accountability. More to the point, it met a demand for news of the Senate. As 70 per cent of Australians tell pollsters that they use television news as their primary and almost exclusive source of information, to block this medium from covering the Senate in the way that it does best—with pictures and words—was a strange anomaly in the latter part of the 20th century.

Robert Ray, the Leader of Government Business in the Senate at the time, accused Vanstone and the Opposition of trying to shanghai the decision, and the government opposed the suspension of standing orders so that the motion could be debated. In her speech to the Senate that day, Vanstone pointed out that precedents had been set. For example, the United States House of Representatives allowed television in 1979, the US Senate followed in 1986, the House of Lords in the United Kingdom in 1985, and the House of Commons in 1988. Canada started to think about it fairly seriously in 1977, but took 10 years to implement it.

The interesting thing is that television became a mass medium in the late forties. It came to Australia in 1956, and to Canberra in the 1960s. Yet here we were in 1990—not only us but the United Kingdom and the United States—very reluctant to allow this medium to come into our parliament. (Just as an aside, the Soviet Union had no such problems. The Kremlin had allowed for a number of years their debates to be televised.)

Why was there this resistance? Vanstone told the Senate that the government knew that:

> … if the Senate does this, there is a full expectation that the House of Representatives will follow—as it should. That is where the rub comes … It is well known that Government members do not want the behaviour of their ministers in the lower House televised live nationally at Question Time.

As former Senator Bruce Childs has said, Labor was very concerned about Paul Keating's verbal pyrotechnics being broadcast into people's lounge rooms. Before the 1990 election, Senator Childs was a member of the Joint Broadcasting Committee, which consists of the presiding officers and people from both houses. That committee had met over a period of time and finally made a unanimous decision to televise parliament. That decision was conveyed to the leadership of both parties.

> The Labor government of the time was very concerned about it. They were worried that Paul Keating would be provoked during question time and that would go out into the lounge rooms of Australia. Therefore, there was great consternation among the government leadership as to what it should do about this unanimous decision of the committee that would be reported.
>
> While the government was agonising over what it should do, Andrew Peacock, the leader of the Liberal Party, was consulted and, fortunately for us, he decided that it was a Labor plot and opposed it. The significance of this was that it was just before an election. So we were able to sit back and go into that election without the threat of the televising of parliament.[1]

As an example of the kind of damage that was avoided, we could take the incident when Wilson Tuckey provoked Keating into outrageous pyrotechnics in February 1986, when, during a heated debate in the old house, he accused Keating of breaking a promise. It was a breach of promise case, and Keating's jilted fiancée was a woman called Christine. Keating became so incensed that he said, among other things, 'You stupid foul-mouthed grub. You piece of criminal garbage.' The uproar that followed received considerable coverage in the media. In those days, television could only show a still picture of Keating and play the audio of what he was saying. Even this was enough for questions to be raised about Keating's ability to hold high office in a robust democracy. Consequently Keating was desperate, and based on personal

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[1] Bruce Childs, contribution from the floor during the media session of the Representation and Institutional Change Conference, 6 August 1999.

conversations with him at the time, I would say anxious, to keep television away when parliament moved up the hill.

Bob Hawke, on the other hand, was a sort of preening prime minister, and he had no objections at all to television. He thought it should be allowed, so that people could see how wonderful he really was. The hard heads in the party thought—and knew—better.

The 'Christine' incident survived throughout the time Keating was in parliament. In 1990, Tuckey again provoked Keating simply by yelling out the name 'Christine'. This led Keating to accuse Tuckey of being 'a dog returning to his vomit', and accuse John Howard and the Liberals of being 'sleazebags' and 'scumbags'. He later defended his language along the lines that, while he was all for very robust political debate, Tuckey, who, in Keating's view, was aided and abetted by Howard, had hit well and truly below the belt, was in the gutter and deserved all he received.

This example explains some of the resistance to the introduction of television in the Senate. Interestingly, the majority in the Senate at the time was made up of Democrat and Coalition senators. When the government saw that the numbers were against it, it dropped its opposition; there was no division, and the motion was passed.

Another point worthy of note is that Vanstone had a very big battle with her own party about the matter. Several senators in the Liberal Party room were opposed to the idea of allowing television into the chamber, and her move nearly failed. At one stage, it appeared that some of the senior Liberals who were opposed to it had convinced Liberal leader John Hewson to stop Vanstone. But she persuaded Robert Hill, her leader in the Senate, that now was the time to make the move because Keating, as Treasurer, was attending an OECD meeting in Paris. Had he been in Canberra, he might have brought more pressure to bear on his party.

What the Senate approved

According to the conditions set down and accepted in a resolution of the Senate of 31 May 1990:

> 2. *Recordings and broadcasts may be made only from channel 2 on the house monitoring system.*

So a filter was put in place, and the television networks could access only the pictures made available on channel 2, which are the edited pictures. This does not mean that the content is edited, such as what senators are saying, but that the picture is edited. Strict instructions were given to the Sound and Vision Office as to what pictures were to be allowed.

> 3. *Broadcasts of excerpts shall be used only for the purposes of fair and accurate reports of proceedings, and shall not be used for:*
>
> *(a) political party advertising or election campaigns;*
>
> *(b) satire and ridicule; or*
>
> *(c) commercial sponsorship or commercial advertising.*

4. *Reports of proceedings shall be such as to provide a balanced presentation of differing views.*

5. *Excerpts of proceedings which are subsequently withdrawn may be broadcast only if the withdrawal is also reported.*

6. *Debate on a motion for the adjournment of the Senate shall not be broadcast.*[2]

The last condition, which lasted for three years, was unfortunate because many interesting political things are said in the adjournment debate. Television was not to be privy to that, but radio and newspapers were. Television journalists had to act as newspaper or radio reporters to cover this material.

While there was extreme resistance in the House of Representatives, the writing was on the wall. The House followed within a matter of months, although with much more restrictive guidelines, the most restrictive of which was that in the House of Representatives, unlike in the Senate, points of order were not to be broadcast. One reason for this was that Keating, particularly, had realised that points of order were one device that oppositions could use to bump ministers off answers or to correct perceptions that ministers might or might not be trying to shape—'misconceptions' one might say on some occasions.

Television, PR and the Senate

The Senate became more comfortable with the concept of televising. In fact, it led the way in dropping the ban on the broadcasting of the adjournment debate and on the telecasting of excerpts from television. Vanstone's motion was principally to allow the ABC to put question time on air in its entirety. It also allowed—and this was of great interest to the other networks and to ABC TV news—excerpts to appear in news reports.

The motion also allowed broadcast of Senate committees. However, the Senate did leave it to committee chairs and to the committees themselves to vote on each occasion on whether or not they would allow television. The Senate ruled that only public committee hearings could be telecast. The House of Representatives later picked up these guidelines for its committees.

Proportional representation in the Senate enabled it to lead the way on televised proceedings. The House of Representatives had a more difficult time. Steve Martin, when he became Speaker of the House, came under heavy pressure from the gallery committee and the television networks. He decided to set up another inquiry: he got a committee of the House of Representatives to look into the televising question, and asked for submissions.[3] In July 1993, the submission from Network Ten submitted that:

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[2] Senate *Journal*, 31 May 1990, p. 193.

[3] House of Representatives Standing Committee on the Televising of the House of Representatives, *To See or not to See, This is the Answer: Review of Arrangements for the Televising of the House of Representatives*, Canberra, AGPS, 1993

> … there should be no restriction on the professional TV news reporting of the House of Representatives and its committees. In the event of the House of Representatives continuing to take a different view, we urge the House to bring its TV conditions into harmony with the Senate.

The Senate set the precedent in 1990, and it put enormous political and moral pressure on the House of Representatives.

An interesting postscript to this is that when Martin took the submissions from the television networks and others and brought the guidelines of the House of Representatives into line with those of the Senate, Prime Minister Keating was so furious that he called the Leader of the House, Kim Beazley, into his office and said, 'This has got to be overturned now.' However, the government could only do this by way of a motion on the floor of the House. It was absolutely transparent that Keating and the government did not want the guidelines, and it was overturned on the floor of the House.

Why was there so much difficulty in letting television and the media into the proceedings of the Senate in our multimedia democracy? One explanation may come from the treatment of one group of the Fourth Estate that to this day feels particularly aggrieved: the still photographers. They have quite strict conditions imposed on them. While the television networks cannot put their own cameras into either chamber, and have to take the edited feed of both houses from channel 2, in many ways this suits the networks because they do not have to have three or four cameras available all day. They can just plug in and take the pictures they want. There are times, of course, when the networks would like their own cameras in there. Press photographers, on the other hand, have been confined to taking still frames off the television pictures. On the occasions that they are allowed into the chambers, it is under strict conditions: only four at a time, and only at question time. Special permission is needed at any other time. The explanation for this comes from a letter Madam President Margaret Reid wrote to Michael Bowers, chief photographer of the Fairfax Canberra bureau, when the gallery committee was fighting for access on behalf of the stills photographers.

In the letter, dated 28 June 1999, Reid explained the Senate's rather restrictive view in this way:

> Over recent years a distinction has been made between the television coverage of chamber proceedings and still photography because of the perceived intrusiveness of the still photographers, especially when they focus large zoom lenses on senators, compared with the unobtrusiveness of the SAVO filming [that is, the coverage that the TV networks get through the Sound and Vision Office].
>
> Many senators have indicated that these large lenses directed at them are intimidating and believe the Senator with the call should be the sole focus of any stills photographer … still photographers with telephoto lenses can be both intrusive and intimidating.

Michelle Grattan

Reporting the Senate has become one of the most fascinating aspects of covering politics, and it involves some special features and challenges. However, before looking in detail at the Senate, I want to canvass briefly the reporting of the other main institutions of parliament, the executive and the House of Representatives, because the contrasts are interesting. Covering the executive inevitably confronts the journalist with a paradox. There is both an absolute abundance of information and a paucity of it. A great paper deluge floods the press gallery boxes—press releases, faxes and the like—and now there is also the Internet. There is simply too much information to transfer to the public. Not all of this comes from the executive, but a large amount does, reflecting the frenetic pace of decision making by modern governments.

In contrast to the ease of access to this mass of information, however, is the difficulty the political reporter has with the barriers to burrowing in to the Cabinet and to the bureaucracy. How often do you read a report of a rattling good brawl in the Cabinet? Not often, and probably not nearly as often as they actually occur in the Cabinet room in various governments. Details of some battles within the government or the bureaucracy, and—as we have seen in the current Barratt case—between political masters and their public servants, do get out, but a lot is successfully hushed up or simply not obvious enough for the media to pick up. This is often the media's fault, but points to some of the difficulties of reporting.

The problems and challenges in reporting the House of Representatives are different again. While it is easy to romanticise the past, there *is* less news in House debates than there once was. It is difficult to know, however, what came first: the newspapers running less of what the ordinary MPs say, or the MPs saying less of real interest in their speeches, knowing that they were not going to get much publicity. It is a long time, for example, since newspapers ran parliamentary pages, which used to be quite routine in the 1970s.

Unlike some, I do not write off the modern question time. It is true that dorothy dixers have gone completely over the top, taking over the government side of question time and often making the questioners look imbecilic. But, when a minister or a government is in trouble, question time and the parliament more generally can be a riveting forum—just look at the example of Warren Entsch, and he is not even a minister. On such occasions, the politicians are in the dock and the media are among the jury—not the only members of the jury, however; party colleagues are on that jury as are members of the public watching television, reading newspapers or listening to the radio. To change the metaphor: when trouble is afoot, the parliament is the stage and the lights are hot on the actors. That applies to both the House and the Senate.

Reporting in the Senate

Journalists covering the Senate find that they need to pay much more attention to the minor players. The Senate has its own specific brand of unpredictable politics; it is often politics of a different style, and not the style that governments like. Hence, the

attacks on the Senate as 'unrepresentative swill' and the dark talk from time to time of the need to clip its wings, even if nobody has a mechanism in any practical sense for doing that. But a powerful Senate in which control is not in a government's hands is obviously one of the media's favourite places. There is a real synergy—and not for any virtuous reason, simply the knowledge that such a place will generate plenty of cracking good stories.

On key legislation, the large amount of horse-trading and compromise that can occur means that reporters have to follow events with an eye to detail and for sudden changes that the more predictable House politics outside question time do not require. Often they can never be quite sure what will happen. One notable example of this was the day during discussion of the Wik legislation when Tasmanian Independent Senator Brian Harradine had one view on various matters before lunch and quite another in the afternoon. At least he did it within reasonable hours. When the unpredictable happens on deadline, it is heart stopping.

Discussion of the Senate inevitably raises the issue of mandates, which is a difficult topic because there are elements of merit in the conflicting arguments put with great passion by the advocates from the various camps. Probably those who hold the Senate balance of power recognise that the public, too, has an ambivalence about mandates. For this reason, they tend to avoid what we might call 'full denial politics' because that would eventually bring public pressure for changing the Senate in a way that curbed its powers, however much that might look impossible in theoretical terms. Recognition of this was one factor—only one, and maybe a subconscious one—driving the Democrats' tax deal.

The power of the Senate combined with its voting system changes the balance of power and equality more generally among the political players in the federal system. Democrat Leader Meg Lees or, before her, Harradine and Independent Senator Mal Colston can on occasions be as powerful as a prime minister. Leaving aside whether this is a virtue or a fault of the system, it exposes the political process to more public scrutiny, and that is undoubtedly a good thing. While not wanting to over-emphasise this point, I think the minor players seem to have a naturally more open approach to their politics; they are more ready to say what they are doing. Just one recent example: Lees was willing to talk on the record about her discussion with Prime Minister John Howard on whether the preamble should, or could, be revived; Howard, when pressed on the meeting, refused to say anything at all. The minor players are accustomed to relying on publicity as part of their limited political tool box. Open government is actually something that governments almost never really believe in. This is not to say that minor party and independent senators who hold the balance of power are more virtuous or more public spirited than other senators, but just that they have different interests. This same point applies to being more open. Put Howard in charge of the Democrats and he would be much more chatty, while Lees as prime minister would certainly be more clam-like.

Keeping the media's attention

The uncertainty of Senate politics can inject a high degree of drama into the political process. This has the advantage of being an antidote to political journalists and their reporting becoming jaded, which is one of the high risks of Canberra journalism.

Those in the media involved in covering the government-Democrat tax negotiations or the Wik debate or, a few years ago, the Mabo debate could not be untouched by the sense of excitement that pervaded all these big political stories. These issues had all the elements of a good mystery story, but it was not possible to peek ahead and cheat by looking at the last page of the book; one could only guess at how it would all end. In many cases, the story see-sawed throughout the negotiations or debates so that it was never quite possible to know where it would end.

A danger here is that the journalist can get too addicted to process and drama and pay less attention to whether or not the policy coming out of this give-and-take process is good. Equally, however, following the to-ing and fro-ing can force the journalist to report policy in more detail and with more depth than when policy is simply announced in press statements, press conferences and so on, and implemented without any prolonged battle. The uncertainty of Senate politics also meant that during the recent debate over the tax legislation, journalists paid greater attention to speeches in the Senate chamber than in the House of Representatives.

Despite all this, however, Senate question time is under-observed by the media because it is seen on each day as the also-ran political performance. The senior journalists mostly go to the House, with those covering the Senate question time often being conscripts to that chamber rather than choosing to be there. Where it is possible, it is desirable for the bigger bureaux—and this is perhaps more possible with newspapers than the electronic media—to have people who specialise in the Senate and to encourage some of their journalists to regard the Senate as a round, just as you might regard health, education, Aboriginal affairs or whatever as specialist rounds.

The media's task is, and should be, to penetrate the dark corners of politics where (some) politicians do not want people to go. However, one characteristic of politicians that journalists find useful is that while they try to conceal the dirty linen on their own side, they have a very great interest in revealing that of their opponents. By definition, governments have more dirty linen, or at least linen of more importance that is likely to be dirty. And, with governments now perpetually in a minority in the Senate, the committee system is a good way of bringing it into the open. From a media point of view, it is hard to keep up with the information generated by the committees. The dirty linen will be grabbed for obvious reasons, but a lot of other useful data can be overlooked because there is not time or energy to attend to it. Finding a way to overcome this problem and tap into that information more effectively is difficult and, so far, no journalist has found a solution.

One final point about reporting the upper house; the Senate has recently contributed significantly to the cult of personality. In the last couple of years, Senate power, and the accompanying media attention, turned both Harradine and Colston into larger than life household names. The Senate is also more congenial to individualists on the backbench, even when they are not in a balance-of-power situation. The same happens with bureaucrats. What House of Representatives' clerk gets as many media calls, speaking requests or column inches as Clerk of the Senate Harry Evans? It could be said that all of this is traceable back to proportional representation.

Melissa Langerman[*]

In nearly ten years of covering the Senate, I've found that reporting on it is essentially like reporting on the habits of an unpredictable political platypus. A uniquely Australian compromise between the powers of the British and American upper houses, it has rarely fulfilled its role as a states' house. And the constitutionally unstated role it has seized, as a house of review, has never satisfied either the party in power or the party in opposition.

Before the introduction of proportional representation (PR), when the government was more likely to obtain a majority, the Senate was damned as a rubber stamp. Since then, whenever the government has not held control, the Senate has been damned as obstructionist, vicious, and, in the words of former Prime Minister Paul Keating, as 'unrepresentative swill'.

Proportional representation has meant that you can never be entirely sure of a Senate outcome. Perhaps the only certainty for political parties, particularly in recent years, has been that whatever procedures they introduce as a stumbling block for the government while they are in opposition, almost certainly become a stumbling block for themselves in government.

The on-going political argument about the Senate's 'proper' role makes it the most frustrating and most fascinating house to cover. But this argument, evidenced most recently in the Coalition's mandate mantra, has a tendency to grab media headlines and overshadow the role the Senate performs as a check and balance on the executive and as a fixer-upper of government bills.

Because Australian Associated Press actually sits in the chamber, one tends to be more aware than the rest of the gallery of the use governments make of Senate processes to plaster over faults in legislation rushed through the lower chamber, through the use of 'technical amendments'. These seldom get widespread media coverage and are usually overshadowed by more controversial changes negotiated or forced on the government during the committee stage.

The widely reported vitriol levelled at the Senate and its debates on controversial issues also often ignores the work of Senate committees that examine, and make recommendations on, crucial issues facing all Australians, from family law to agriculture. It downplays the fact that there is often cross-party support for recommendations, even when these are not accepted by government.

The tactic of blaming the Senate and proportional representation for giving Australia 'unstable and uncertain' government has suited both Labor and the Coalition in recent years. Certainly PR has meant that governments have only held majorities a handful of times since it was introduced, but a government was never entirely certain of a

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[*] This paper represents the author's own views rather than those held by Australian Associated Press.

majority before PR either. My argument is that PR, by introducing minor parties and independents, at least gives a government some chance of compromise in getting its legislation through, instead of facing an entirely hostile Opposition. For example, the composition of the Senate under PR could explain why two Native Title bills, the Workplace Relations Bill, the Telstra Sale bills and the tax and environment legislation packages passed the Senate despite hostile resistance from the major Opposition party.

But while PR has had benefits in this respect, it has not made the job of reporting the Senate any easier because of its effect on the balance of power. When I began reporting on the Senate in 1990, the hours were a lot more onerous, with midnight sessions and early morning estimates committees, and getting only a few hours sleep was not uncommon. However, because the Australian Democrats then held the balance of power, with occasional input from the other minor parties if the Democrats split on a vote, it was easier to patrol the likely outcome of amendments, legislation, and procedural debates. In contrast, the last few years have been somewhat of a nightmare—the views of Democrats, Greens, independents and Labor senators have been required on all but uncontroversial issues, and often the final result has remained unknown until the third reading of legislation.

For a reporter like myself, without a legal background, the immediate reporting required by a wire service of vast arrays of amendments in difficult and controversial bills is made even more difficult by the fact that they are often rushed through at the end of sessions under guillotine. Sometimes senators themselves have appeared bewildered by what changes have passed, and there have been several instances recently where amendments have had to be re-submitted because of confusion. Again, successive governments have embarked on a media strategy of blaming the workings of opposition Senate parties for the last mad dash of several pieces of controversial legislation, often successfully burying the fact that their own management of the introduction and passage of legislation through the chamber was at least partly at fault.

Such a strategy of blaming the Senate often overshadows the fact that a guillotined debate allows little, or sometimes no, consideration of amendments put forward by opposition parties to which the government is opposed. The constrictions of media space and time to report passage and reaction to controversial bills often means that protestations within the Senate chamber about these procedural issues are simply ignored.

Overuse of other forms of Senate protest, such as urgency and censure motions, has also downgraded the coverage they are likely to get in the media. And reporting on Senate wins by opposition parties, such as when they obtain government documents under returns to order requirements, is not made easier by the fact that the documentation is often tabled late at night and that spare copies are often not immediately available to reporters. By the time the information is available, sometimes days later, the focus of media attention may well have moved on.

In theory, changes to the Senate since 1994 to establish opposition-dominated references committees as well as government-dominated legislative committees should have provided opposition parties with a way to ensure greater media scrutiny

of government actions. But the sheer volume of reporting work these committees produce, combined with the daily task of covering both houses of parliament, can mean that committee reports get little major media coverage unless they focus on bills immediately before parliament. About the only time good coverage is guaranteed is when someone ignores Senate procedures and leaks information to the media in advance, although even this tactic does not ensure full coverage of a committee report at a later date. Delayed government responses to committee reports—sometimes a response comes months or a year after a report is tabled—also has the effect of dulling media awareness.

When I started reporting the Senate, covering estimates committees was an onerous task to say the least, with some committees sitting up to 20 hours at a stretch. Shorter sitting hours have made the task of remaining alert through hours of scrutiny a lot easier, but having to provide coverage of four simultaneous estimates committees can often strain reporting logistics because of the need to cover other parliamentary developments at the same time. Further reporting stress is caused by estimates committees now holding at least four hearings a year, compared to the two when I started, and budget cutbacks have meant that Hansard reports are now only available sometimes days after committees have sat.

One of the key issues of parliamentary reporting in the future will be the effect of information technology. Theoretically, the Internet and other developments in the rapid electronic transfer of information and images should mean quicker public access to the workings of the Senate. But the real question is whether Australians, who often appear bemused by Senate processes and elections at the best of times, will be satisfied merely with a lot more factual information.

I am enough of a Luddite to believe that increased public access through information technology to Senate workings will make the media's interpretative, analytical and reporting role even more difficult—but even more necessary—as the public demands to know what the volumes of information produced by parliament actually mean.

To me, the crucial issue for the Senate, as Australia prepares to celebrate its first 100 years of Federation, is to end this century's bickering over the upper house's role by getting multi-party support for a clear statement of its functions, a statement that would probably require constitutional change to be effective. I admit that getting such support may not be easy, with minor and major parties all having their own interests to protect. But at least it would enable reporters to concentrate on what the Senate does, rather than the political argument of what it should be doing.

15

Lobbying the Senate: Two Perspectives

Peter Sekuless, Francis Sullivan

Peter Sekuless

The main interaction lobbyists have with the Senate is via the committee process and in this paper I will briefly outline the constructive role played by the Senate Standing Committee responsible for education in framing the legislation and regulatory framework for international education.

Australia discovered the benefits of exporting education in the 1980s. Minister John Dawkins facilitated the stream of foreign students into Australia by not just deregulating the infant industry, rather leaving it unregulated. So much so that after the market was closed following the Tiananmen Square massacre in 1989, the Australian taxpayer was left with a $100 million bill to pay, with a sorry trail of collapsed colleges, students out of pocket and Australia's reputation in tatters.

Naturally enough, the response was to put in place a regime that would ensure the *situation* could not happen again. The government's initial response was such that *nothing* would ever happen again. A valuable and lucrative industry would have been uncompetitive.

Over several years in the early to mid-1990s, the appropriate Senate committee—it had different names over the period—referred the legislative package back and forth, and it performed a de facto executive function. The key element was continuity. The Department of Employment, Education and Training had no corporate memory. Each year the public servants were different.

By contrast, the committee had a continuing and largely bipartisan composition. The late Senator Olive Zakharov of the Australian Labor Party was Chair, Senator John Tierney was the most consistently active Coalition Senator and former Senator Robert Bell was the Democrat, ably assisted by a then staffer, Natasha Stott Despoja. Another

constant was the committee secretary, Brenton Holmes—one of the long-standing committee secretaries who are pillars of the whole system.

More recently, the industry survived the potentially equally disastrous Asian currency crisis virtually unscathed, although current reports reveal that new immigration scams involving foreign students have emerged. Interestingly, the same Senate committee warned the government in 1998 to look at this area as part of a 'sunset clause' reference on the same legislation. Unfortunately, the government did not act on the committee and industry warnings.

Clearly a Senate committee performing such a role is only possible thanks to proportional representation. Maybe I am too cynical, but I cannot imagine an independent committee system emerging in a Senate dominated by one or the other of the two major parties.

This leads me to comment on the developing trend of partisanship, which is undermining confidence in the Senate committee system. The first committee I ever attended was Public Accounts in the late 1960s when the redoubtable Senator Dame Ivy Wedgwood was in the chair. Under Dame Ivy's control, witnesses—even public servants—were protected from overzealous and partisan questioning.

Even considerably later as a lobbyist I could encourage reluctant clients to appear before committees secure in the knowledge that they could enjoy the protection of the Chair. No longer. The Goods-and-Services Tax (GST) committees are only the most recent and most blatant example of outsiders being savaged. Several people who fronted the GST committees thinking they were doing the right thing—not professional lobbyists—will never participate in the process again.

What is the solution? There is no return to a golden age, but the status of committee chairs could be promoted in terms of staff and extra allowances so that they were not simply stepping stones to ministerial office, but an alternative career path for able politicians. This might lead to acceptance of a bipartisan role. Second, there could be a review of the committee structure to differentiate more between the legislation committees, which will obviously be partisan, and the others. Third, a code of conduct for senators participating in committees would remind them of the required standards and prevent the bad impression they so frequently make.

Francis Sullivan

When considering lobbying the Senate, it is instructive to reflect on what perception ordinary people have of the upper chamber and senators in particular. I believe the community's opinion of its elected representatives has deteriorated. While I have a great regard for the parliamentary process, for public service and for elected office, my opinion is not typical of current community sentiment. These days, rather than holding senators in high esteem, ordinary Australians perceive the Senate to be full of 'just another bunch of politicians'. There is little community appreciation for the different roles and responsibilities of senators, and there is no general cognisance of the legislative watchdog function performed in the Senate. Distinctions between members of the House of Representatives and the Senate have become blurred through the nature of media presentation. All parliamentarians are being unfairly clumped together and treated with the same degree of community cynicism, mistrust and disappointment. Opinion polls are consistently registering this erosion in public confidence and trust of elected representatives.

This community scepticism manifests itself in widespread disengagement with the political process and an undermining of the value of elected representatives. This complicates the lobbying process. It means lobbyists must connect community concerns with the Senate and negotiate solutions in an atmosphere in which the outcomes of the political process are often regarded dubiously by the community. This is a major challenge for parliamentarians and all involved in the political process. It is a challenge that falls equally to the media and those presenting the value of parliamentary democracy. In effect, it requires us to explain the reality of the Senate's workings and the capacity for the community to effect change, influence decision making and promote public policy. An old axiom says that the practice of politics is akin to human nature standing before a mirror. In other words, the good and bad of human nature is exposed in political activity. Successful lobbying involves an appreciation of the foibles of human nature, the frailty of egos and the lure of power and importance.

The motivations of senators are mixed. Some senators appear as if they would prefer to be in the House of Representatives, presumably to have a better chance of becoming a minister. Others are simply glad to have a seat, enjoying the spoils of party loyalty. There are those who want to change the world and are in the Senate to be the community's moral watchdog. Overall, however, senators are just like everyone else: they have varying passions, capabilities and intentions. The manner in which they approach their responsibilities greatly affects the community's general attitude towards politics. It is important that elected members speak from a consistent values base rather than from political expediency if the community's trust is to return to the political process.

An example of the type of honesty required was displayed recently by Independent Senator Brian Harradine in his emotional speech against the introduction of the goods-and-services tax. He stopped the nation with his speech, which was based on consistent and predictable values, and tapped into a widely held sentiment in the community. Harradine's speech captured the romance of the Senate. I cannot recall

another speech like it in the last six years, yet people yearn for such speeches to be made in the Senate. They also yearn, through their community lobby groups, to be able to connect with elected people who speak from a predictable and consistent values base. Besides instilling integrity and authenticity into the Senate process, this enables community groups to connect with more than an obscure, hidden, often-times unreachable process conducted in back rooms. Too often the cynical view has many believing that the political process has been reduced to party manoeuvring determined more by opinion polls than by stated policy positions.

The operation of the Senate is complex. These days, when lobbyists observe the Senate, as compared to the House of Representatives, they see the evolution of representative 'cells' rather than the direct representation of the states and territories. The traditional understanding of the Senate preserving states' rights and being a house of review is shifting. Now, with minor parties and independents, mini constituencies are in effect controlling the agenda of the Senate's deliberations and even determinations.

This change in the functioning of the Senate has implications for lobbying. The Australian Catholic Health Care Association's experience in lobbying the Senate reveals the transitory nature of dealing with various political parties in the Senate. We have found that relationships change depending on the relative power or influence parties have in the overall calculus of the Senate's balance of power. That is, parties appear to have a different disposition towards community groups at different times in the electoral cycle. Also, this disposition shifts in accordance with the party's importance in terms of the balance of power.

Some Senate groups give lobbyists immediate access; others prefer to make lobbyists wait. The difference appears to depend on where the party considers itself to be within the overall scheme of things. That is, whether the lobbyists need the party more than the party needs the lobbyists. In a 'balance of power' scenario, those parties that are effectively the official Opposition in the Senate have the luxury of setting the agenda and determining time-lines in regard to addressing the concerns of different lobby groups.

These are important dynamics that frustrate those outside the political process, who do not understand the intricacies. Members of our association, for example, will contact me and say, 'You've got to tell the Senate X, Y and Z'. When I say that we have done just that through the proper processes or even in informal conversations with significant senators, many members do not understand why the situation has not then changed. Effective lobbying is more akin to an integrated continuum of activity, information sharing and problem solving than to the glamorised notion of heavy-handed quick fixes imposed by powerful interest groups.

So, is the Senate the main game for lobby groups? The answer, obviously, is no. The main game is always the government of the day. Any competent lobby group spends a lot of time with the non-elected influences in the process, such as bureaucrats and ministerial staffers. Today it is the people who have influence in the prime minister's office or in the relevant ministerial offices who are of particular importance. This approach is common sense as the majority of real decisions and funding outcomes are determined in these settings, not in the parliament.

On the other hand, lobbying the Senate can be beneficial. One example of this for our association was the Howard government's aged care reforms. The government had announced its reforms, involving the introduction of fees in nursing homes, in the 1996 Budget, although they were not to take effect until towards the end of 1997. In the first instance, a broad piece of legislation needed to pass through the parliament. The government's majority in the House of Representatives meant amendments to the legislation were only ever a possibility in the Senate. Consequently, to be effective, our lobby needed to isolate the most crucial Senate influences.

At that time, the Australian Labor Party had expressed outright opposition to the government's policy, which effectively removed the party from any negotiated compromises. Lobby groups therefore needed to deal with those who could broker change. Lobbying focused on talking to, and building relationships with, those who were prepared to modify or amend legislation rather than reject it. As the Australian Democrats, the Greens and the independents held the balance of power, this meant dealing with these minor parties and independents to press our case for amendments. We spent a lot of our energy targeting these senators while simultaneously pressuring the government for change.

Other credible groups shared our concerns, and a coalition of church groups formed an effective lobbying voice. One of the most important and early policy matters to be resolved was the level of subsidy to be paid to nursing homes for admitting financially disadvantaged people. Previous government research had indicated this subsidy needed to be at least $12 per person per day. This was our preferred level, but the government chose a level of $5 a day and held firm. As predicted, the legislation passed the lower house intact. Initially, it seemed that the Senate parties were generally in favour of the legislation. However, the Democrats in particular began to have concerns raised through part of their constituency base, that is, the major social service agencies of the churches. During a fairly consistent lobbying effort, the Democrats realised that the funding attached to the legislation had to be improved. Consequently, the Democrats brokered a negotiated deal between the association, other church groups and the government. The result was a shift in subsidy from $5 to $12 in exchange for passage of the legislation.

This was an example of the Senate acting as a broker. The credibility of the brokerage came from the community groups, which was important. The change was the result of the intellectual value-added input of the community, not specifically the Senate. In the case outlined, the Democrats happily brokered what was already a credible community-based position. It was an effective process and a pragmatic demonstration of the workings of the Senate.

The issue spilled on from there and became quite high profile in the media. Other legislation was needed in the Senate, which created the opportunity for another Senate inquiry. Senate inquiries are increasingly becoming fairly nasty affairs, partly due to a lack of clear ground rules. People who come to the inquiries, including ordinary citizens, can be subject to rather rude questioning and, at times, criticisms that should be levelled at elected members of parties rather than at individuals in the community. During one Senate Community Affairs Committee hearing, some of the government senators were clearly being briefed by ministerial officers to ask questions

challenging the bona fides of the major church lobbies. They sought to embarrass witnesses by raising irrelevant yet inflammatory questions, but since I'm Irish and Catholic, it is not my wont to meekly sit and smile. Evidently the exchange made good theatre. I later heard a portion of the exchange replayed on the ABC's *The World Today* and on that evening's ABC television news. This only added to the community's perception that the government's policy was wrong and that politicians had resorted to personal attacks to divert attention from the issues.

More importantly, this raises the issue of the value of these inquiries. Apart from providing an opportunity for some senators to grand-stand and attack ordinary citizens, the committees appear to inevitably divide on party lines when final considerations are determined. It is almost as if the major and minor committee reports could be written without taking public evidence. If the aim of the committees is genuinely to review legislation and the policy settings behind it, then political posturing in the committees becomes counter-productive. This trend undermines the effectiveness of the committees.

The committee system is beneficial to longer-term policy development. Policy suggestions can be raised and at least superficially examined. However, it appears that the committee process is at risk of being hijacked by a more pressing political agenda. This only furthers the degree of cynicism that prevails in the community about the value of the parliamentary system. The public trust that legitimate parliamentary processes will independently analyse, assess and discern the best policy in the interests of the common good is tenuous at best.

Another case in point relates to the parliamentary process surrounding the GST legislation. Many groups with good intentions got involved in the Senate tax inquiries. They put huge resources into submissions and organised themselves to appear at hearings in Canberra or elsewhere, all at their own expense. But, at the end of the day, many would say the effort was not worth it. While some very heartfelt scenes at the hearings were reported, ultimately there were no major changes to the tax package that were not predicted beforehand. Most social service groups highlighted issues about food and pension rates when the tax package was first released. It serves little purpose to the community if the majority reports do not have much impact on the overall outcome. It can be argued that committee scrutiny highlighted concerns in the community, and added to the workings of democratic deliberations because the committees afforded the community another opportunity to raise issues and possible solutions. Some senators may even have gained extra information. But for members of the major parties, internal party discipline rendered any 'vote-changing information' relatively impotent. The 'big ticket' issues were well canvassed in public debate before the hearings. Any compromise measures likewise were floated early in the process. Surely responsible senators, on an issue as crucial as fundamental tax reform, would not largely rely on the committee process to inform their thinking, let alone their vote. The tendency for the major parties to manipulate the committee process and politicise the hearings dominates the usefulness of the outcomes.

The Australian Democrats and the independents were able to use public submissions to advance their cases with the government. However, the ultimate result was always going to be determined by a negotiation over the publicly high-profile issues in the tax reform proposals and the well-flagged solutions. This would have been so whether or

not the protracted committee process occurred. The challenge for everyone, including people like myself who are involved in making representations in the Senate system, is to at least ensure that transparency is a value that is promoted. Also, to some degree people need to be free to speak frankly and openly. This places senators squarely back in the role of legislators and not merely party representatives defending a pre-determined policy position. This would result in credibility returning to the committee system and the Senate as a whole.

16

Personalities versus Structure: the Fragmentation of the Senate Committee System

Anne Lynch[*]

> I should like to thank my fellow members on this Committee for what I regard as the most impressive performance by a Senate committee in the time that I have been in this place … This report is virtually unanimous. On only one point of substance was there a disagreement, and this did not follow party lines.

How positive this statement would have been had it been any chair's statement when presenting a series of Senate committee reports on the goods-and-services tax. In fact, it was a statement by the Chair of the then Senate Constitutional and Legal Affairs Committee, Senator James McClelland, on 15 October 1974. At that time, such unanimous reports constituted the norm for Senate committees—even though they were still in their infancy, were conducting inquiries during arguably the most controversial period in the history of the Australian Senate, and were dealing with highly-contentious policy questions, on which the respective parties had polarised positions.

The report in question was on the most far-reaching changes to matrimonial law that this country had ever seen: the Family Law Bill. But the same comment could have been made about committee reports into such diverse subjects as death duties, capital punishment, and a policy particularly beloved by the then government—a national compensation scheme. Later reports of the same order, about which similar remarks could have been made, included freedom of information legislation, plant variety rights and a series of foreign affairs matters.

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[*] This paper was prepared for the 30th Conference of Presiding Officers and Clerks, Fiji, July 1999.

A snapshot of dissenting reports

In preparing this paper, I sought statistics on the level of dissent reflected in Senate committee reports, excluding those that might be regarded as housekeeping or routine, for 1978—during the Fraser government, which held a majority in the Senate at the time; 1988, half-way into the near-decade of the Hawke government, and during the transition from the old parliament house to the new; and finally 1998—two years into the period of the Howard government.

In 1978, there were no minority or dissenting reports. In 1988, several dissenting reports were published. In most cases, however, the breakdown was not on party lines, and also included several addenda and reservations by individual senators or parties. In one case, a government senator dissented along with three opposition senators, while a further two involved opposition senators only. By 1998, in respect of the primary evaluative committees of the Senate, the Legislative and General Purpose Standing Committees, the trickle of dissent on each side had become a flood. It is difficult to find any report on any but the most anodyne of subjects that has not resulted in a splintering of views. This is especially true in respect of legislation referred to the committees. The reports, both government and non-government, tend to restate the policy of the respective parties, articulated well before the matters even reach the relevant committees, and rarely address the detailed provisions of the bills—much less suggest or recommend amendments.

Structure of Senate committees

Many explanations of the increase in dissenting reports fall back on the excuse that the present structure of committees has led to a fragmentation of views. This structure derived from a recommendation of the Procedure Committee that the Legislative and General Purpose Committees should be divided into references and legislation committees, covering the range of Commonwealth activities, each with a core membership and sharing a common secretariat. The recommendation came into effect in 1994. References committees were established to continue the work, previously undertaken by the Legislative and General Purpose Committees, of dealing with general issues that the Senate, the committees themselves or interested parties considered worthy of examination. These committees are chaired by non-government senators with the chair having a casting vote, thus creating a non-government majority. Legislation committees, chaired by government senators with a casting vote and with an in-built government majority, were intended to examine legislation, through brisk inquiries, and to scrutinise the government through evaluation of annual reports and general supervision of government departments and authorities. In particular, these committees absorbed the function, previously performed by the estimates committees, which were abolished under the new proposal, of examining in detail proposed expenditure of government departments and authorities.

The restructuring had two main features:

(1) a recognition of the significance of the non-government majority in the Senate through the appointment of non-government senators as chairs, and with a non-government majority of committee membership; and

(2) a further recognition that the Senate's scrutiny of legislation had previously taken second place to its more general inquiries.

The establishment of legislation committees, together with a streamlined process for examining the majority of bills, was intended to fulfil a demonstrated need for 'out-of-chamber' examination of the provisions of bills, in order to accommodate the legislative overload that was particularly prevalent in the Senate at the time.

A subsidiary aim of the restructuring was to limit the number of select committees, which had proliferated to such an extent that they were draining both finance and resources from the more structured standing committee system. These select committees were invariably established to deal with highly contentious and 'coloured' inquiries and, in my view, were with honourable exceptions the genesis of the split inquiries that are now a feature of Senate committee proceedings.

Given the observations made at the beginning of this paper, it is difficult to imagine why this structure intrinsically should have led to the present state of affairs. Apart from the occasional select committee in earlier times, when a government was deliberately denied a majority and not infrequently an independent senator or a senator from a minor party was given the mediating role between entrenched government and opposition senators, most Senate committees were government controlled. It might be expected, therefore, that non-government senators would have had more need to find an outlet through the dissent mechanism. This simply did not occur then, for what must seem an obvious reason. It was clear that, if a government had too much say over the proceedings or the outcome of a committee inquiry, there was an appeal to a higher authority: the Senate plenum.

Yet this feature remains true in the present system—perhaps even more so. If an adventitious majority, whether of government or official Opposition, controls proceedings or suppresses information, there is a ready outlet within the Senate proper for a committee minority to publicise its concerns.

A further explanation for the increase in acrimony and dissent suggests that it is the volume of legislation being referred to committees, and the attendant intensity of political debate, that has led to contention and dissent. This, too, seems difficult to sustain, because in previous years it was mostly contentious legislation that was referred to committees, which managed their inquiries with a minimum of confrontation.

If, therefore, the structures are not to blame, are there any particular procedural constraints that have led to the profusion of split reports?

Time constraints on committee inquiries

There is one, significant, procedural constraint on non-partisan committee deliberations: the dearth of time available to committees both to examine and to report on legislation. When the proposal that there be more systematic examination of legislation was first mooted in 1988, there was an understandable anxiety that the government's program should not be held up by extensive committee inquiries. This led to the establishment of a select committee that, in its report adopted by the Senate

in 1989, came up with a proposal for fast-tracking committee consideration of bills. This in turn resulted in the introduction of what came to be called the 'Friday committee' process. The intent was that a subject-specialist Legislative and General Purpose Committee would receive a bill from the Senate after in-principle agreement was signified by passage of the second reading, and that evidence be taken primarily from the minister responsible for its passage, accompanied by departmental officers familiar with the detailed provisions. In effect, the Legislative and General Purpose Committees were to be mini committees of the whole, performing a comparable function to committees examining estimates. In their early stages, this is what occurred.

The scheme also retained committees' normal powers to conduct more extensive inquiries, involving taking evidence from other witnesses and travelling, if required, throughout Australia. In practice, the committees created a 'hybrid' format, resulting in very fruitful inquiries, most often held in Canberra and not infrequently in a round-table format, taking evidence from not merely the minister and public servants, but from interested groups and persons with a specialised knowledge of the subject area. The committees also began to take evidence through video and teleconferencing facilities to enable maximum access for other interested parties.

This process continued successfully in the succeeding years, which also encompassed the committee restructuring referred to earlier. However, as the volume of legislation being referred to committees increased, so too did the strains involved in conducting a series of brief inquiries within a tight time-frame. The problems for the committees derived from the speed with which complex arrangements, and grasp of the topic, had to be arrived at. There has been little opportunity for committees to discuss and analyse evidence presented to them, leading almost inevitably to a restatement of already-known positions.

This problem has been recognised in informal discussions, and has been stated with admirable clarity by the Legal and Constitutional Legislation Committee in an interim report on two complex bills. The timetable given to the committee is instructive. A recommendation that the bills be referred to the committee was made by the Selection of Bills Committee, which consists of the whips of the various parties and the independent senators. This latter committee was created as the mechanism for streamlining and coordinating suggestions that bills be referred to committees. The Selection of Bills Committee's report recommending the referral was tabled on the afternoon of 24 March 1999. A hearing was proposed for Friday, 26 March, and the date for tabling the report was specified as 29 March.

In its interim report to the Senate on the day the report was due, tabled to meet the Senate's order to report, the Legal and Constitutional Legislation Committee advised that it did not proceed with the hearing. After giving what I regard as extremely cogent reasons as to why it could not conduct the reference in the time available, it suggested that 'the Senate, through the Selection of Bills Committee, reconsider the suggested hearing and reporting dates, and do so in consultation with the Legal and Constitutional Legislation Committee'. The committee sought, and was given, an extension of time to 19 April to report, and brought down the report on the due date. As a matter of rueful interest, the bills that were the subject of the inquiry were not dealt with before the Senate rose on 30 June. So much for artificial deadlines.

This account represents the norm, not the exception. Constantly committees are ordered to report within an absurd deadline only to find that both the report and the legislation about which the report is made languish in the nether regions of the Senate basement and the notice paper, respectively, until the legislation is hastily rushed through at the fag end of a sitting period. As the Legal and Constitutional Legislation Committee puts it, '… such short reporting deadlines do not inspire confidence in the fairness of Senate processes.'

However, this known procedural problem has an easy remedy. In addition to the sane suggestions made by the Legal and Constitutional Committee, a 'civilised guillotine' for consideration of bills in committees could be established, in the same way that proposals for programming Senate business through the use of a similar device might be developed. We can but hope that the very few Senate experiments with the civilised guillotine (also now known in the new managerialist jargon as 'time management') have proved so irresistibly successful that they might become the norm.

Personalities and the Senate

While acknowledging the only structural difficulty leading to hasty reports, this still does not explain the proliferation of confrontationist inquiries and fragmented reports that are now so much a feature of Senate committee inquiries.

My own view is that the change can be laid at the feet of the personalities of rather too many of the senators who are at present responsible for the operations of the Senate and its committees. Some years ago, the then Leader of the Opposition, Senator the Honourable Fred Chaney, contrasted Senate behaviour with that of members of the House of Representatives. As he put it, the need to negotiate on matters, given the government's failure to gain a majority in the Senate, leads to a climate of 'enforced reasonableness'. Senators who were constantly abusive to senators representing other parties were, in those days, isolated by their peers, and were in the worst position to seek co-operation at another time. Even when debate in the chamber, notably at question time, was somewhat robust, this behaviour was rarely translated to out-of-chamber activities. There was an assumption that, even if matters were highly contentious—particularly when legislation was referred to committees—the confrontational element would be set aside, committee members would treat each other and witnesses with courtesy, and significant areas of commonality would be found. There were never any illusions about policy differences being the ultimate determinant of voting in the chamber. Nevertheless, it was assumed that provisions of legislation could be tested by evidence, suggestions for amendments incorporated within the main body of a report and provision made, even within the majority report, for dissent when agreement on particular areas simply could not be reached. The result was usually—dependent on whether haste was a determining factor—a useful analysis of the legislative proposal and majority—and most usually unanimous—recommendations included in the body of the report, with defined areas of dissent forming an integral but nonetheless small part of the report as tabled.

Now, however, it appears that every committee examining all but the most innocuous bills—which are rarely referred to committees—appears to work on the assumption

that there will be an ‘us versus them’ report. Government members appear to consider all legislation perfect, while opposition members consider every piece of legislation as hopeless or antithetical to the ‘tablets of stone’ policy positions established by their lower house counterparts.

On the rare occasions where a majority (government) report analyses a bill and makes constructive suggestions for amendments, this is still not good enough for the Opposition. Thus, a dissenting report will be produced, often of the same length as the majority report. In order to differentiate the ‘product’, much in the majority report is repackaged and there is always an earnest desire to go further than even some quite ‘courageous’—in the Sir Humphrey-esque meaning—departures from the government party line. Add in participating membership of the Democrats, Greens and the occasional other independent senator. We find in any volume tabled in the Senate up to four or five reports that, while they state or reiterate party political attitudes, are devoid of detailed or constructive analyses of the legislation referred, and are not conducive to good legislative process.

In addition, the highly active nature of Senate committees and the unpredictability of outcomes in the Senate have kept the media’s attention firmly focused on the work of Senate committees. It is possible that some senators have found the temptation irresistible to play to the media gallery in order to obtain greater coverage of their immediate party position or agenda, rather than to adopt the long-term strategy of working with their committee colleagues on an effective solution to problems with legislation identified during an inquiry.

The perfect illustration of my concern is represented by the GST reports to which I referred earlier. Despite considerable protest from the Howard government, the Senate after the October 1998 elections made it clear that the massive tax package, which was guillotined through the House of Representatives soon after the parliament commenced, should be scrutinised by the Senate’s committee system. As a result, the government was forced reluctantly into a compromise arrangement whereby various parts of the package were referred to three Senate references committees: Community Affairs; Environment, Communications, Information Technology and the Arts; and Employment, Workplace Relations, Small Business and Education. An over-arching select committee was also established, which the Senate ordered to produce a report on the general terms of reference and then to evaluate findings of the other committees. In addition, this select committee reported on further bills that the government had added to its tax package some months after its passage through the House of Representatives.

It may be observed that all the legislation was referred, not to the Senate legislation committees, on which the government had a majority, but to the references committees, with their non-government majority. (The select committee, too, was constituted by a non-government majority, with the Chair of the committee being the Deputy Leader of the Opposition.) This continued what I regard as an unhealthy trend that developed early in the life of the Howard government. While most bills are still sent to legislation committees, ‘big picture’ bills have been sent to references committees on the pretext of enabling full inquiries, not constrained by the perceived limitations of sending bills to legislation committees. In fact, contentious bills such as the Telstra Privatisation Bill and major proposals for changes to industrial laws have

been referred to references committees primarily because they have had a non-government majority.

Experience on some committees has justified non-government senators' mistrust of government senators 'shutting down' inquiries at the behest of their ministerial masters. Conversely, government senators have been justifiably fearful of opposition senators marching to the beat of their own drum, without regard to the rights and duties of their government and small-party colleagues. Whatever the reasons, the atmosphere of mistrust and potential confrontation, demonstrated by the over-riding of the well-established practice of referring bills to legislation committees, has illustrated the problems that I believe have beset Senate operations in recent times.

Nowhere was this more obvious than during the proceedings of the GST committees. After some of the most acrimonious confrontations ever experienced, affecting committee members, witnesses, consultants and certain committee staff, the committees all managed to report. Surprisingly, all met the Senate deadline. Less surprisingly, all reports consisted of majority and dissenting reports. The select committee probably set all records for amazing reporting structures—its three reports, spread over a two-month period, included virtually all the combinations of reports, dissents, findings, addenda, and conclusions that only the most fertile procedural mind could devise.

The unfortunate consequence of the intransigence of most of the participants in the inquiries was that it became ridiculously easy for the government and its supporters to trumpet 'I told you so' and declare the futility and waste of time and resources involved in the production of the reports. Indeed, the government would have been able to ignore them in their entirety if it were not for one factor: the series of Democrats' reports ultimately became the basis of the discussions with government and of the negotiated settlement required for the passage of the tax legislation.

That the government had treated the committee reports with disdain became obvious during the negotiations: it was clear that no-one had addressed either the content of the Democrats' reports or the amendments flowing from them. Thus the freneticism and haste that resulted from their being ignored between the tabling of the reports in February, March and April and the in-principle agreement that found ultimate expression in the successful legislative package late in June.

Conclusion

For all the futility of the reporting process, and despite the acrimonious and politicised hearings, the references of the tax package to various Senate committees turned out to be vital, for the most important reason of all: the quality of the evidence given. Senators with a commitment to gaining benefit from the process used the hearings intelligently to shape their views and ultimately their voting decisions, and also used the evidence to formulate their own legislative proposals. The more sophisticated economic and political commentators drew heavily on the evidence to inform their readers, viewers and listeners. In particular, as mentioned, the Democrats used the committee process to formulate and refine their views. They created all their substantial amendments after the committees had deliberated and reported, and circulated them in the Senate during the taxation package debate. The Senate had

considered several by the time the Democrats reached agreement with the government, and many were incorporated into the legislation as finally passed by the Senate and the House of Representatives.

So, despite the confrontational and oppositionist nature of much of the Senate committee process, good outcomes can result. Confrontation makes life easy. The individual member of a parliamentary committee does not have to think; does not have to worry about the consequences of diverging, however inadvertently, from the party line; and does not have to become involved in an understanding of detailed provisions of legislation and the time-consuming negotiation of a desired outcome. One can but hope that those members of committees who have intentionally dealt themselves out of the constructive committee process might in the foreseeable future come to realise that a return to the culture of enforced reasonableness, which for so long was the hallmark of the Senate, can be both productive and rewarding.

17

Opening Up the Policy Process

Ian Marsh

The tax debate has placed the Senate in an unfamiliar relationship with the executive. On the one hand, there are the habits and practices of governance of roughly the past 80 years. Throughout this period, the executive has enjoyed almost unchallenged power. The rituals of Parliament have positioned the Opposition as an alternative government rather than as legislators. This is implicit in the description of the system as adversarial politics.

On the other hand, in the current tax debate, substantive parliamentary policy influence has been tentatively renewed. The Senate is the key institution. It has the necessary formal power and seems likely, for the foreseeable future, to lack a majority party.[1] What does this mean for the Australian political system? Does it hold in prospect destructive conflict, frustration of the electorate's will, policy gridlock, sectional pay-offs and lowest common denominator policy compromises? Or does it offer the opportunity to strengthen the policy-making capacity of Australia's political institutions?

In what follows, a case for seeing this as an opportunity to renew necessary policy-making capacities is outlined. The argument develops through several steps. First, the central contribution of party *organisations* in the classic two-party system is sketched. Second, the causes of the progressive atrophy of these organisational contributions since the 1980s are explored. Third, the pluralisation of values and attitudes in the Australian community over the past 20 or so years is described. Finally, the potential to renew necessary policy-making capacities through the Senate is considered. Precedents for such a role are reviewed and some contemporary requirements explored.

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[1] On the Senate's formal powers and the theoretical background see John Uhr, *Deliberative Democracy in Australia*, Melbourne, Cambridge University Press, 1998; also Marian Sawer, 'Representing trees, acres, voters and non-voters: concepts of Parliamentary representation in Australia', forthcoming.

The 'classic' two-party system

The Labor Party was the first mass party in Australia, emerging on the parliamentary stage in the 1891 NSW state election.[2] Its electoral success precipitated the progressive consolidation of non-Labor groups. This occurred in 1909 when the Deakinites linked with the Free Traders to constitute what has become the modern Liberal Party.[3]

A hegemony of only two (later three) parties was a remarkable achievement.[4] The sources of the encompassing power of the major parties provide a perspective on current dynamics and possibilities. Party ideologies then attracted, broadly, one or other half of Australian society. The initial fervour of activists subsequently congealed into strong party identification, in which socio-economic class and religion were also significant factors.[5]

If ideologies provided the rationale for encompassing parties, the party *organisations* provided the institutional means. They provided machinery through which hitherto independent groups and activists could be integrated into political processes. The trade unions and business were the major groups.[6]

Organisations also functioned to set agenda. This was evident in the two great periods of strategic agenda development in Australian politics prior to the 1970s—1901 to 1909 and 1945 to 1950. The Labor Party, with its nationalisation and welfare agenda, was the primary party of change. Yet Sir Robert Menzies, in reconstituting the Liberal Party in the 1940s, renewed its Deakinite legacy in endorsing the post-war extension of the welfare state and managed economy.

Labor's internal processes were influential in determining the agenda for the parliamentary party. Its structure gave the trade unions special status and its national executive for many years exercised considerable influence over the parliamentary

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[2] Bede Nairn, *Civilising Capitalism, the Beginning of the Australian Labour Party*, Carlton, Vic., Melbourne University Press, 1989.

[3] Summarised in my *Beyond the Two Party System*, Melbourne, Cambridge University Press, 1995, especially chapter 1, 'The formation, structure and impact of the two party regime', and chapter 10, 'Governments and Parliament'; also Alfred Deakin, *Federated Australia, Selections from Letters to the Morning Post, 1901–1910*, Carlton, Vic., Melbourne University Press, 1968.

[4] 'What makes political parties so indispensable is the aggregating and representational functions that they fulfil.' Clive Bean, 'Parties and elections', in Brian Galligan, Ian McAllister and John Ravenhill, eds, *New Directions in Australian Politics*, Melbourne, Macmillan Education, 1997, pp.102; also Peter Mair, *Party System Change: Approaches and Interpretations*, Oxford, Eng., Clarendon Press, 1997.

[5] Ian McAllister, 'Political parties in Australia: party stability in a utilitarian culture', a paper prepared for *Political Parties and the Millennium: Emergence, Adaptation and Decline in Democratic Societies*, Brunel University, March 1998; V. Burgmann, *In Our Time, Socialism and the Rise of Labour, 1885–1905*, Sydney, Allen and Unwin, 1985.

[6] On the Labor Party, see L.F. Crisp, *The Australian Federal Labor Party, 1901–1951*, Melbourne, Longman Green, 1955; on the Liberal Party, see Katharine West, *Power in the Liberal Party*, Melbourne, Cheshire, 1965; also Gerard Henderson, *Menzies' Child, the Liberal Party of Australia, 1944–1994*, St Leonards, NSW, Allen and Unwin, 1994. Other organised interests, such as returned servicemen, were also active in federal politics.

party. Resolutions of its biennial conference were binding.[7] The party's ideology made the parliamentary party the servant of the broader Labor movement.

For its part, the Liberal Party (in its various forms) was defender of the status quo, and this was reflected in its organisational structure. As a powerful theme was state rights, the state organisations preserved their relative strength and the national organisation lacked disciplinary powers. Business groups, which were the principal source of funds, were integrated into the party directly through a federal committee and indirectly at the state level.[8]

In sum, the 'classic' two-party system rested on particular organisational and electoral foundations. Organisationally, it involved the mobilisation of activists and interest groups through party forums. Party conferences and committees allowed activists and interest groups to influence the formation of the strategic political agenda. Electorally, it was based on a broad division of the community into supporters of one or other of the major groups. The party label or brand provided a sufficient cue for the formation of opinion by most electors on most issues. This allowed strategic policy development to be (largely) internalised within the major parties and muted the need to seed the broader 'education' of public opinion.

Recent developments have undermined, if not destroyed, these foundational features of the two-party system.

The systemic gap in interest integration and opinion framing

Major party organisational change in the past couple of decades has basically excised interest integration. Over the same period, the capacity of party labels to cue public opinion has diminished. These developments have been caused by the coincidence of at least four factors.[9]

1. *Economic globalisation.* Economic globalisation required a new national economic strategy. Manufacturing industry could no longer be developed to serve only domestic markets. Economic globalisation, new technologies and a new role for service industries required new capacities for economic adaptation and adjustment. Needs-based, nationally determined wages were seen to introduce dysfunctional rigidities and inflexibilities. Both major parties have been obliged progressively to redefine their policy stance, which has had ideological, organisational and arguably electoral consequences.

   At the ideological level, differences between the major parties have blurred as their approaches to economic strategy have converged. After 1983, both major parties broadly adopted the neo-liberal economic agenda. Thereafter, electoral

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[7] Crisp, op. cit.; Dean Jaensch, *Power Politics*, 3rd edn, St Leonards, NSW, Allen and Unwin, 1994.

[8] West, op. cit.; Jaensch, op. cit.

[9] Paul Kelly, *The End of Certainty*, Sydney, Allen and Unwin 1992; John Edwards, *Keating, the Inside Story*, Melbourne, Viking Books, 1996; Stephen Mills, *The Hawke Years: the Story from the Inside*, Melbourne, Viking, 1993; Dean Jaensch, *The Hawke-Keating Hijack*, St Leonards, NSW, Allen and Unwin, 1989.

considerations, not ideological dispositions, determined which parts of this agenda would be championed or resisted in public.

In recasting its agenda, the Labor Party parliamentary leadership has often found it expedient to by-pass formal party forums. Conferences and councils have become stage-managed affairs. The organisation now rarely exerts influence on policy issues.

For its part, the Liberal Party has turned from being defender of the status quo to being the principal advocate of economic change.[10] In the process, it has largely jettisoned its Deakinite wing and thus weakened its encompassing capacities.[11]

Electorally, ideological convergence has arguably been one of the factors eroding the standing of the major parties. Federally, the number of electors casting a first-preference vote for other than the major parties in the House of Representatives has doubled from around 10 per cent in the 1970s to around 20 per cent in 1998. Over the same period, the proportion voting for other than major parties in the Senate increased to 25 per cent in 1998.[12] Further evidence of the weakening role of the major parties is provided by trends in party identification, for so long the sheet anchor of the stability of the Australian political system. The number of Australians without a party identification has increased from roughly 2 per cent in 1967 to around 18 per cent in 1997. Further, the number acknowledging only weak identification has increased from 23 per cent in 1967 to around 37 per cent in 1997. Thus over half of the electorate have no or only weak identification with one or other of the major parties.[13] This is a particularly significant trend if party labels are relied on as a primary cue for citizen attitudes.

2. *Agenda setting.* Since the late 1970s, the major parties have lost their agenda-setting roles. The major parties have been displaced by the social movements that have emerged in the post-1970s period. Every significant extension of the political agenda in the past decade or so has originated with one of the social movements, not the major parties.[14] The womens, environment, gay, Aboriginal, consumer, multicultural, so-called 'new right', republican and other movements are all organised independently of the major parties.

   This development is symptomatic of a significant change in the role of major party organisations. Agenda development no longer occurs primarily in party forums, and activists are detached from especial allegiance to one or other party. Internal processes have not provided the forum for testing strategic acceptability

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[10] See for example, the (albeit unofficial) National Commission of Audit, *Report to the Commonwealth Government*, (R. Officer, Chair), Canberra, Australian Government Publishing Service, 1996.

[11] Ian Ward, 'Leaders and followers: reforming the Liberal Party', *Current Affairs Bulletin*, November, 1994.

[12] Ian Marsh, 'Political integration and the outlook for the Australian party system', in P. Boreham, R. Hall and G. Stokes, eds, *The Politics of Australian Society: Political Issues for the New Century*, Melbourne, Addison Wesley Longman, forthcoming, 1999.

[13] McAllister, 'Political parties in Australia: party stability in a utilitarian culture', op. cit., p. 9.

[14] See chapter 3, 'Setting and implementing the political agenda', in my *Beyond the Two Party System.*

or for initiating opinion formation. The initiative has moved elsewhere. Activists have framed public opinion through public campaigns, and the resultant media attention. The success of these campaigns has significantly widened the national political agenda by pressuring the parliamentary leadership of the major parties to adopt new agendas, and has raised the importance of public opinion formation and diminished the influence of major party organisations.

3. *Interest integration.* The major party organisations have been unable to manage interest integration, with interest groups organising and campaigning outside party arenas. The general proliferation of interest groups has simply overwhelmed older patterns. Peter Drucker has described the contemporary United States as a 'society of organisations', a description that is equally applicable to Australia.[15]

4. *Organisational roles.* Changes to party organisational orientation and staffing have diminished the organisational capacity of the major parties. Party managers are much less likely to be organisational loyalists, and are much more likely to be professionals in public opinion polling, and marketing and advertising techniques. Direct marketing, polling and media advertising and packaging promised to make organisational policy development activities unnecessary and the associated membership base dispensable. Clever marketing, focused on the parliamentary leadership, could, it was imagined, sufficiently compensate for weakened party identifications amongst electors. Indeed, conferences, large memberships and internal policy development processes came to be seen as constraints on the political leadership. Liberation from them allowed the parliamentary leadership to reach out directly to electoral opinion. Sophisticated marketing techniques seemed capable of delivering the required outcomes in mass opinion formation.[16]

In combination, these four factors have progressively resulted in the major party organisations largely jettisoning their roles in interest integration and opinion framing. Instead, party leaders now mostly rely on a direct reach to public opinion via elections and a direct reach to interest and cause groups via such activities as summits. The Howard Government's approach to the goods-and-services tax (GST) provides strong evidence of the strengths and weaknesses of a direct reach to public opinion.[17]

A direct reach to public opinion by the leadership of the major parties is clearly one viable approach to building public opinion, but it is subject to a number of constraints. It is extremely risky politically, as the last election demonstrated. Electoral pressures will push the leadership of the rival party into almost certainly opposing what is proposed, irrespective of the merits of the issue or the party's own past policies (for example, Labor on the GST in 1985). This creates a public debate in which one side

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[15] See, for example, F. Gruen and M. Grattan, *Managing Government, Labor's Achievements and Failures*, Melbourne, Longman Cheshire, 1993; G. Singleton, *The Accord and the Australian Labor Movement*, Carlton, Vic., Melbourne University Press, 1990.

[16] Stephen Mills, *The New Machine Men*, Ringwood, Vic., Penguin Books, 1986.

[17] Ian Marsh, 'The GST and the policy making system: is there a gap in strategic capacity? How might it be closed?', paper prepared for conference on *Tax Change in Australia*, Centre for Public Policy, University of Melbourne, February 1999.

declares black whatever the other asserts is white. This outcome, almost inevitable in our wholly adversarial structure, is dysfunctional from the point of view of building electoral understanding about real choices and options, and from the perspective of mobilising support from interest group coalitions.

Further, the last election occurred 24 years after the proposal for a GST was first registered on the public agenda through the Asprey report of 1974. In the interim, there were three other attempts to introduce this measure—a push by then Treasurer John Howard in 1981, the Tax Summit of 1985, and the Fightback campaign of 1993. The adequacy of the tax system was an issue in the 1983, 1984, 1987 and 1990 elections. It is hard to believe that this protracted period of public exposure had no impact on public opinion.

But must we always wait decades to settle major issues? Must we accept the political hypocrisy that adversarial politics imposes on the major parties? Must we accept this as inevitable, part of the nature of things, and of no consequence from the perspective of public confidence in the political system? Is there no better way of introducing major strategic issues to the Australian people? Is there no better way of testing the scope for even partial bipartisanship, engaging interest groups and beginning the process of seeding public opinion?[18]

Think of the issues currently or potentially on the agenda: reconfiguring the welfare system, drugs, Aboriginal reconciliation, a reorientation to Asia, euthanasia, the republic, developments in Indonesia.[19] The system has so far demonstrably failed to institutionalise interaction between protagonists or to raise the level or quality of attention in broader community forums.

Change in the role of the major parties leaves a worrying gap in policy-making capacities, a gap arising from the inability of our political system to explore contested issues in a strategic phase. A strategic phase in opinion formation is critical. It allows longer-term shared interests among citizens and interest groups to be recognised.[20] The political system needs a capacity to routinely engage interest group and broader opinion in a strategic, 'framing' phase.

Such a phase in opinion formation can lay the groundwork for subsequent action in an 'operational' phase.[21] This phasing of policy development is recommended in relevant scholarly literatures and routinely practiced in business and voluntary organisations and institutions throughout Australia.[22] Yet in the much more important political

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[18] John Hewson, 'Yes Minister, there's no debate', *Australian Financial Review*, 26 February 1998; John Stone, 'Some modest proposals', *The Adelaide Review*, December 1998, p. 14.

[19] On the welfare system see, for example, Gosta Esping-Anderson, *Social Foundations of Postindustrial Economies*, Oxford, Oxford University Press, 1999.

[20] Donald Schon and Martin Rein, *Frame Reflection: Towards the Resolution of Intractable Policy Conflicts*, New York, Basic Books, 1996.

[21] D. Yankelovitch, *Coming to Public Judgement*, New York, Syracuse University Press, 1992; Robert Reich, ed., *The Power of Public Ideas*, Cambridge, Mass., Harvard University Press, 1990.

[22] Dennis Turner and Michael Crawford, *Change Power*, Warriewood, NSW, Business and Professional Publishing, 1998, especially chapter 5, 'Engagement'; Doug Stace and Dexter Dunphy, *Beyond the Boundaries, Leading and Recreating the Successful Enterprise*, Sydney, McGraw Hill,

domain, where our shared aspirations are articulated, our common purposes are constituted and our common interests are realised, the capacity to focus public and interest group opinion on emerging issues has substantially diminished, despite the increased need for strategic capacity arising from the pluralisation of Australian society.

The pluralisation of Australian society

The proliferation of interest groups and social movements is arguably the single most significant change in the character of post-war domestic politics.[23] It is hard to overstate the degree to which Australia has become a group-based community. The array of organised actors on any issue is legion. These groups vary enormously in size, budgets, political skills, organisational sophistication and campaigning capacities, but the major ones are as effectively organised as any of the major political parties.

The social movements articulate new patterns of political differentiation. There are at least nine major movements: environment, ethnic, consumer, Aboriginal, women, gay, peace/Third World, animal rights and the 'new right' or neo-liberal movement. All represent a concern at some level of generality below, or different from, that of socio-economic class. In turn, these groups have stimulated imitators advocating new issues (for example, euthanasia, legalised heroin, a republic) or defending traditional approaches (for example, shooters' rights, the monarchy, anti-abortion, anti-euthanasia and so on).

So the image of the contemporary Australian community as a kind of vast silent majority with a noisy fringe of pressure groups is fundamentally wrong. Talk of a 'new class' as some alien sectional minority is fundamentally wrong. The idea that Australian society has been taken over by a politically correct discourse is fundamentally wrong. Images of a silent majority, of political correctness and of a new class may all be useful rhetorical ploys in the political game. But as pictures of social reality, they do not square with the facts. The pluralisation of Australian society is the fundamental fact—and the proliferation of interest groups and issue movements is its organisational expression.

Environmental concerns, Aboriginal rights, the new role for women, new protections for consumers, and so on, are now all government responsibilities. This expanded agenda spawns more new issues as developments in one area have consequences in others. Think, for example, of the emergence of biotechnology. Policy trade-offs are now more complex, and protagonists need to share perspectives. The grounds for supporting or opposing particular developments among relevant interests can be fluid. Dialogue, deliberation and interaction are all required—but in settings in which benefits and costs can be clarified, issues can be redefined in more encompassing

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1996, especially chapter 5; David A.Garvin, 'Building a learning organisation', *Harvard Business Review*, July 1993, pp. 78–91; Peter Senge, 'The leaders new work: building learning organisations', *Sloan Management Review*, Fall 1990, pp. 7–23; John Kay, *Foundations of Corporate Success*, Oxford, Oxford University Press, 1995.

[23] Peter Drucker, *Post-Capitalist Society*, New York, Harper Business, 1993; Sidney Tarrow, *Power in Movement*: *Social Movements, Collective Action and Politics*, New York, Cambridge University Press, 1994.

terms, and compensation strategies can be explored. This is the problem with summits on issues. They can be effective as the capstone of a more embedded process, but otherwise they are too short for the necessary development of views. Further, in our more complex world, new issues are abundant, as noted above. Externally, our political environment remains uncertain and our regional linkage requires a fundamental development of public attitudes and orientations. Thus the need for capacities to frame and develop public and interest group opinion has actually increased. This is the context in which the role of the Senate deserves fresh appraisal.

The Senate and community representation

The Senate was constituted as a 'strong' house by Australia's founders. The immediate stimulus was fear by the small states of domination by their larger cousins,[24] but more deeply, this particular constitution of power has deep roots in liberal traditions—majorities should rule, but not heedless of collective minorities. Protections for minorities need to be entrenched in the structure of power.[25] The principal collective minorities at the time of Federation were the states.

State identity continues to be a potent force in Australian politics, but it has been joined by cross-cutting sources of sectional or minority identity. Think of labour movement supporters, small business champions, or the women's, gay, Aboriginal, multicultural, or republican movements. These and many other organisations are the sites through which, and from which, the opinions, aspirations and interests of a newly diversified and pluralised Australian community are refracted and framed.

Australia's founders created, and intended to create, a distinctive constitutional structure—looking to Britain for ways to institutionalise 'strong' government and to the United States for ways to institutionalise collective minority rights. Strong government was necessary to realise aspirations for nation-building and equality of opportunity between citizens from vastly different initial conditions. Collective minority rights were essential protections against illiberal majorities. This resulted in our distinctive constitutional settlement—made up of two virtually co-equal federal houses.[26] One might speculate that this arrangement institutionalises exactly the aspiration for collective fairness that is such a rich element in Australia's political culture.[27]

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[24] Brian Galligan, *A Federal Republic*, Melbourne, Cambridge University Press, 1994; Helen Irving, *To Constitute a Nation*, Melbourne, Cambridge University Press, 1997; J.A. LaNauze, *The Making of the Australian Constitution*, Carlton, Vic., Melbourne University Press, 1972; Alfred Deakin, *The Federal Story*, Melbourne, Robertson and Mullens, 1944.

[25] Uhr, op. cit.; also Campbell Sharman, 'The Senate and good government', *Papers on Parliament* no. 33, May 1999, pp. 153–170; Geoffrey Brennan, 'The unrepresentative swill feel their oats', *Policy*, Summer 1998–99, pp. 3-9. On earlier uses of Senate power see L. Young, 'A disproportionate amount of power? Influence of minor parties in the 1993 Budget process', *Legislative Studies*, vol. 13, no. 1, Spring 1998, pp 1–17.

[26] Richard Mulgan, 'The Australian Senate as a house of review', *Australian Journal of Political Science*, vol. 31, no. 2, July 1996, pp. 191–205.

[27] For an American contrast see Louis Hartz, *The Liberal Idea in America*, New York, Harcourt, Brace, 1955.

The potential of the Senate as a forum for minority representation was displayed in the first ten years after Federation. In this more pluralised world, no party enjoyed an absolute majority in either chamber. The main parties, Alfred Deakin's Protectionists, George Reid's Free Traders and the newly formed Labor Party, needed to reach accommodations with each other to form governments and to pass legislation. A variety of hotly contested strategic issues needed to be resolved in setting the economic and social foundations of the Australian Federation. Tariffs and wages were the most divisive issues, but others such as old age pensions, nationalisation, the construction of national railways, and the establishment and role of the Post Office, were also prominent. Joint or Senate select committees were established to investigate each of these issues, to establish the options for handling them and to build awareness in key constituencies.[28] Findings were debated in both houses, and since the government could not be assured of a majority, debate on particular issues was decisive.

In the first ten years, the Senate used its powers regularly against governments.[29] It functioned as the house of minorities it was intended to be, using its committees to gather information and to build opinion among senators. The committees became the key institutional mechanism for investigating strategic issues. There were frequent disagreements between the houses, particularly on tariff issues. Disputes between the chambers were fierce, but accommodations ultimately were reached. Indeed, these cameo dramas became an occasion for public learning. The site of contention was not party conferences or internal party committee processes, but parliamentary committees and debates within and between the houses. The political drama constituted the setting in which the educative role of political investigation and deliberation was more fully realised.

Indeed, committees are the only mechanism available to express the investigative capacities of parliamentary institutions and they provide essential foundations for parliamentary deliberations.[30] They are the only mechanism through which the scope for even partial bipartisanship between the major parties can be explored.[31] In the more confined, but more plural, political world of nineteenth century Britain, and in the more democratic Australian colonies, before the genesis of mass politics, committees were a primary means for investigating contested issues.[32] The legislature

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[28] Marsh, *Beyond the Two Party System*, op. cit., pp. 294–297.

[29] Surveyed in Geoffrey Sawer, *Australian Federal Politics and Law, 1901–1929*, Carlton, Vic., Melbourne University Press, 1972.

[30] Writing in 1867, Walter Bagehot identified a number of functions for the House of Commons that extended well beyond 'watching and checking ministers of the Crown'. These included 'expressive', 'teaching', 'informing', and 'elective' functions. (*The English Constitution*).

[31] The power of bipartisanship is clearly displayed in the 1980s. Floating the exchange rate, financial deregulation and the reduction of protection all attracted bipartisan support (e.g. John Button, *As It Happened*, Melbourne, Transaction Books, 1998). By contrast party U-turns under electoral and/or interest group pressure are evident on, for example, GST and Telstra privatisation.

[32] 'After 1820 … Select Committees were used with a regularity and purpose quite without precedent. It is difficult to overestimate the importance of this development. Through session after session, through hundreds of inquiries and the examination of many thousands of witnesses a vast mass of information and statistics was being assembled. Even where (as was uncommonly the case) the official enquiry was in the hands of unscrupulous partisans, a sort of informal adversary system usually led to the enlargement of true knowledge in the end. A session or two later the counter-partisans would secure

and its committees have always contributed to interest group integration and to community education in the very different political system of the United States.[33]

Building a consensus about strategic issues, about the options for handling them, and building public understanding of the benefits and costs of alternative courses of action, and perhaps about how winners can compensate losers, are all challenges we face anew in becoming a flexible and adaptable community. The tax debate points to the means for renewing interest integrating and opinion framing capacities in a strategic phase—that is, through the Senate and its committees. It illustrates the capacity of parliamentary structures to mobilise expert, bureaucratic and interest group opinion, to attract publicity, and perhaps to contribute to the formation of a majority coalition for action. In the classic two-party system, these roles were mostly located in the major party organisations.

The tax debate has emerged at the wrong end of the policy development process. It illustrates what should be happening in the initial phase rather than the legislative phase of the policy process. For a deliberative process to occur in this earlier phase of policy development, when departments are beginning to consider an issue, the Senate committee system needs to be able to intervene at this point. I have explored these issues in detail elsewhere.[34] Staff support for committees needs significant strengthening. The capacity of committees to challenge the executive may need to be refurbished. Clashes between the Senate and the executive at appropriate moments in the policy development process, far from occasioning hand-wringing, might be welcomed for their contribution to the broader development of opinion throughout the Australian community.

Of course, the risks in such developments must be acknowledged. The combination of a strong executive and minority rights imposes distinctive behavioural norms on participants. Above all, protagonists would need to be willing to compromise, and to display qualities of moderation in the parliament or in its backrooms, that they might not choose to display to their more ardent supporters. But such are the familiar ways of democratic politics.[35] In the mutation envisaged here, the major parties might even occasionally combine to discredit unpalatable opinions or to make public that bipartisanship on broad strategy that is now mostly tacit.

Protagonists for majoritarian, winner-take-all conceptions of government now, as in the past, will see only instability in the further development of the Senate's role.[36] On

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a counter exposition of their own. All this enabled the administration to act with a confidence, a perspective and a breadth of vision which had never hitherto existed. It had also a profound secular effect on public opinion generally and upon parliamentary public opinion in particular. For the exposure of the actual state of things in particular fields was in the long run probably the most fruitful source of reform in nineteenth century England.' Oliver MacDonagh, *Early Victorian Government, 1830–1870*, New York, Holmes and Meir, 1977, p. 6.

[33] Arthur Maass, *Congress and the Common Good*, Cambridge, Mass., Harvard University Press, 1983.

[34] Marsh, *Beyond the Two Party System*, op. cit., chapter 9, 'Parliament and policy-making'.

[35] For example, procedural norms in the US Congress.

[36] 'Undue power shows Senate reform needed', Editorial, *Weekend Australian*, 28 November, 1998, p. 18; 'The Senate needs to be reformed', Editorial, *Sydney Morning Herald*, 8 February 1999; 'The tyranny of minorities', Editorial, *Herald-Sun*, (Melbourne) 25 November 1998; Helen Coonan, 'The Senate: safeguard or handbrake on democracy?', Address to the Sydney Institute, February 1999. For

the contrary, I believe underlying electoral trends may progressively precipitate a significant mutation in our familiar two-party system. The Senate, armed with a clear sense of its potential policy-making contribution and with appropriate capacities, is the principal potential agent of regime change in Australia. The minor Senate parties have most to gain immediately from a change in the structure of policy making.[37] But the major parties, too, may ultimately come to see gains in a structure that holds in prospect improved opportunities for all participants to advance their policy agendas.

Australia has a strong tradition of fairness along with a rough-and-tumble political style. As we adapt to the changed world economy and to our own changing aspirations as a people, the need to change the structure of politics may increasingly be forced upon us. These things do not happen easily or quickly—many societies require revolution and insurrection to achieve new distributions of political power. Yet in the 20 years from 1890 to 1910, the new Australian union was successfully crafted and a compact that provided the framework for its economic and social development in the subsequent 80 years was constructed.

Are we in such a phase once more? Trends in voting and weakening party identification affirm the possibility.[38] There are at least three more federal elections between now and 2010. By then, I think, we will be well on the road to a more open and transparent political and policy-making system. There will doubtless be much turbulence, uncertainty and perhaps instability in the process—the two-party system is too deeply embedded in our habits and routines, and too many able people have a stake in its preservation, for change to be simple or easy. Nor should it be. These are basic issues touching the kind of people we are and might aspire to be. Just because of this, however, we will ultimately be best served by a mutation of the two-party system and the emergence of a more plural alternative. Liberal democracy, not economic rationalism, is after all the crowning ideal of our time.

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an overview, see Hugh Emy, 'The mandate and responsible government', *Australian Journal of Political Science*, vol. 32, no. 1, 1997, pp. 65–78.

[37] Ian Marsh, 'Liberal priorities, the Lib-Lab pact and the requirements for policy influence', *Parliamentary Affairs*, vol. 43, no. 2, July 1990.

[38] The development of multi-party politics in New Zealand, devolution to Scotland and Wales and possibly the English regions, the possibility of an MMP voting system in Britain, and the possibility of constitutional change in Canada all point to regime movement in the countries closest to Australia in political culture and institutions.

18

Cyberdemocracy and the Future of the Australian Senate

Kate Lundy

As new technologies revolutionise the way society operates, the federal parliament remains an anachronism in many respects. Despite the availability of information technologies that have enhanced the operations of almost every modern organisation, the Australian parliament operates in a very traditional manner. In this paper, I argue that the effective use of online technologies would greatly enhance not only the operations of parliament, but also the ability of its members to function more efficiently. More importantly, it would bring the parliament in step with changes taking place in society. I conclude by suggesting that parliament might well benefit from serious examination of the United States model of electronic voting.

Already the Internet is enabling mass participation in the democratic process and cyberdemocracy is becoming a reality that politicians cannot ignore. Before long we will have a parliament dominated by a new generation of computer-literate politicians who will be demanding online services in the chambers of parliament.

In democracies all around the world, online technologies are gaining increasing credibility in the political system. Political campaigners in Australia are starting to wake up to the potential of the Internet as a primary tool for electioneering, fundraising and organising. The Australian Labor Party's web site in the 1998 federal election campaign received an unprecedented two million hits over the five-week campaign. In a country of 18 million people, of whom 11 million are voters, this was a remarkable achievement; one that was accomplished through the use of Internet-based techniques never before used during a campaign. The ALP site established visitor loyalty through its dynamic structure and managed to attract visitors who would never before have visited a political site and who in doing so were exposed to the ALP's political message. All this was backed up with an email-based query service, which answered more than 1,100 policy related queries each week of the

campaign. To provide an alternative to the media's campaign coverage, the ALP's 1998 election web site offered exclusive access to major events that received only selective coverage in the mainstream press. An example of this was the ALP campaign launch, which was webcast live and viewed by more than 105,000 Internet users across Australia and around the world.

Email has become an entrenched form of communication between political representatives, their offices and constituents. Increasingly, it is being used as a lobbying tool by those individuals or organisations who are looking for new real-time ways of engaging in the current political system. While some political offices still fail to give email correspondence the same weight as a written letter, the effectiveness of this tool in 'bombing' politicians' email accounts and disrupting traditional office procedures during the recent debate over the Broadcasting Services Amendment (Online Services) Bill cannot go unnoticed.

Cyberdemocracy brings with it the opportunity for a reassessment of the methods by which government services are provided. Through increasing departmental utilisation of the online environment, access to details of government services and initiatives could be extended to include all Australians regardless of their geographic location and with no limitation of access to public service working hours. Numerous opportunities exist with respect to possible new dimensions of government presence in an online environment. Programs are also needed to encourage effective participation in Australian democracy through the use of interactive technologies. The unrepresentative nature of Australians who are currently online provides a limited audience for a participatory democracy, and brings its own inequities in giving undue weight to the information 'haves', at the expense of the information 'have nots'. It must be acknowledged, however, that before any real change in this area can occur, government policies must redress these inequities of Internet access. Government priorities in this area must include the provision of high-quality access for all Australians to information and communications technology, such as programs to facilitate community-based training in using the Internet and ensuring the affordability of Internet connectivity.

As the Internet and email become more entrenched in the political process, the pressure on our parliament to continually upgrade its technology increases. The time to embrace the concept of a cyberdemocracy with a degree of forward thinking and an acceptance of the use of technologies to enhance the running of federal parliament is upon us. The next few months will see the final stages of Internet connectivity rolled out to parliamentarians' electorate offices.

The next challenge is for parliamentarians and political parties to develop the skill base necessary to gain maximum advantage from the World Wide Web. The value in publishing a web site is as much related to providing for interactive communication with politicians as it is a potential source of accurate and timely information. These technologies, though reasonably new to the political domain, have been developing in the private sector for the past decade, and many of them are already used in electronic commerce and by research and information services.

The United States example

The US Congress is by no means a 'technology-free zone', even though the 104th US Congress in January 1995 amended a clause prohibiting the use of 'electronic office equipment … including computers' on the floor of House. The reason for this ban was 'to avoid the disruptions and distractions that can be caused by sound emitted from such equipment.' Congress has about 40 electronic voting stations and there is electronic equipment at the respective floor managers' tables that is used to monitor the progress of votes. Computers located at the back of the chamber are part of a connected voting system for use by members. Since 1970, electronic voting in the chamber has been available and 'the names of Members voting or present may be recorded through the use of appropriate electronic equipment.' (In November 1971, the House installed an electronic voting system with supporting legislation enacted a year later, and on 23 January 1973, the new electronic voting system became operative with its first use being to conduct a quorum call.)

Although the US Congress has experienced many changes affecting its management, structure, administration and decision-making over the years, the distribution of computers is a most significant development. Congress initiated the CyberCongress Project aimed at providing an extensive range of information resources including email, committee information, Internet access and improved links between offices. Also, clerks and officers in the House have phones, fax and computer services available as part of their electronic voting operations and to assist with official business.

Unlike the US Congress, the Australian Senate has assigned seats. If electronic voting was introduced in the Australian Senate, rather than spending eight minutes for every division where the Whip reads out every attending senator's name to the Clerk, senators could identify themselves and indicate their voting intentions electronically as a supplement to traditional voting systems. This would not reduce the public visibility of voters' intentions.

Arguments for developing online technologies

1. Parliament would be more efficient and productive

Developments in the United States demonstrate that legislatures are more effective and productive after the introduction of electronic devices. There are excellent efficiencies in delivering online information on bills, amendments and calendar updates. Accessing parliamentary records (Hansard) and the Internet from the floor of parliament allows members instantaneous information at minimal costs. Access to word-processing applications enhances the writing of speeches, briefs or amendments and email access permits the rapid exchange of information and documents between members.

Electronic voting has also sped up the passage of bills and allowed members more time to pursue other duties.

2. Parliament has a proven record of innovative use of information technologies

Except for the floors of the House and Senate, information technologies are already extensively used in both parliament house and in electorate offices. Mobile phones,

pagers, fax machines, email and the Internet are used to communicate between members, staff and constituents. The use of some, if not all, of these technologies should be available inside the chambers. Although members and senators can be contacted through their mobile phones and pagers, once inside a chamber, the only form of communication is via a direct phone link between the seat allocated to the politician and his/her parliamentary office. In today's world, this lack of wider communication access is anachronistic. We should actively consider the merits of politicians being able to contact their electorate offices, another chamber, departmental staff or even their families electronically as this would not disrupt proceedings any more than the use of the existing phone. Likewise, multimedia applications on a laptop computer can enhance an understanding of bills or legislation. This is certainly true with respect to complex technical or scientific legislation where 'virtual' displays can be both informative and instructive.

The Australian parliament has been able to leapfrog a generation of technology and is preparing for live webcasts of parliamentary proceedings, having avoided the prospect of broadcast technologies such as C-span in the United States. Digital video conferencing technologies could change the way Senate committees operate both within the parliament and in taking evidence from the Australian public.

While others have identified the risk of information overload, the reality of information-technology service provision in the chambers is that members and senators would only access what they as individuals deemed necessary to fulfil their parliamentary duties in a co-ordinated and timely manner.

3. The Internet and Intranet are transforming the political landscape

The Australian parliament has both an Intranet and a Parliamentary DataBase System available to all electorate and parliamentary offices. The Intranet comprises various online services, including Hansard, Parliamentary Directory Services (comprising an occupant directory and listings of committee-room meetings), and the Electronic News Service. ParlInfo is a searchable database containing information on legislation, publications, Hansard, policy papers, procedural matters, library and media resources as well as the Parliamentary Handbook. These services are critical to the activities of parliamentarians and should be made available on the floor of parliament, either through in-built computers or by allowing laptop computers to be used by members and senators.

4. Email is critical to exchanging documents and information

Electronic mail has transformed modern society and facilitated the rapid exchange of documents and information. Email can be used to instantaneously update legislative amendments, bills in progress, Hansard, news and so on. That is how a modern parliament should operate and, more importantly, that is what the public expect, given their level of cynicism at the archaic and bureaucratic nature of parliament. During sitting periods, senators and members need to communicate with their staff who frequently need to provide updated information, research, diary changes or to pass on constituent or other correspondence.

While it has been argued that the floor of the House should be insulated from outside interference, that notion is not necessarily valid in today's world, where the accessibility of information is paramount. In addition to contacting staff and receiving

information on legislation, email could be used to provide a direct communication link between the House and Senate. Furthermore, access to email would facilitate the exchange of correspondence between members and electors and electorate offices. Again, there is a view that if members are exchanging emails then they are not giving their undivided attention to debates and speeches. However, this presumes that no member reads newspapers, clippings, correspondence and the like while in the chamber—all practices well known in the Australian parliament.

5. Electronic technology would not disrupt parliament

The possibility that online services would cause disruption and diversion was a factor in the US Congress' decision to prohibit the use of such services on the floor. It was argued that it would be 'discourteous' to a politician making a speech if other members were glued to their computer monitors, answering emails or researching legislation. According to the US Subcommittee on Rules and Organization of the House (21 November 1997), 'If electronic devices are permitted in the chamber, lawmakers may be so engrossed in their "electronic office" that they are unlikely either to be "hearing" or "studying" the viewpoints of their colleagues.'

On the other hand, there is nothing to prevent similar 'distractions' of members and senators conducting their own work while in the chamber. Noise is not a valid argument for banning computers from parliament. Anyone familiar with the level of 'activity' in either the House of Representatives or the Senate would be hard-pressed to argue that either computers or electronic voting devices would disrupt proceedings any more than is the current situation. In some respects, electronic technology might result in a 'quietening down' of parliament, as members would be able to work during normally inactive periods.

6. Parliament is old fashioned

Given the workload that most politicians are burdened with, and the time-constrained environment in which they operate, the ability of modern parliaments to deal effectively with all business is questionable. Therefore, the provision of online technologies would only improve the quality and quantity of parliamentary output, particularly with respect to legislation where bills could be better scrutinised, rather than just processed. Furthermore, if parliament is to effectively deal with the complexities of the 21st century, it must embrace the technology of the day. It is a bizarre situation when legislators are debating digital television, conversion, encryption, electronic voting, privacy and the Internet yet they are not able to use these technologies within the legislature.

Problem areas

The introduction of information and communications technologies in the chambers, and their application in all aspects of parliamentary proceedings, will no doubt be subject to some initial teething problems. With the provision of adequate training and support, this transition will be made a lot smoother. It must be acknowledged that politicians, like members of the community, will all choose to use the technology in a different way. Attempts to overly homogenise information systems would—not surprisingly—be resisted. Technology should not inadvertently be used to discriminate against those whose life experience perhaps does not engender comfort or ease with its use.

Some broader problems have also been identified with respect to the introduction of a cyberdemocracy. Lobbyists, constituency groups and sections of the community would no doubt use email and the Internet to flood ('bomb') politicians with electronic messages during consideration of legislation. 'Electronic lobbying' in parliament would be an ever-present possibility whenever controversial legislation was being debated.

In a paper tabled by the President of the Senate in 1990, it was argued that the use of electronic voting in the Senate chamber would be of little assistance because:

> assuming that Senators would continue to vote in person in the chamber, very little time would be saved because four of the approximately seven minutes spent on each division consists of the time taken to ring the bells to summon Senators to the chamber.

The paper also illustrated the perceived disadvantages of electronic voting, summarised by Kirsty Margarey as follows:

- removal of a pause in the proceedings that is often convenient;
- possible transfer of activities that now take place during the count to other components of the time spent on divisions, so that little time would in fact be saved;
- loss of advantages of the current practice of senators sitting to the right or left of the chair, particularly the visibility and public nature of the act of voting;
- possible increase in the calling of divisions.

From a purely party political point of view, it may also be harder for parties to ensure that senators and members follow caucus decisions on voting.

Another 'problem' is whether the use of electronic technology would alter the way parliament processes bills. Would technology transform existing power arrangements or create new divisions between those who are computer literate and those who are not? Would politicians become too reliant on technology? What would happen when computer glitches occurred or the server goes down? These issues would need to be fleshed out. However, international experience may offer solutions to these problems.

Regardless of which direction the Australian Senate decides to take with respect to the introduction of electronic voting or the use of information and communications technologies on the floor of parliament, new political technologies are here to stay. As Dana Milbank says, whether or not that is a good thing is still a topic of debate:

> Though it has the potential to reverse voter apathy, it might further disenfranchise the poor. Though it could limit the power of special interest groups, it might also cause presidential [or, in the Australian case, parliamentary] candidates to pander to more and more people, as if they

> were running for city council … A politician [could] make me one promise and you one promise, and his competitor wouldn't even know it.

Problems regarding privacy and democracy will no doubt become more prevalent as the use of technology in the political arena expands. While the current debate circulates around the value of the technologies themselves and their merits in a participatory democracy, broader issues regarding the nature, scope and use of an online environment and its accessibility must receive the attention they deserve. Only then can we create a political culture that will truly embrace the concept of an Australian cyberdemocracy.

19

The Senate and Proportional Representation: Some Concluding Observations

Geoffrey Brennan

In reviewing the range of papers presented here, we should not perhaps be too surprised that the question of proportional representation (PR) in the Senate has raised such a variety of issues—broad questions like representation, and participation, and the role of the press, and the access of lobby groups of various kinds, and high principles of democratic governance such as the appropriate system of checks and balances and the effectiveness of general electoral constraints. There is not much in political life that the current role of the Senate leaves unaffected, and proportional representation has been crucial in establishing that 'current role'. Just at the moment, the Senate is the biggest game in town—not least because of various proposals around to clip its wings. And however one comes down on the question of whether the various proposed clippings are desirable, one cannot deny that they involve matters of fundamental political principle. In other words, a discussion of the Senate is timely, quite apart from the 50th birthday celebrations; and that discussion serves to direct attention not only to the role of proportional representation in the Senate, but also to a wide range of important features of our political institutional life.

In a more delimiting spirit, it seems to me that a distinction ought to be drawn between PR as a mechanism of election in general, and PR as an ingredient in the bicameral structure in the way it operates in the Australian context. If one believes—as Harry Evans' paper suggests—that good government is, like the amateur golfer's swing, a mass of compensating errors, then a good case might be made for the use of PR in the Senate without requiring one to decide on whether PR is, in a global sense, a better electoral system than the single-member electoral district system that characterises the House of Representatives. One might take the view that there is something to be said for both multiple-member (PR) and single-member districts, and conjecture that the Australian bicameral system serves to exploit the advantages of each. Or one might take the view, implied by Fred Chaney, that the critical feature of

the electoral system used for the Senate is that it generally ensures a party composition in the Upper House different from that prevailing in the Lower House—and that it is *this* feature of our current arrangements (and of our use of modified PR) that is the basis of any reasoned defence of PR in the Senate. Of course, the question as to whether PR, in some form, offers a 'better' basis for representation than alternatives is an interesting issue, and whether in particular it constitutes in itself a form of 'consensus' as opposed to 'majoritarian' politics (to use Arend Lijphart's typology) is a matter of considerable moment. But in the particular bicameral setting in which PR applies here, these latter questions seem to be second-order. In particular, as John Faulkner suggests in his paper, one does not have to criticise the House of Representatives or its method of election to approve the Senate—or vice versa. There *has* been a certain amount of such criticism in current party political contestation; but Faulkner is right to imply that that kind of criticism is mostly to be understood as adversarial rhetoric of the standard party-political kind.

Related to this point, it seems to be harder in politics than in almost any other arena of life to maintain the distinction between playing the game within the rules and the determination of the rules themselves. The failure to observe that distinction is, I take it, what underlies the *cri de coeur* for a renewed (small c) 'constitutional sense' that we hear from Fred Chaney in his paper. By a 'constitutional sense' here, I mean an awareness of the general rules of the political game, specifically shorn of any more immediate issue of whether those rules happen to work to your advantage in a particular instance. As Chaney notes, it may be a tough ask to look for such a sense among our political leaders. They are the players in the game and players do not normally make good umpires—except when they cease being players. (I rather took it that Fred himself confessed that difficulty in his own political past.) One thing, however, that I thought misplaced in the Chaney paper was the inclination to identify the constitutional sense with 'conservatism'. It may well be that stability is an important element in any well-functioning set of political rules; if the rules change all the time, then one really does not have any rules at all. But a concern with institutional arrangements as such, and a concern to have the political game played according to well-defined rules, is no monopoly of those who take a conservative stance on policy matters. It is both misleading and potentially destructive of support to suggest otherwise.

One aspect of the discussion contained in this volume that is particularly interesting is the history of PR. I have in mind not only John Uhr's very interesting paper on the initial decision in the late 1940s and its doctrinal pre-history, but also some of the general discussion. There was the account of the young Catherine Helen Spence witnessing the world's first PR election, conducted by her father in 1840 for the Adelaide Municipal Corporation. This account reminds us of the larger story of Australia as an institutional innovator/experimenter/adventurer/entrepreneur. A significant number of routine features of Australian political institutional life are either distinctive—like compulsory voting—or are examples of Australia being the first to use a practice that is now almost universal—like the secret ballot (the Australian ballot, as it used to be known). Perhaps we are no longer as innovative as we once were. Perhaps not all our innovations have deserved the life they have enjoyed here. But we have an impressive history in this area and a laudable tradition. Despite this, we are sometimes inclined to see our institutions not just against a comparative backdrop (which is almost always useful), but as if they were *derivative*

(which seems to me unhelpful). To take a particular example, I confess I find the description of Australia's system as a form of 'Washminster'—a hybrid of American and British forms—diminishing rather than illuminating. It is certainly true that the system has some elements that are reminiscent of the United Kingdom and some of the United States. But particularly in relation to our prevailing bicameral arrangements, it seems to me to be most useful to understand them in their own terms and evaluate them accordingly. We were, after all, the first country to directly elect its upper house and to combine this with strong bicameralism. To see the Australian Senate through the prism of the House of Lords, for example, is to invite an irrelevant prejudice—not entirely unknown in Australian politics.

Finally, although I share general anxieties about becoming excessively celebratory about *any* element of political life, it also seems to me to be a mistake to refrain from applauding institutional strengths where you see them. As I see it at least, PR in the Senate has been by no means the worst feature of our political institutional array. It has certainly been one of the most interesting and distinctive features. On that basis, if no other, it deserves the standard birthday treatment, and a cheerful round of 'Happy Birthday'.