

# The Pursuit of State Interests in the Senate

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## Introduction

On the face of it, there should be little expectation for the modern Senate to operate as a states' house, with a particular responsibility for working in the interests of the states within the Australian federation. The Australian Parliament is a national parliament which inquires, debates and legislates on national issues arising from the federal powers granted to it under the Constitution. While the composition of the Senate is structured to reflect the federation, with equal representation of each of the states, for the most part the modern parliament is dominated by political party machines that keep a firm grip on votes in both houses.

Among senators, in some quarters, cynicism about a states focus for the Senate abounds:

I always get concerned when senators come in here and start arguing the 'states house' argument. It is like what they say about the last refuge of a scoundrel: it is used when it suits; we suddenly become a states house.<sup>1</sup>

Other senators have seen and continue to see the defence of their state as an important representational role:

The Senate is the states house, and part of a senator's job is to raise matters of importance to the states and to defend their status within a federated Commonwealth.<sup>2</sup>

The representation role of senators is a complex interplay of state, regional, party, national and philosophical interests. While the relationship of senators to their constituents is more remote and diffused than that of members of the House of Representatives, a substantial proportion of senators still consider themselves to primarily represent a defined geographical area.<sup>3</sup> As Senator Richard Colbeck advised

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<sup>1</sup> Senate debates, 5 December 2002, p. 7258 (Senator Chris Evans).

<sup>2</sup> Senate debates, 26 November 1996, p. 6041 (Senator Boswell).

<sup>3</sup> Scott Brenton, *What Lies Beneath: The Work of Senators and Members in the Australian Parliament*, Department of Parliamentary Services, Canberra, 2010, p. 78. Forty-two percent of senators thought that they primarily represented either a defined geographical area or that area through a party (or vice versa).

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the Senate in defence of the concerns of Tasmanian farmers in 2009, it ‘does not always have to be about politics’; it can be about ‘trying to do the right thing and getting the government to do the right thing’. Senators, he noted:

should use the mechanisms that exist in this parliament to stand up for the things that [they] believe in and to try and achieve outcomes ... that is what we are here to do. It is an important part of the process of being a member of this place ... This is not about trying to destroy; this is trying to alert the government that there needs to be a proper way of dealing with this.<sup>4</sup>

This paper explores how these parliamentary mechanisms exist in the procedures of the Senate and some of the ways in which they have worked in practice as a vehicle for the expression or achievement of state interests.

### **Voting in the Senate**

#### *The bloc vote*

The longstanding notion expressed in the federation debates of the Senate’s representational role as the ‘states’ house’ has brought with it the expectation, even among senators themselves, that senators from different parties would vote together as representatives of their states:

If I had a belief for this chamber when I first came, it was that it would be more of the states’ house, as it was supposed to be. I have to say I think the biggest problem with this chamber is that it has become a representation of political parties. I think we fool ourselves. We say, ‘The Senate is the states’ house.’ I have never ever seen a vote in this place based along state lines and that is a shame.<sup>5</sup>

The myth of the lost opportunity of the bloc vote has persisted throughout the life of the Senate. Some commentators<sup>6</sup> have used the fact that the Senate usually votes on party lines to argue that the Senate does not fulfil its function as envisaged by the federation founders ‘to resist, in the legislative stage, proposals threatening to invade

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<sup>4</sup> Senate debates, 17 September 2009, p. 6849 (Senator Richard Colbeck).

<sup>5</sup> Senate debates, 21 March 2013, p. 2399 (Senator Joyce).

<sup>6</sup> Greg McIntosh, ‘The Senate: states’ house or party house?’, *Current Affairs Bulletin*, March 1989, pp. 25–7; L.F. Crisp as quoted in Stanley Bach, ‘Crisp, the Senate, and the Constitution’, *Australian Journal of Politics and History*, vol. 54, no. 4, 2008, pp. 545–61.

and violate the domain of rights reserved to the States'.<sup>7</sup> Others have pointed to constitutional convention delegates such as Alfred Deakin, John Macrossan, Sir John Downer and Sir John Winthrop Hackett who foresaw the dominance of political parties or a national will that would diminish the importance of the states.<sup>8</sup>

Certainly we need to go back a long way to find a classic example of a bloc vote, where a state's senators from government and opposition parties sided together to attempt to bring about a legislative change or other action in the Senate that favoured their state.

On 3 June 1952, all ten senators from Tasmania (five Labor and five Liberal) voted together to support an amendment by Liberal Senator Reginald Wright to the Land Tax Assessment Bill 1952, which had been seen to unfairly burden Tasmanian taxpayers. The amendment was carried with the support of the opposition, 26 votes to 24. The victory, however, was short-lived. When the House disagreed with the amendments and returned the bill the following day, the Tasmanian Liberal senators voted to no longer insist on the amendment, amid protests from the opposition that Wright had fallen back 'into line at the beck and call of the Government Whip'. Ultimately, though, the disquiet within the government ranks prevailed and a bill to abolish Commonwealth land tax and repeal the Land Tax Assessment Act was passed the following year.<sup>9</sup>

Similarly, on 29 March 1977, with the Liberal-Country Party in government and a Liberal-Country Party majority in the Senate, four Tasmanian Liberals, together with Tasmanian independent Senator Brian Harradine, voted with the opposition to support Senator Wright's second reading amendment to the Apple and Pear Stabilization Amendment Bill 1977. The amendment expressed the view that the government support available to apple growers who received below-average export prices should be increased from a maximum level of \$2 a box to \$3. Tasmanian fruit growers were the major beneficiaries of the scheme. The vote was won 31 votes to 28, with Liberal Senator Brian Archer the only Tasmanian to oppose the amendment. The victory,

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<sup>7</sup> John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth*, Angus & Robertson, Sydney, 1901, p. 414.

<sup>8</sup> John M. Williams, *The Australian Constitution: A Documentary History*, Melbourne University Press, Carlton, Vic., 2005, p. 289; John Uhr, 'The Australian Senate model', *Canadian Parliamentary Review*, Spring 2009, p. 29; Parliament of Australia, Joint Committee on Constitutional Review, Report, November 1959, PP 108/1959, p. 13; Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution*, Cambridge University Press, Cambridge, 2009, pp. 196–99.

<sup>9</sup> Senate debates, 3 June 1952, pp. 1213–21, 29 October 1952, pp. 3803–5, 26 February 1953, p. 338; *Sydney Morning Herald*, 5 June 1952, p. 3.

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however, was only symbolic as second reading amendments have no legislative effect.<sup>10</sup>

Bloc votes involving senators from one state without the support of the opposition are doomed to failure. All Tasmanian senators voted together in October 1953 to (unsuccessfully) oppose a motion to adjourn debate on berry fruits, an industry of particular importance in their home state.<sup>11</sup> In September 1954 all Tasmanian senators, concerned about the effect of the Sugar Agreement Bill 1954 on manufacturing industries using sugar in their state, voted to refer the bill to a select committee. The motion failed when it attracted support from only nine other senators, with the majority of the government and opposition opposing the motion.

### *Crossing the floor*

While examples of all or most of the senators from a particular state voting together on a state issue are undoubtedly rare, examples of an individual or a small group of senators from a variety of states crossing the floor on a matter that affects those states are more common. Coalition senators frequently crossed the floor during the period of conservative government from the late 1950s to the early 1980s and have continued to employ that course of action on occasion since then.

Where Acts and actions of the Commonwealth have had an impact on federalism, senators have been quick to jump to the defence of states' rights<sup>12</sup> and crossing the floor has been a means of making a decisive protest. Four Liberal senators crossed the floor in 1954 to support Senator John Gorton's motion to form a select committee to inquire into how duties collected on petrol were apportioned among the states.<sup>13</sup> In 1973 the Seas and Submerged Lands Bill was opposed by nine Liberal and Country Party senators who were concerned by the principle of the parliament asserting sovereign power over the off-shore areas of Australia without the agreement of the federal and state governments or a referendum of the people.<sup>14</sup> For Queensland senator Ian Wood, despite his support for uranium mining, the lack of consultation by the federal government with the state governments on atomic energy legislation was the deciding factor in him crossing the floor in 1978 to support a Labor second reading amendment that the bills not be proceeded with 'until after full and proper consultation with the states'.<sup>15</sup>

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<sup>10</sup> Senate debates, 29 March 1977, pp. 593–5.

<sup>11</sup> Senate debates, 21 October 1953, pp. 882–96.

<sup>12</sup> Brian Galligan, 'Parliament's development of federalism' in G. Lindell and R. Bennett (eds), *Parliament: The Vision in Hindsight*, Federation Press, Annandale, NSW, 2001, p. 19.

<sup>13</sup> Senate debates, 28 October 1954, pp. 1110, 1116.

<sup>14</sup> Senate debates, 27 November 1973, pp. 2135, 2156.

<sup>15</sup> Senate debates, 24 May 1978, pp. 1787–8, 1792.

Other floor crossings were motivated by seeking benefits of a regional nature such as the efforts by senators in 1956 to secure tax concessions for Queenstown, King Island and the Furneaux Group in Tasmania<sup>16</sup> or Queensland senator Woods' support for an amendment to the Queensland Beef Cattle Roads Agreement Bill in 1966 which would add a road to the works program in the vicinity of his home town of Mackay.<sup>17</sup>

Individuals who repeatedly engaged in floor crossing needed to be willing to suffer the possible consequences for their career. ACT Senator Gary Humphries crossed the floor on three occasions between 2006 and 2009 to defend the rights of the Australian Capital Territory to legislate on same-sex marriages and other matters without interference from the federal government.<sup>18</sup> Senator Wright's campaign to ensure that concessions for the sugar industry did not impact on Tasmanian fruit producers resulted in him crossing the floor in 1956 and 1962, co-opting a number of Liberal and minor party colleagues to his cause.<sup>19</sup> Queensland senator Neville Bonner's concern for oil drilling on the Great Barrier Reef was the motivation for his failure to support his government's Petroleum (Submerged Lands—Miscellaneous Amendments) Bill 1981.<sup>20</sup> All three senators experienced difficulties with their party, and while attributing their political fortunes to their history of floor crossing would be an oversimplification, it is notable that Humphries and Bonner lost preselection and Bonner and Wright eventually left their party in protest.<sup>21</sup>

### *Minor parties and independents*

The election of senators through proportional representation since 1949 has resulted in a rise in numbers of independents and minor party senators in the Senate. When the Senate does not have a government majority—which since 1949 has been the case for around 70 per cent of the time—and the major parties disagree on legislation, minor party and independent senators can combine forces with the opposition to amend or reject legislation.

In September and October 2009 Tasmanian Greens senator Bob Brown and Tasmanian opposition senator Eric Abetz had 'a meeting of minds' when they joined forces to propose an amendment to the Access to Justice (Civil Litigation Reforms)

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<sup>16</sup> Senate debates, 1 November 1956, pp. 1155–62.

<sup>17</sup> Senate debates, 1 September 1966, pp. 289–90.

<sup>18</sup> Senate debates, 15 June 2006, p. 53, 8 February 2007, p. 22, 26 November 2009, p. 8964.

<sup>19</sup> Senate debates, 31 October 1956, pp. 1079, 1083, 9 May 1962, pp. 1244–46.

<sup>20</sup> Senate debates, 2 June 1981, pp. 2461–9.

<sup>21</sup> Ann Millar and Geoffrey Browne (eds), *The Biographical Dictionary of the Australian Senate*, vol. 3, 1962–1983, UNSW Press, Sydney, 2010, pp. 141, 362–3; *Canberra Times*, 24 February 2013, p. 6.

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Amendment Bill 2009 to ensure that the position of Federal Court Registrar would be retained in Hobart. The senators objected to plans to move the registrar's functions to Melbourne that would 'leave Tasmania as the only state in the Federation which does not have a registrar'. A House amendment removing the requirement that the registrar be full-time was later agreed to in the Senate.<sup>22</sup>

The threat that minor parties and independents might side with the opposition gives them considerable leverage in negotiations with the government—leverage that has been turned in some instances towards furthering state interests.

Independent Tasmanian senator Brian Harradine has been one of the most effective state advocates to date. Indications of Harradine's commitment to the rights of small states became apparent in his first speech when he moved an amendment to the address-in-reply to the Governor-General's speech declaring that the Fraser Government obtain the approval of the less populous states before implementing its 'new federalism' policies. Harradine went on, by his own reckoning, to secure \$353 million for environmental, technological and other programs in Tasmania in negotiations with the Howard Government over the legislation for the partial sale of Telstra in 1996 and 1999.<sup>23</sup> Earlier, in 1993, as part of negotiations with the Keating Government to secure passage of budget measures, Harradine obtained a \$2 million per year increase in subsidies for Bass Strait shipping.<sup>24</sup> In 2003 and 2004 Harradine and three other independent and minor party senators, Shayne Murphy (Ind., Tas.), Meg Lees (Australian Progressive Alliance, SA) and Len Harris (Pauline Hanson's One Nation, Qld), all won concessions for their states in return for their support of higher education and health legislation.<sup>25</sup> But then, as Harradine stated in his valedictory speech to the Senate, as an independent he 'had the luxury of always being able to put Tasmania first'.<sup>26</sup>

Similarly, in February 2009 when the opposition refused to support the economic stimulus package proposed by the Rudd Government to combat the global financial crisis, independent South Australian senator Nick Xenophon was able to negotiate \$900 million in fast-tracked funds for water buy-backs and water-saving projects for the Murray–Darling Basin in exchange for his vote. Senator Xenophon noted, 'This is

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<sup>22</sup> Senate debates, 27 October 2009, pp. 7217–19, 7224–6. See also Senate debates, 16 September 2009, pp. 6762–9.

<sup>23</sup> Brian Harradine, 'Senator Harradine will not recontest seat', Media release, 29 June 2004; Senate debates, 25 February 1976, pp. 239–43, 29 October 2003, p. 17092.

<sup>24</sup> Statement by the Prime Minister, the Hon. P.J. Keating: the Budget, 19 October 1993.

<sup>25</sup> *West Australian*, 11 March 2004, p. 7; *Australian Financial Review*, 12 March 2004, p. 26; Senate debates, 4 Dec. 2003, p. 19399–400 (Len Harris was paired), 11 Mar. 2004, p. 21410 (Harradine paired).

<sup>26</sup> Senate debates, 21 June 2005, p. 91.

a good result for the river, it's a good result for South Australia, it's been done in the national interest and South Australia will benefit from it'.<sup>27</sup>

### **Procedural mechanisms**

The procedures for the operation of the Senate, as laid down in the standing orders, provide a number of opportunities for senators to pursue state interests. Many of these procedures allow senators to influence the Senate while working within the confines of a party system, long before matters come to the finality of a vote on legislation.

#### *Orders for the production of documents*

Orders for the production of documents are formal directions by the Senate for ministers to table government documents of interest. The documents both inform the Senate in its decision making and are a form of accountability, placing documents used or created by the government on the public record.

When the government does not have a majority in the Senate, orders for the production of documents moved by senators are rarely opposed by the Senate. The Senate has in fact shown a great deal of tolerance for orders for documents of a state or local nature. The vote on the September 2014 order for documents on the funding for the Toowoomba Bypass road project, for instance, received the support of the opposition and the 17 members of the politically and geographically diverse 18-member cross bench that were present in the chamber at the time.<sup>28</sup>

However, the success of the Senate in actually obtaining the documents from such orders has been mixed. The ministerial response to the order for documents on the Toowoomba Bypass project is typical for many active infrastructure projects:

the responsible minister tabled several relevant documents but in relation to detailed financial or commercial information about the project, made an implied public interest immunity claim on grounds of potential prejudice

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<sup>27</sup> *Advertiser* (Adel.), 14 February 2009, p. 6.

<sup>28</sup> Other orders of a state or local nature given by the Senate include documents on tree clearing in Queensland (2000), the monitoring of genetically-engineered crops in Tasmania (2001), the funding or other support for the Nathan Dam on the Fitzroy River in Queensland (2002), the Basslink project to link the Tasmanian and national electricity grids (2003), a proposed pulp mill in Tasmania (2005), the Coorong and Lower Lakes in South Australia (2008), irrigation in northern Victoria (2009), harvesting requirements for Tasmanian forests under intergovernmental agreements (2011), the WestConnex Motorway project in New South Wales (2013), the East West Link tollway in Victoria (2014) and the Perth Freight Link tunnel (2016).

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to the final outcomes of the project which was at a sensitive commercial stage.<sup>29</sup>

Even when orders for the production of documents are unsuccessful, they can provide a mechanism for debate on issues of public interest. On 17 July 2014 the Senate sought information on the successful tenderer for the manufacture of boots for the Australian Defence Force, requesting specifically the margin between the winning tenderer and the next closest competition. The order was made in response to news reports that a longstanding South Australian boot manufacturer had been overlooked in favour of cheaper imported boots from Indonesia. The minister partially complied with the order, citing potential commercial harm as the reason for more information not being provided. Following a motion by an opposition senator ‘that the Senate take note of the document’, the minister’s response was debated. Two senators were able to argue that by using local suppliers and factoring in broader benefits to the community in government procurement rules, both the interests of South Australia and the nation would be served.<sup>30</sup>

### *Committee inquiries*

There has been a long tradition of Senate select committees (committees set up to undertake a particular inquiry) inquiring into matters with a single state or regional focus, commencing with the first select committee into steamship communication between the mainland and Tasmania established within months of federation in 1901.<sup>31</sup> In more recent times, two notable inquiries have sought to consider matters that fall firmly within state jurisdictions: the 1996 inquiry into the actions of the Victorian Government in granting a casino licence to Crown Casino Ltd and the 2014 inquiry into aspects of the Queensland Government administration. In addition, a number of select committee inquiries have considered matters of importance to more than one state such as the 1987 inquiry into the consequences of Commonwealth legislation restructuring the regional commercial television industry<sup>32</sup>, and inquiries

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<sup>29</sup> Department of the Senate, *Procedural Information Bulletin for the Sitting Period 22 September–2 October 2014*, no. 286, 3 October 2014, p. 4.

<sup>30</sup> *Advertiser* (Adel.), 14 July 2014, p. 1; *Journals of the Senate*, 17 July 2014, p. 1241; Senate debates, 26 August 2014, pp. 5605–6.

<sup>31</sup> Rosemary Laing, ‘The Senate committee system: historical perspectives’, *Papers on Parliament*, no. 55, February 2011, p. 159. For a complete list of Senate select committees in 1901–84 see appendix 2 of Laing’s article. Select committees from 1985 are listed in the appendices of *Odgers’ Australian Senate Practice*. State-specific select committee inquiries include the closing down of Fitzroy Dock in Sydney by the Defence Department (1913), the relocation of the post office in Balfour, Tasmania (1917), future demand and supply of electricity for Tasmania (1982), the retrenchment of 400 workers by the Mount Lyell Mining and Railway Company in Tasmania (1976) and aircraft noise at Kingsford Smith Airport in Sydney (1995).

<sup>32</sup> Senate Select Committee on Television Equalisation, *Television Equalisation*, PP 106/87.



into state government financial management (2008)<sup>33</sup> and the reform of the Australian federation (2011)<sup>34</sup>.

Senate standing committees, which have a continuing responsibility beyond the life of a parliament, have also considered state matters such as the 2007 Rural and Regional Affairs and Transport Committee inquiry into options for additional water supplies for South East Queensland. In 2014 five Victorian and South Australian senators from the opposition and cross benches successfully initiated an Economics Committee inquiry into the automotive industry in Australia, an area of particular interest to these two states.<sup>35</sup> A Community Affairs Legislation Committee hearing on 5 May 1998 was remarkable for the attendance of state health ministers engaged in a dispute with the Commonwealth over health funding in the Health Legislation Amendment (Health Care Agreements) Bill 1998.<sup>36</sup>

Tasmanian senator Brian Harradine made five attempts spanning over a decade to introduce a standing committee on treaties comprised of one senator from each state.<sup>37</sup> His particular concern was the effect that treaties agreed to by the federal government, and the federal government's use of the external affairs power under section 51(xxix) of the Constitution, would have on the legislative powers and responsibilities of the Australian states. Finally, after a report on the matter by the Legal and Constitutional Affairs Committee in 1995 and several unsuccessful private senators' bills to involve parliament in treaty-making, a joint committee on treaties was established in May 1996.<sup>38</sup>

Senate inquiries have benefited from receiving diverse views on the implications of federal policies for regional centres not only by virtue of the diversity and geographical make-up of the participating senators, but also by the views expressed through interstate hearings and an Australia-wide submissions process. The 2008 select committee into housing affordability, while investigating issues more widely across Australia, became aware of more specific housing problems faced in a number of regions. As a result, its report paid particular attention to mining towns, 'sea change' regions, Western Australia's Pilbara region and Western Sydney. The committee also scheduled a public hearing in Karratha in order to hear about and see at first hand the housing conditions in that city.

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<sup>33</sup> Senate Select Committee on State Government Financial Management, report, PP 336/08.

<sup>34</sup> Senate Select Committee on Reform of the Australian Federation, *Australia's Federation: An Agenda for Reform*, PP 167/11.

<sup>35</sup> Senate debates, 25 November 2014, p. 9213.

<sup>36</sup> PP 145/98.

<sup>37</sup> Senate debates, 23 August 1983, p. 8, 21 February 1985, pp. 19–20, 12 October 1988, pp. 1187–8, 8 May 1990, pp. 18–20, 4 May 1993, pp. 26–7.

<sup>38</sup> Senate Standing Committee on Legal and Constitutional Affairs References Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, 1995, PP 474/95.

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Inquiries that fail to adequately take into consideration the geographical diversity of Australia have attracted criticism, such as this assessment of the joint select committee inquiring into the clean energy bills in 2011:

We saw that with this legislation, of such sweeping effect, the parliamentary inquiry into it did not get outside the Melbourne-Sydney-Canberra triangle. It is just outrageous. If any part of this parliament should be outraged, of course, it should be the Australian Senate. It should be the place in which the states, with their equal representation, deserve to have a fair say heard—where the smaller states, the more distant states and the more disparate regions are meant to get their voices heard. Yet they were silenced throughout that inquiry process.<sup>39</sup>

### *Examination of the budget*

An important role of the parliament (under section 96 of the Constitution) is to approve revenue proposals and determine in which states that expenditure should occur. Payments to the states, which are not part of the normal operational expenses of the government, can be amended by the Senate. In Senate estimates hearings, senators examine the budget and the ways the executive government spends money appropriated by the parliament. The hearings provide non-government senators with an unparalleled opportunity to interrogate government officials over the administration of government programs and monitor the fairness of the distribution of revenue. In May 2014, for instance, non-government senators used the Legal and Constitutional Affairs Committee estimates hearings to quiz the Australian Federal Police Commissioner on Hobart airport security following the proposed removal of all AFP officers.<sup>40</sup> In June 2014 senators examined the take-up and efficacy of a wage subsidy scheme offered to Tasmanian employers who engaged long-term unemployed Tasmanians.<sup>41</sup>

Information gleaned by senators at estimates hearings can be repurposed in other Senate procedures. A question without notice in March 2013 on funds for Riverland communities along the Murray River asked by a South Australian independent senator had its origin in a response given by an official to the Environment and Communications Legislation Committee hearings the previous month.<sup>42</sup>

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<sup>39</sup> Senate debates, 12 October 2011, p. 7234 (Senator Birmingham).

<sup>40</sup> Legal and Constitutional Affairs Committee Legislation Committee Hansard, 26 May 2014, pp. 23–30.

<sup>41</sup> Education and Employment Legislation Committee Hansard, 1 June 2014, pp. 144–53.

<sup>42</sup> Senate debates, 20 March 2013, p. 2195; Environment and Communications Committee Legislation Committee Hansard, 12 February 2013, p. 52.

*Private senators' bills*

One indication of the dominance of major political parties in parliament is that it is rare for legislation that is introduced into the Senate by members of parliament who are not ministers to become law. Many lapse in the Senate, such as the bill introduced in 2010 by two South Australian senators to increase the powers of the Murray–Daring Basin Authority to manage the basin's resources in extreme crisis.<sup>43</sup> Others pass the Senate only to fail in the House.

In 2011 the Territories Self-Government Legislation Amendment (Disallowance and Amendment of Laws) Bill 2011 was passed by both houses—only the 13th private senators' bill to receive assent since 1901. The bill had implications for the Australian federation, strengthening the powers of the territories by removing the executive government's ability to disallow or recommend amendments to laws made by territory legislative assemblies. Instead 'any disallowance or amendment of an ACT law should be by legislation of the Parliament as a whole'.<sup>44</sup>

While territory rights were at the forefront of debate on this bill, it was not proposed by a territory senator but was an Australian Greens bill motivated by the federal government's attempts to override territory legislation on euthanasia and civil unions. Conversely, in 2000 the Senate passed a bill co-sponsored by the Greens, Labor and the Democrats which sought to overturn a Northern Territory law for the mandatory sentencing of juvenile offenders. In this case it was the House of Representatives that did not pass the law due to states and territory rights considerations.<sup>45</sup>

Threats to introduce private senators' bills, like threats to cross the floor, can be used by senators to signal their strong concerns about the policies of their party. In May 2006, New South Wales government senator Bill Heffernan was reported to be 'taking advice' on the introduction of a private senator's bill forcing a higher proportion of federal government ownership of Snowy Hydro. The proposed private senator's bill was part of a grassroots campaign to oppose the Commonwealth, New South Wales and Victorian governments' intention to privatise the public company. Nine days later, amid growing community opposition, the Prime Minister reversed the Commonwealth government support for the sale.<sup>46</sup>

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<sup>43</sup> Senate debates, 18 March 2010, p. 2162; *Advertiser* (Adel.), 19 March 2010, p. 20.

<sup>44</sup> Senate debates, 29 September 2010, pp. 302–3 (Senator Brown).

<sup>45</sup> *Mercury* (Hobart), 15 March 2000.

<sup>46</sup> *Australian Financial Review*, 24 May 2006, p. 1; *West Australian*, 3 June 2006, p. 6.

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### *Disallowance motions*

Legislative instruments such as regulations, ordinances, determinations, rules and orders are used to provide much of the detail required for an Act of parliament to function. Unlike Acts, legislative instruments can become law without the direct approval of parliament. Both houses of parliament have the power to disallow a legislative instrument. While the Regulations and Ordinances Committee undertakes most of the formal monitoring of legislative instruments in the Senate, any individual senator may also move a motion for disallowance. Due to the detailed nature of the instruments, disallowance motions quite commonly concern issues at a state and local level. Some examples include:

- On 22 August 2012 a Tasmanian Greens senator moved a disallowance motion against a determination that set the small pelagic fishery allowable catch quota. The motion was aimed at stopping a ‘super’ trawler FV *Margiris* (later *Abel Tasman*) from operating in Australian waters. While the disallowance motion did not pass the Senate, it brought about three hours of debate. The issue generated a high level of community concern in Tasmania and legislation to achieve the same end was introduced by the government the following month.<sup>47</sup>
- On 17 November 2009 two Queensland opposition senators opposed a proclamation for the creation of the Coral Sea Conservation Zone east of the Great Barrier Reef. The senators were concerned at the lack of public consultation and the loss of fisheries that they feared would adversely affect the Cairns region. The vote was tied and so failed.<sup>48</sup>
- On 17 September 2009, a Tasmanian senator moved a motion for disallowance on behalf of Tasmanian farmers concerned at the inclusion of lowland native grasslands in the list of threatened Tasmanian ecological communities. The vote hinged on independent South Australian senator Nick Xenophon who extracted concessions from the government to partially address the farmers’ concerns in return for his vote.<sup>49</sup>

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<sup>47</sup> Senate debates, 22 August 2012, pp. 6155–6, 10 September 2012, p. 6423, 17 September 2012, p. 7013.

<sup>48</sup> Senate debates, 17 November 2009, pp. 8040–54.

<sup>49</sup> Senate debates, 17 September 2009, pp. 6835–50.

*Questions to ministers*

Question time, the most publicly visible of parliament's proceedings, serves many different purposes when employed in the service of states and territories. For government senators, the use of prearranged questions along the lines of 'Will the minister update the Senate on how the government is delivering choice and flexibility for the vocational education and training students in our home state of South Australia?' enables them to promote achievements on behalf of their state constituencies.

For the opposition, the directing of questions to ministers in question time has long been used as a means of exposing disquiet in government ranks over state issues. In 2014 the share of the goods and services tax received by Western Australia and the widely held view in that state that its success during the mining boom was subsidising the poorer states in the federation had become 'the most important issue to Western Australia—full stop; no ifs no buts'.<sup>50</sup> Questions directed at Western Australian government ministers by non-government senators exposed the tensions in the government between the expectations of the home state and the realities of governing for the nation.<sup>51</sup> Open warfare broke out between Western Australia and Tasmania with the Minister for Defence and senator for Western Australian declaring:

For 16 years Tasmania have been nothing more than a passenger. Tasmania have been a mendicant state. On their west coast, they have fabulous mineral reserves. Will they touch them? No! They want their state to be a national park. We do not agree with that, and we do not want to pay for it either.<sup>52</sup>

Questions on notice allow senators to ask more comprehensive questions and receive more detailed answers, such as the nine-part question on staffing of Bureau of Meteorology offices in north Queensland asked by Senator Macdonald in 2012 and the six-part question on funding for the Marine and Tropical Sciences Research Facility in north Queensland he asked in 2010.<sup>53</sup> Data requested by senators that is broken down by state and territory, such as the question from Senator Johnston in 2012 about defence reserves training days and budgets, allows senators to make comparative assessments of federal government expenditures in each jurisdiction.<sup>54</sup>

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<sup>50</sup> Senate debates, 4 September 2014, p. 6515; 'Coalition clash on GST carve up', *Australian Financial Review*, 2 September 2014 (online edition); Peter van Onselen, 'Liberals let down the west', *Sunday Times* (Perth), 20 April 2014, p. 52.

<sup>51</sup> Senate debates, 15 July 2014, p. 4939, 25 March 2015, p. 2345.

<sup>52</sup> Senate debates, 27 August 2014, p. 5747 (Senator Johnston).

<sup>53</sup> Senate debates, 9 February 2012, p. 736, 11 May 2010, p. 2534.

<sup>54</sup> Senate debates, 30 October 2012, p. 8530.

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The standing orders also provide opportunities for senators to pursue questions on notice that have not received replies. In August 2012 Senator McKenzie questioned the Attorney-General on federal government rejections of applications for clean-up and recovery grants from Victorian communities affected by floods in 2011. After 30 days had elapsed the senator sought an explanation and moved a motion that the Senate take note of the Attorney-General's failure to reply to the question. In debating the motion she expanded on what she saw as the federal government's tardiness in delivering its 50 per cent contribution to disaster relief funding.<sup>55</sup>

Party discipline can inhibit both government and opposition senators from raising issues that may be of concern for their states where they are seen as contrary to their party's political interests. Brenton Prosser and Richard Denniss note that marginal (independent and minor party) senators may provide a solution to airing public concerns while maintaining an appearance of party unity:

It is not uncommon for a member of a major party to contact a crossbench marginal member ... For marginal members in the Senate, often the request for help comes from a minister in a state or territory parliament.

Bound by Cabinet solidarity, they cannot speak out on an issue, so they call on the federal marginal member to speak out and represent citizens from the state they represent. Sometimes the issue is in [an] area for which they are portfolio minister, so they offer more than a request or advice. While they rarely divulge information, they can suggest the right questions to ask.<sup>56</sup>

Minor party senators have extensively used question time to question ministers on state representational matters from the particular problems facing dairy farmers in Queensland, unemployment in Tasmania, inequitable road funding by the federal government for South Australia, disparities among the states in the amounts private health funds pay to private hospitals and, on occasion, pursuing matters on behalf of individual constituents.<sup>57</sup>

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<sup>55</sup> Senate debates, 30 October 2012, p. 8412, 19 November 2012, p. 9098.

<sup>56</sup> Brenton Prosser and Richard Denniss, *Minority Policy: Rethinking Governance When Parliament Matters*, Melbourne University Press, Calton, Vic., 2015, p. 190.

<sup>57</sup> Senate debates, 28 August 2014, p. 5899 (Senator Lazarus), 8 July 2014, p. 4353 (Senator Lambie), 4 December 2013, p. 832 (Senator Xenophon), 18 June 2014, p. 3262 (Senator Xenophon), 20 March 2013, p. 2195 (Senator Xenophon), 13 May 2015 p. 2999 (Senator Lazarus), 16 September 2009, p. 6724 (Senator Xenophon).

*Debate on motions*

Senators can debate motions or formal proposals put to the Senate calling for an action or expressing the will of the Senate. Debates on motions allow senators to deliberate on a matter before a decision is made.

In 2011 a Greens senator moved a motion relating to sightings of bilbies at the site of the proposed James Price Point gas hub in the West Kimberley region of Western Australia. It called for an immediate halt to land clearing until the nature and extent of the bilby colony had been investigated. The debate that followed was an everyday example of state interests being contested in the Senate, with senators in turn discussing their views on the relative importance of the project to Western Australia, the nation, local Indigenous communities and the need for protection of an endangered species.<sup>58</sup>

An urgency motion proposed in 2013 on Australia's commitment to the automotive industry canvassed many national issues such as the efficacy of government subsidisation of the industry and philosophical points of difference on investment in industries supporting fossil fuels versus renewables. However, the debate also ranged over the impact of plant closures on jobs and the economy in South Australia and Victoria and, as all good representation should, offered the perspective from the ground:

I appreciate the social impact. I grew up not far from the Holden plant in Adelaide. I went to school in the neighbouring town. My parents still live there. I know that part of Adelaide well. I know that right now, even with Holden operating, it has youth unemployment in excess of 40 per cent and that, if Holden were to close, a terrible situation in that part of Adelaide would only get worse.<sup>59</sup>

In short, national issues are debated within the broader context of the state and local.

*Debate on other matters*

The Senate standing orders allow matters to be debated without a motion before the chair in procedures known as matters of public importance (SO 75), senators' statements (SO 57) and debates following the question for the adjournment of the Senate (SO 53). Such debates provide an opportunity for senators to speak on topics of their own choosing and inform the Senate and the public on issues of interest. If a

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<sup>58</sup> Senate debates, 18 August 2011, pp. 4810–13.

<sup>59</sup> Senate debates, 10 December 2013, p. 1305 (Senator Birmingham).

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senator has something to say about inaction on Indigenous housing, women's issues on the NSW Central Coast, the banana industry in Queensland or cattle grazing in Victoria, the adjournment debates or senators' statements are frequently the place.

The 60- or 90-minute debate afforded by proposals for matters of public importance are usually politically charged sessions, but on occasion are a chance to express diverse views on matters with a state focus. Examples include state and federal government environmental policies for Victoria (25 November 2014), the development of northern Australia (24 February 2010), the Queensland government response to an oil and chemical spill on the south-east coast (16–17 March 2009) and policy failures of the NSW government (8 September 2009).

### **Case study: Future Submarine Project, 2014–15**

In 2014 the politically sensitive future submarine project came to the attention of the Senate. The need to replace the ageing Collins Class submarines, which were constructed by the Australian Submarine Corporation at Osborne, near Port Adelaide, coincided with concerns, particularly from South Australian senators, about the decline of the manufacturing sector and associated job losses.

Both government and non-government senators from South Australia expressed support for the work to build the new submarines to be undertaken in Adelaide.<sup>60</sup> After the June 2014 visit of the Japanese prime minister to Australia, there were concerns that an earlier government undertaking to this effect, articulated by the Opposition Defence Spokesman Senator David Johnston before the 2013 election, would be reversed and that the project would go offshore to Japan.

Non-government senators employed a cascade of procedural mechanisms in the Senate to obtain information on the government's intent for the future submarine project and to assess the merits of its policy.

On 25 June 2014 the Senate referred an inquiry into the future sustainability of Australia's shipbuilding industry to the Senate Economics References Committee. The inquiry's second report, on the acquisition of Australia's future submarines, was tabled in the Senate on 17 November. As part of its deliberations, the committee received 26 submissions, held five public hearings and conducted site visits in Melbourne and Adelaide. The committee's recommendations supported a competitive tender and considered the 'military-off-the-shelf' option inadequate. Additional

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<sup>60</sup> Senate debates, 6 March 2014, p. 1091 (Senator Farrell), p. 1096 (Senator Fawcett); 11 February 2015, pp. 435–6 (Senator Edwards).



comments were also made by Senator Xenophon who specifically recommended that the submarines be built in South Australia.

Senators used Senate estimates hearings throughout 2014–15 to extensively question the Defence Minister and officials from the Defence Materiel Organisation on submarine design requirements, progress on the future submarine project, and the competitive evaluation process.<sup>61</sup>

In a further bid to obtain information, an order for the production of documents requesting the economic modelling report for the submarine tender process was approved by the Senate on 17 November 2014. The minister's response, tabled in the Senate on 24 November, indicated that the report was at a draft stage and would be provided once it had been finalised and considered by the government, subject to any public interest immunity considerations.

Between June and December 2014 Opposition senators used question time in the Senate to relentlessly interrogate the Defence Minister, Senator Johnston. The questions were largely aimed at political point scoring, and in particular to embarrass the minister over the change in policy from the comments he had made in May 2013, but also to attempt to uncover the government's intentions for procuring the submarines. Information gleaned at the Senate inquiry was put to the minister for response at question time.<sup>62</sup> Opposition senators frequently used motions to take note of answers given by the Defence Minister to further debate the issues at hand.

On 25 November in reply to a question without notice, the Defence Minister commented that he 'wouldn't trust [the ASC] to build a canoe', a comment that was widely reported in the media.<sup>63</sup> The following day the minister made a statement to the Senate regretting any offence taken by workers at ASC at his 'rhetorical flourish'. This was followed by a 90-minute debate in the Senate. The Opposition continued the pressure later that day in question time, culminating in a censure motion against the minister which was again debated extensively and carried with the support of the majority of minor parties and independents.<sup>64</sup> While the censure motion carried no formal consequences, the Defence Minister was later replaced in a ministerial reshuffle on 23 December.

The procedures of the Senate also provided senators with a range of opportunities for debate in which they could emphasise what they considered to be the likely

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<sup>61</sup> Supplementary Budget Estimates, Defence, transcript, 22 October 2014; Additional Budget Estimates, Defence, 25 February 2015; Budget Estimates, Defence, transcript, 1 June 2015.

<sup>62</sup> Senate debates, 28 October 2014, p. 7886.

<sup>63</sup> Senate debates, 25 November 2014, p. 9200.

<sup>64</sup> Senate debates, 25 November 2014, pp. 9376–9410.

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implications for South Australia. South Australian senator Anne McEwen used the adjournment debates to goad the South Australian Liberal senators ‘to stand with the rest of the South Australian senators, with the Labor senators on this side of the chamber’ to support shipbuilding in South Australia.<sup>65</sup> Two motions for a matter of urgency were agreed to in the Senate: one concerning the government ‘refusing to commit to building twelve future submarines’ was agreed to on 17 June 2014 and debated by eight senators while another on the need for the government ‘to keep its pre-election promise to design and build Australia’s Future Submarine Fleet in Adelaide’ was debated by nine senators and carried on 3 September. On 24 September a proposal for a matter of public importance engaged nine speakers on much the same topic.

The debate on future submarines saw some creative use of Senate procedures. On 1 December 2014 the Senate agreed to an Opposition motion to bring forward debate on the Omnibus Repeal Day (Spring 2014) Bill 2014, a bill intended to clean up the statute books by removing obsolete Acts and provisions. The Senate then amended the *Public Governance, Performance and Accountability Act 2013* requiring the submarine replacement project to be determined by open competitive tender. When the House, which disagreed with the amendments, returned the bill some eight months later, a substitute amendment, also placing requirements on the submarine tender process, was again passed by the Senate.<sup>66</sup>

On 9 February 2015 the Senate passed a motion noting and concurring with a South Australian House of Assembly motion condemning the new Minister for Defence. Government senators were also able to use procedures of the Senate to present alternative views, such as by providing answers to questions on actions the government was taking to support Australia’s shipbuilding industry.<sup>67</sup> The dissenting report by government senators in the Economics References Committee report, while stating ‘we want to see the Future Submarine contract awarded to Australian shipbuilders’, qualified the statement on the grounds of what they saw as the greater need for quality and value for money.<sup>68</sup> South Australian interests were not mentioned directly. South Australian government senators trod a delicate path between their state and party affiliations, using adjournment debates and statements by senators in the

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<sup>65</sup> Senate debates, 17 June 2014, p. 3162.

<sup>66</sup> *Procedural Information Bulletin*, no. 288, 5 December 2014, pp. 1–2; *Journals of the Senate*, 2 December 2014, pp. 1933–5, 19 August 2015, pp. 2984–5.

<sup>67</sup> For example, Bernardi to Johnston, Senate debates, 26 November 2014, pp. 9366–7.

<sup>68</sup> Senate Economics References Committee, *Future of Australia’s Naval Shipbuilding Industry: Future Submarines*, November 2014, p. 83.

Senate to signal to their home state that they were not unsympathetic to the involvement of Australian companies in the future submarine replacement project.<sup>69</sup>

However the greatest influence on government policy made by government senators occurred outside the Senate when South Australian senator Sean Edwards tied his vote on the Liberal Party leadership in February 2015 to the submarine project, securing the agreement of the Prime Minister that Australian shipbuilders be able to compete for the submarine project on merit.<sup>70</sup>

### **Equal state representation in the Senate**

While the procedures and practices of the Senate can and do support the pursuit of states interests, the rigidity of the party system in Australia gives cause for most Senate observers to stop short of describing it as the states' house:

It is often said that this is a states' house. It is a term that I have not been comfortable with because it is a house for the people assembled by the states. It is still a people's house but it is people assembled by the communities in a geographic sense, as defined by the states.<sup>71</sup>

Brian Galligan in his essay 'Parliament's Development of Federalism' posits the question 'What is the point of over-representing smaller States in the Senate if the Senate does not usually represent State interests?' Equal representation in the Senate, he notes, ensures a different composition of national representation in each chamber and both of the houses have to agree, resulting in 'sifting and reviewing' of 'national interest and outcomes':

If the issue is one of national interest, the national view will be weighted in favour of smaller State public and party opinion. That view might well be the same as in larger States, but ... [i]f there are aspects of the national policy that affect smaller States, then those interests can be more readily factored in.<sup>72</sup>

Galligan maintains that to expect the Senate to have a particular federal role and for legislative outcomes that favour the state interests is to misunderstand federalism.

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<sup>69</sup> Senate debates, 1 October 2014, pp. 7458–61 (Senator Fawcett), 26 Nov 2014, pp. 9457–9 (Senator Fawcett).

<sup>70</sup> Senate debates, 11 February 2015, pp. 435–7 (Senator Edwards); *Sunday Mail* (Adelaide), 8 February 2015, p. 12; Marian Wilkinson and Karen Michelmore, 'House of cards', *Four Corners*, 16 March 2015.

<sup>71</sup> Senate debates, 27 June 2012, p. 4660 (Senator Ryan).

<sup>72</sup> Galligan, *op. cit.*, p. 15.

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Instead both houses have roles that are part federal and part national. He argues that the federal character of the Senate is ‘not to represent State interests per se, but to over-represent smaller State populations in national decision-making’.<sup>73</sup> Harry Evans states that the Senate ensures the geographical distribution of the legislative majority, making it impossible to pass laws with the approval of the representatives of only a minority of states. He notes that this is also reflected in the Constitution where alterations require approval by a majority of voters in a majority of states as well as an overall national majority.<sup>74</sup>

In many senators’ minds, it is the equal representation of the states in the party rooms rather than the parliament which has the greatest influence on policy<sup>75</sup>:

if an issue comes up about transport, I can bet my bottom dollar that the Tasmanians will be on their feet. If an issue comes up about gold tax, I know that the Western Australians and some of the Victorians will be on their feet. I know that if it is an issue about some other area that relates particularly to a state, those senators will support the House of Representatives members from those states and argue vehemently in the party room.<sup>76</sup>

Senator Kay Patterson related an incident illustrating the importance of geographical representation when in the early 1990s the Labor government decided to merge all small rural nursing homes that were less than 250 kilometres apart. The issue particularly affected Victoria but at that time there were no Labor representatives of House of Representatives seats in rural Victoria. On Senator Patterson’s telling:

When I heard about this decision I went into orbit. I could not believe it ... I talked to my colleagues from the other states about it. Guess what? They were not concerned. Why were they not concerned? The answer is that there are hardly any small rural nursing homes in the other states ... Rural Victoria was not represented in the government of the day. The only way it could be represented in the Labor caucus room was by Labor senators. I think that that speaks for itself.<sup>77</sup>

In 1994 Senator Abetz argued that no party has benefited ‘in a disproportionate way because of the equality of the states within the Senate’. Instead, the equality ensures

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<sup>73</sup> *ibid.*

<sup>74</sup> Harry Evans, ‘The role of the Senate’, *Papers on Parliament*, no. 52, December 2009, pp. 93–4.

<sup>75</sup> Senate debates, 29 September 1954, pp. 593–4 (Senator McLeay).

<sup>76</sup> Senate debates, 17 March 1994, p. 1883 (Senator Patterson).

<sup>77</sup> *ibid.*, p. 1884.

‘that all parties have a real input from all the states so that issues that uniquely affect a state such as Tasmania are able to be put forward in the Liberal, Labor and [minor] party rooms’.<sup>78</sup> Or, put another way, ‘no political party can afford to neglect any state’.<sup>79</sup>

## **Conclusion**

The equal representation of the states in the Senate provides a structural safeguard whereby the larger states cannot numerically dominate the smaller states. While the Senate is not and may never have been a states’ house, the party control of voting in the Senate has not extinguished the pursuit of state interests. For individual senators there is an inherent tension in their state, national and party affiliations. However, in a myriad of great and small ways senators do attend to state interests as the need arises, performing their roles recognised since federation to ‘maintain and protect their constitutional rights against attempted invasions, and to give them every facility for the advocacy of their peculiar and special interests, as well as for the ventilation and consideration of their grievances’.<sup>80</sup> The procedures and practices of the Senate, as they have evolved for over a hundred years, continue to support senators in this endeavour.

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<sup>78</sup> *ibid*, p. 1881 (Senator Abetz).

<sup>79</sup> Evans, ‘Role of the Senate’, p. 95.

<sup>80</sup> Quick and Garran, *op. cit.*, p. 414.

