

Law-making

One value of a second chamber is often said to be that it gives the opportunity for a 'second look' at legislation and thereby governments are able to tidy up problems in their legislation that may have been overlooked in the first chamber. The Australian Senate certainly plays such a role. In 2001, for instance, in the committee of the whole, the Government's 709 proposed amendments constituted 55 per cent of all amendments moved, and 69.9 per cent were successful.³³ For much of the history of the Parliament there was criticism of the manner in which governments would push legislation through in the last days of a session. The Senate moved on this issue in the mid-1980s and forced a modification of government practice by resolving that it would defer to the following sitting any bills that were received after a nominated deadline. The popular impression of the Senate's legislative work is probably one in which there is constant delay and rejection of government legislation. In fact, the vast majority of legislation is passed with little delay by the upper house, most is passed 'on the voices' with no formal vote taken, and the larger proportion is passed without amendment.³⁴

Investigation

If 'a legislature is known by the committees it keeps',³⁵ the Australian Senate stands high in the list of national legislatures due to the development of a effective committee structure over the past three decades. Senate committees aid the parent body in its review function, they play a part in increasing the degree of accountability of government to parliament, they give Senators a good opportunity to gather information on government activities, and they are an important channel of communication between the Senate and the general public. A committee secretary has spoken of the value Senate committees add to the operation of government in Australia:

Getting material—and as much truth as possible—on to the public record is one of the main virtues of Senate committee inquiries ... as a rule, they deliver a comprehensive elucidation of the facts, a judicious weighing of advice and opinions, and the careful crafting of recommendations that reflect the needs and interests of Australia's citizens.

Such work, he concludes, provides 'no small benefit to governance'.³⁶

Protection

All Bills considered by the Senate are assessed by the Scrutiny of Bills Committee as to their conformity to important civil liberties principles. The Standing Committee on Regulations and Ordinances submits all items of delegated legislation that have been tabled in the Senate to the same civil liberties test, as well as seeking to ensure that each is within the authority of the relevant piece of legislation. John Uhr notes that the precise influence of such work is hard to quantify, but notes that the Scrutiny of Bills Committee itself is convinced that its work has an important modifying effect upon government legislation, while a Senate document notes that since the establishment of the Regulations

and Ordinances committee in 1932 no recommendation that a regulation be disallowed has been rejected by the Senate itself.³⁷

An example of this type of Senate work occurred between March and June 2002 when the Senate considered five security-related Bills that had been passed by the House of Representatives on the day after their introduction. After receiving in excess of 430 submissions, the Senate's Legal and Constitutional Legislation Committee recommended wide-reaching amendment of the Bills, recommendations accepted by the Government.

Accountability

Oral and written questions directed to ministers are a significant part of the accountability function of legislatures in many countries, and the questioning of ministers in both houses of the Australian Parliament indicates its importance in this country. Each sitting day features question time in the Senate, though with only a limited number of ministers sitting in the upper house its role cannot be as significant as in the House of Representatives. Other occasions for calling a government to account include censure motions against ministers and inquiries into ministerial conduct. Such events may have no constitutional significance, but 'may have a significant political impact'.³⁸ In 1996, for instance, the eventual outcome of a Senate resolution calling on two government members to explain apparent conflicts of interests was their resignation of their government offices.³⁹

As noted above, Senate committees play an important part in making government more accountable to the legislature than it might otherwise be. The consideration of Budget estimates by legislation committees is very important in this. On such occasions government departments and agencies provide information while officials explain the data to Senators—and through them to the public. As noted by Wayne Hooper of the Senate's Procedure Office, accountability here is 'as much about *explanation* as it is about *information*'.⁴⁰

Debate

By their very nature democratic legislatures are important as venues for public debate. In his classic work on the British constitution, Walter Bagehot spoke of parliament's 'expressive function', which was 'to express the mind' of the people 'on all matters which come before it'.⁴¹ There is much debate on legislation that comes before the Senate, of course, but on occasion the upper house can become an important venue for a debate of national significance. Examples of recent years involved the Native Title Bill 1993, the Euthanasia Laws Bill 1996 and the Native Title Amendment Bill 1998. Such debate is widened due to the impact of the electoral system. The fact that it has become the norm for the Senate to have members from outside of the Coalition or Labor parties means that different voices and interests have been given a voice in the nation's parliament.

Debate does not only take place on the floor of the Senate. The fact that Senate committees give opportunities for many Australians, both as members of different bodies,

and as private individuals, to give evidence to the committees serves to inform the Parliament, as well as the community, of issues that are of importance to the nation.

The Urge to Alter the Senate

From a very early stage people began to express the need to reform—or even abolish—the Senate. Even before the Australian Constitution came into being there was some uneasiness over the creation of both a strong House of Representatives and a strong Senate. At the 1897–98 Federation Convention a leading New South Wales delegate indicated his concern:

You provide machinery for passing legislation up to a certain point; but when you get to that point you provide further machinery to block it from going an inch further. What is the use of the machinery created in the first instance when the work of the house of representatives can be blocked by the upper chamber?⁴²

Like William Lyne, many people have seen the creation of a lower house with powers akin to the House of Commons, plus a Senate with virtually all the powers of the US model, as somehow unnatural and an unfortunate blemish on Australia's constitutional arrangements. This is because Australia's federal system, which includes the State governments, the Senate and the High Court, has been seen by many politicians and academics as inferior to the Westminster model, where quick and coherent government activity is facilitated by the manner in which power is concentrated in the House of Commons.⁴³ It has become a commonplace to see the Australian political system described as some form of 'hybrid' that has awkwardly welded together unrelated parts of different systems of government.⁴⁴ A much-quoted paper has spoken of the Australian political system as being the "'Washminster' Mutation"—namely a combination of Washington and Westminster systems of government.⁴⁵ Implicit in such descriptions has been a view that the Senate, as structured, perhaps did not 'belong' in a modern political system that traced much of its history to Westminster. It can be argued that the existence of such a view has made it easier for critics to see the Senate as a constitutional aberration.

To an important degree, the Senate has been seen as a problem, no matter what its current level of activity. For most of the period 1910–49 it was criticised for its failure to properly act as a house of review (let alone a States' house); since the mid-1950s its failings have been associated with its frustration of various Commonwealth governments by its use of the significant legislative powers given to it by the Founders. Whatever the views of its critics, the need to reform the Senate has been a constant refrain in Australian politics.

Do we Need an Upper house?

For some in the labour movement, there was no need for the inclusion of an upper house in the new Australian Constitution. Noting that the smaller colonies' votes would be worth much more than the larger, the *Sydney Worker* stated that such a chamber might be a sop to the smaller colonies, but it would hardly be democratic: 'Where an Upper House exists

the people rule in name only'.⁴⁶ The abolition of the Senate was for sixty years part of the platform of the Australian Labor Party, being removed only in 1979—in recognition of the electoral harm it did the party.⁴⁷ It was no doubt also a recognition of the practical difficulty involved in removing the Senate from the constitutional arrangements. Apart from the difficulty of securing approval of a national majority of the voters in a referendum, there would probably be a need to secure a majority in all six States, as claimed by former High Court Chief Justice, Sir John Latham.⁴⁸

In more recent times, Liberal Senator Helen Coonan has been vocal in criticising the power of the Senate to hinder government legislation, and has suggest that there might not even be a need for a strong upper house in a modern democracy such as the Australian:

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.⁴⁹

Coonan's words are a reminder of the famous assertion by the Frenchman, the Abbé Siéyès, who judged that 'If the Second Chamber agrees with the first it is unnecessary: if it disagrees it is pernicious'.⁵⁰ One still hears the occasional call for Senate abolition,⁵¹ but a combination of the immense difficulty of removing it from the Constitution, plus its popularity (see p. 27), probably means that such calls are never likely to be heeded by governments.

What About Democracy?

At the Federation Convention of 1897–98, some delegates from New South Wales and Victoria attacked the plan to give all States equal numbers in the Senate, irrespective of population, claiming, 'It absolutely drags down responsible government'.⁵² Although this is a fundamental part of the original contract between the six colonies, the equality of State numbers in the upper house is often referred to disparagingly when critics seek to attack any activity by the Senate to hinder or alter legislation passed by the House of Representatives.

In the 2001 Senate election a Tasmanian Senate vote was worth 12.6 New South Wales votes, a proportion that is steadily increasing with the passage of time. A former Victorian Solicitor-General has claimed that the tenet 'one vote one value' has long been a basic principle of democratic governments, yet the Senate was created 'as one of the most undemocratic legislative chambers to be found anywhere'.⁵³ Although the principle of one vote one value is well entrenched in most lower houses in Australia, the national upper house provides a spectacular example of the distortion of the value of a vote. This was condemned by a Prime Minister from New South Wales, Paul Keating (ALP):

Has the Liberal Party taken leave of its senses on this matter in not understanding where the weight and fulcrum of our democracy are? It is in the representative chamber [i.e. the

House of Representatives]. That is where there are roughly equal numbers of electors across the country and we have an election where every person's vote is equal. But in the Senate a person's vote in a small state is not the equal of a person's vote in a big state. It is unrepresentative and, because it operates as a party house and now a spoiling chamber, it is in fact usurping the responsibilities of the executive drawn from the representative chamber, the House of Representatives.⁵⁴

Government Resentments

Despite the fact that the Senate was established, quite deliberately, with great potential powers, many prime ministers have resented not being able to push their legislation straight through both houses with a minimum of delay. In one of his communications with the Governor-General when advising a double dissolution election in 1983, Prime Minister Malcolm Fraser (Lib) probably spoke for all such prime ministers when he asserted that, 'there is a need for the Government, in the critical period we face, to have decisive control over both Houses of Parliament'.⁵⁵ Others, however, are content that the Senate prevents prime ministers having such control. Commenting on Liberal Prime Minister John Howard's most recent attempt to rein in the upper house, Senate Clerk, Harry Evans, summarised the desire of prime ministers as follows:

All prime ministers become very addicted to power after a while and, I think that like all prime ministers, he [i.e. Prime Minister Howard] would like to be able to pass whatever legislation he likes when he likes.⁵⁶

The desire for legislative control is often influenced by the view that modern governments are required to implement their agendas, committed as they are to the provision of many welfare arrangements and concerned with the difficulties of managing a modern industrial economy. As noted by the late Professor Geoffrey Sawer, such priorities are sorely limited in their performance, 'if the initiatives of a government based on a House of Representatives majority are to be constantly "checked" by a hostile majority in the Senate'.⁵⁷ For such critics, the election process, whereby governments must account regularly for their actions, is check enough to satisfy the needs of a democratic state.

It follows, then, that some commentators would prefer to see s.53 (dealing with the powers of the Parliament) altered so as to reduce Senate power over legislation. The ALP has long been of that view, as noted in the party's platform:

Labor reaffirms its belief in the primacy of the people's House (the House of Representatives) and believes that a government enjoying the confidence of that House should be able to govern without obstruction by the House of review (the Senate).⁵⁸

All of this is related to the belief held by all governments that electoral victories give them a mandate from the voters both to govern the country and to implement particular policies promised during the election campaign.⁵⁹ Prime Ministers such as Robert Menzies (Lib) have been loud in their complaints about the Senate denying the electorate what they have been promised during their campaigns for office. In 1950 Menzies reminded the Labor-

controlled Senate of the mandate principle which he believed to be fundamental to Australian democracy:

... Australia requires, always has required, and always will require, some stability of government, some continuity of administration and some reasonable prospect of putting on the statute-book the programme of which the people have approved.⁶⁰

Prime ministers tend to believe that such stability as Menzies spoke of can come only when the Senate is prepared to heed the people's will.

Many prime ministers, facing an intransigent upper house, have also asserted that the Senate has lacked an accurate understanding of the needs of the Australian people. Typically, the upper house is accused of not appreciating a government's 'big picture' and of not understanding what needs to be done for the country. During the Australia Card controversy in 1987, for example, Prime Minister Bob Hawke (ALP) spoke of the Senate standing in the way of a larger policy picture that was 'aimed at restoring fairness to the Australian taxation and social welfare systems'.⁶¹ More recently, Prime Minister Howard has expressed his concern over the Senate's failure to appreciate the wider benefits for Australians from his industrial relations or health legislation.⁶² Rarely, though, has a Prime Minister spoken as bitterly as Prime Minister James Scullin (ALP), after the refusal of the Senate to pass his Government's Fiduciary Notes Bill (1931) that he described as a necessary precursor to the achievement of greater government relief for the unemployed and for farmers:

I believed that at least the majority of the senators had bowels of compassion ... The responsibility assumed by members in another place [i.e. the Senate] is great, and surely they ought to offer some alternative measure to relieve the unemployed and the wheat-growers. In our whole political history I have never known such a policy of negation in a critical situation. The Government has submitted a policy that would give relief immediately, but members in another place have rejected it and offered nothing in its place. History will record that they have been guilty of a crime against humanity.⁶³

Essentially, prime ministers deny that the Senate can have as accurate a sense of what is needed to be done for the Australian people as do the governments they lead.

The 'Supply' Problem

Of particular concern for Labor has been the fact that the controversial events of 1974–75, concerning the Senate and money bills, indicated just how much power the upper house can wield.⁶⁴ Words similar to the party's 2000 Platform have been part of every ALP Platform since the 1970s:

Labor supports constitutional reform to prevent the Senate rejecting, deferring or blocking appropriation bills.⁶⁵

For the ALP, this is said to be non-negotiable: '... removing the power of the Senate to block supply is fundamental to Labor'.⁶⁶

It has not only been the Labor Party that has had concerns over the Senate's power to defeat money bills. In 1967 Liberal Prime Minister Harold Holt claimed that 'one of the most firmly established principles of British Parliamentary democracy', was that a second chamber 'should not reject the financial decisions of the popular House'.⁶⁷ Over twenty years earlier, Liberal Senator John Gorton suggested one means of 'preventing the Senate from inhibiting and frustrating government' was to 'deprive the Senate of the power to reject Supply'.⁶⁸ In 1988 the Constitutional Commission recommended that the Senate not have power to reject Supply legislation.⁶⁹

Today the parties are far from unanimous on this question. While the Coalition and the Greens oppose any move to amend the Constitution to remove the power to block money Bills, and the Australian Democrats oppose use of the power, only the ALP seeks its formal removal from the Constitution.

Clerk of the Senate Harry Evans has pointed out that the introduction of fixed House of Representatives terms—of three or four years—could provide a solution to the power-to-block-money bills issue. The insertion into the Constitution of a fixed House term, that could only be shortened by a motion constitutionally identified as a motion of no confidence, would withdraw the usefulness of blocking or rejecting Supply as a parliamentary tactic.⁷⁰

Changing the Deadlock Arrangements?

A different approach to the money bills issue was the proposal by former Western Australian Premier Charles Court (Lib), made in the wake of the events of 1974–75. If 'proposed laws appropriating revenue or moneys for the ordinary annual services of the Government' were rejected or blocked by the Senate, his proposal would provide for the automatic dissolution of both houses. The Governor-General would have no discretion in the matter. Interim Supply would be provided and, if after the dissolution the House of Representatives again passed the proposed law, 'it shall be taken to have been duly passed by both Houses of Parliament and shall be presented to the Governor-General for the Queen's assent'.⁷¹ Such a change would not remove the power to block Supply, but would make it mandatory for the Senate to face the voters if it forced the issue over financial legislation.

Court's approach, therefore, would be to modify the power of the Senate by altering s.57 of the Constitution, the deadlocks clause, but only insofar as it relates to the Senate's power over Supply legislation. In this he echoed the Joint Committee on Constitutional Review (1959) which suggested that s.57 be modified so as to draw a distinction between money bills and other bills. In an effort to resolve a Supply Bill breakdown, a deadlock would be deemed to have occurred if such a Bill was not passed by the Senate within

thirty days of its receipt from the House of Representatives. One rejection by the Senate would be sufficient for a deadlock to have occurred.⁷²

Others have suggested that a wholesale alteration to the deadlocks clause might make the legislative process more flexible and less prone to delay. The clause, it is said, 'is not a workable means of resolving deadlocks', because it has essentially worked as a means of 'prolonging rather than resolving' disputes between the Houses'.⁷³ A number of possible amendments have been proposed over the years. John Gorton's suggestion was to require the Senate alone to face an election.⁷⁴ The 1959 Joint Committee spoke of blocked legislation moving straight to a joint sitting. An absolute majority of Members and Senators plus one-half of Members and Senators from at least half of the States would be required to pass legislation. In 2003 a Department of Prime Minister and Cabinet discussion paper made a similar suggestion, though it would require just the absolute majority of all parliamentarians—a suggestion also made by former Labor leader Bill Hayden.⁷⁵ Another proposal devised by Michael Lavarch, one-time Labor Attorney-General, would retain most aspects of s.57, but would replace a double dissolution with just a House and half-Senate election.⁷⁶

The debate during 2003 on this issue produced a number of other suggestions. Independent Senator Brian Harradine, for example, spoke of a fixed House term, with no dissolution possible, and a joint sitting available to sort out deadlocks.⁷⁷ Australian Democrat leader Andrew Bartlett, by contrast, spoke of a national plebiscite, wherein Australian voters could approve or reject legislation that had become the subject of a deadlock. He claimed that such a proposal would 'give power back to the people'.⁷⁸

Changing the Electoral System?

One simple change that could have a far-reaching impact upon the politics in the Senate would be to change the electoral system. To do so is simply a matter of altering the *Commonwealth Electoral Act 1918*, with the replacement of proportional representation with some other system. If the major parties agreed to do so, Australian Democrat, Green and One Nation support for the system could be thus swept away with little difficulty.

What might replace Proportional Representation? As we've seen, the Block Vote (1902–19) and Preferential Voting (1919–48) often produced near-whitewash results, yet they did ensure that the government of the day usually controlled both houses. A few people have wondered about the re-introduction of preferential voting with one significant difference from its mode of operation between 1919 and 1948 when each State had just the single electorate. Section 7 of the Constitution speaks of Senators being 'directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate'. There was therefore a flexibility built into the system whereby the Commonwealth Parliament could alter the arrangements if the need arose. Former Liberal Federal Director, Andrew Robb, has spoken of taking advantage of this, by dividing each State into six electorates, each returning one Senator at each half-Senate election, and with Preferential Voting being used. In 1994 Prime Minister Keating apparently considered a

similar proposal.⁷⁹ This would be similar to the Legislative Council arrangements operating in Victoria until 2003, under which only one non-major party Legislative Councillor was elected in the twelve elections up to 2002.

If changing the voting system were not politically possible, former Queensland Liberal Senator, David MacGibbon, has suggested that proportional representation could be retained, but with the hurdle for election to be made higher than is currently the case by the introduction of an electoral threshold.⁸⁰ This is a legislative provision that would state the proportion of the vote that a party needs to get representation, or that an individual candidate must achieve, to remain in a count. Electoral thresholds are used in a number of countries where proportional representation is the voting system.⁸¹ In Germany, for example, where the threshold is colloquially known as the '5 per cent guillotine', it has been described as leading to 'a stability of political life', and as helping ensure a functioning Bundestag.⁸² Thresholds are not unknown in Australia. The first two post-self-government elections for the ACT Legislative Assembly (1989, 1992) required candidates to win about 5.6 per cent of the primary vote to remain in the count. Senator Coonan has stated that 'the imposition of a formal threshold would be consistent with the principles of representative democracy', and would 'enhance the strength and stability of government, whilst retaining a system that recognises the legitimacy of minority representation'.⁸³ She has shown how a threshold of 11.43 per cent (80 per cent of a Senate quota) would have meant that only four of the sixteen minor party and independent Senators elected in 1993, 1996 and 1998 would have been able to gain election.

No Ministers in the Senate?

Interestingly, some who defend the Senate's legislative power would make one change that would be designed to strengthen its review role. Many Senators have served as ministers since Federation; in the States, Legislative Councillors have also been part of state ministries. Despite this, some have challenged such a practice as weakening the upper house role: 'Surely a true house of review can only be so described where Ministers of a government are not part of that review'.⁸⁴ For some years such views have been occasionally heard in relation to the Senate: 'while the ambition of most of the leading and abler players in the Senate is to retain or secure ministerial office ... then the capacities of the Senate will be distorted to service those ends'.⁸⁵ Such a change is part of Australian Democrat policy. On the other hand, it has recently been asserted that the presence of ministers and former ministers in the upper house both increases the Senate's profile and enhances the quality of the scrutiny carried out by Senate committees.⁸⁶

The Difficulty of Achieving Constitutional Change

Most significant changes to the Senate would require amendment of the Constitution. The difficulty with this, however, is that Australians are reluctant to tamper with the nation's constitutional arrangements. This seems to be particularly the case if voters suspect that a national government is attempting to increase its power. In the first half-century of the

Federation a consistent theme was the Commonwealth's desire to add to the powers of the Parliament; in more recent times the focus has been on altering the arrangements for the Senate. Whatever the type of change required, most amendments of this nature have been defeated, often by a wide margin. Australians have been unprepared to alter the federal system of government if they perceived its basic structure to be under threat; nor have they looked favourably upon proposals which seemed designed to weaken the position of the Senate.

Since 1967 there have been six attempts to alter the Constitution in a way that was designed to alter the place of the Senate; five have failed to gain the required majorities (see Table 1).

Table 1: Amendments Relating to the Senate 1967–88*

Year	Proposed amendment	Sponsoring government	YES vote (per cent)	States in favour
1967	To remove the 'nexus' that ensures that the Senate remains about half the size of the House of Representatives	Coalition	40.3	NSW
1974	To provide for simultaneous elections of the House of Representatives and the Senate	ALP	48.3	NSW
1977	To provide for simultaneous elections of the House of Representatives and the Senate	Coalition	62.2	NSW Vic SA
1977	To ensure that a Senate casual vacancy would be filled by a person from the same party as departed Senator.	Coalition	73.3	All States (Carried)
1984	To provide for simultaneous elections of the House of Representatives and the Senate	ALP	50.6	NSW Vic
1988	To provide for simultaneous elections of the House of Representatives and the Senate. To reduce Senate terms to four years.	ALP	32.9	None

* A referendum fails if it does not secure a majority of the total vote plus majorities in a majority (4) of the states.

Support for the Senate

Should the Senate be left alone? Some people believe to do so makes good political sense. Since 1949 the sharp view taken of it by successive governments has not been translated into a widespread public support for its 'reform'—on the contrary, polls seem to suggest a widespread public support of its review activities. One former Liberal leader has suggested that a response of the smaller States to attempts to weaken the Senate's powers could be severe enough to place 'severe burdens on the federal compact and threaten its existence'.⁸⁷ Former Labor leader, Bill Hayden, believes that as the Senate becomes more representative of the community, so it is more likely to gain even more support from that

community for its continued operation in its present political shape.⁸⁸ Hayden has suggested that, as constitutional change is so difficult, perhaps it is best simply to rely on the evolutionary process that he believes is occurring in the Senate's operation. The politically cautious response would therefore seem to be that it is better to leave the upper house alone.

'... the Safeguard of the Commonwealth'

Some observers defend the Senate by claiming that it is doing its job quite satisfactorily and, hence, is not in any need of any change. This has always been the view of *Odgers' Australian Senate Practice*, the institutional defender of the Senate.

What are the functions of the house that *Odgers* calls the 'essential feature'⁸⁹ of the Constitution? *Odgers* spells out various roles that the Senate is said to perform:⁹⁰

- As an 'essential of federalism', it ensures adequate representation of the people of all the states.
- It gives the less populous states a reasonable number of representatives in the national Parliament, something that is not guaranteed in the House of Representatives.
- Its current voting system provides wider representation of significant groups than is likely in the House of Representatives.
- It acts as a house of review wherein are expressed second opinions in relation to legislative and other proposals initiated in the House of Representatives.
- It provides protection against 'a government ... introducing extreme measures for which it does not have broad community support'.
- It gives financial measures adequate consideration.
- It occasionally initiates non-financial legislation.
- It probes government administration.
- It exercises surveillance over the executive's regulation-making power.
- It protects personal rights and liberties through the Standing Committees for Scrutiny of Bills; and Regulations and Ordinances.
- It provides, as a parliamentary institution, a place 'where a government can be, of right, questioned and obliged to answer'.

For *Odgers*, the Senate is *primus inter pares*: '... the Senate has been rightly seen as the safeguard of the Commonwealth'.⁹¹

But the Senate's main defender is not alone. Since the virtual disappearance of government majorities in the upper house, the Senate has come to gain a number of academic supporters who see it as 'a distinctive creation of Australia's constitution-makers'.⁹² Most Senators have given maximum attention to national affairs rather than to State issues, and this, according to its supporters, combined with the fact that the government of the day usually does not control it, has meant that the Senate has functioned as 'national parliamentary institution with multiple purposes of governance'.⁹³ Professor Brian Galligan believes the Senate should be seen as a powerful parliamentary body which has developed 'a national role comparable to that of the House of Representatives'.⁹⁴

For analysts such as these, to look at the Senate as part of an 'hybrid' system may well be to miss the point that what we are observing is not a 'hybrid', nor a 'mutation', in some way inferior to what is seen in other political systems. It may be more accurate, and hence, of more value to our analysis, to see the Australian political system as *sui generis*, a quite distinctive set of arrangements in which are being developed 'quite distinctive forms of parliamentary government'.⁹⁵ To those holding such a view, the Senate is simply part of what is an *Australian* whole that works perfectly well and which should be left alone.

Protection Against Autocracy

The Senate is sufficiently powerful for its champions to see it as able to play a role in protecting Australians against autocratic government—according to *Odgers' Senate Practice*, it is 'the most conspicuous example' of the institutions set up 'for balancing and controlling power'.⁹⁶ A former Liberal Senate President has described the upper house existing 'in the broadest sense', to 'preserve the liberty of society against a menace of unrestricted power, based on a House of Representatives majority which may be temporary'.⁹⁷ For a *Sydney Morning Herald* journalist, the Senate is the one guarantee that Australians have against a prime ministerial steamroller:

... the Senate is vital to protecting Australia's democracy and ensuring good, considered law is passed by the Federal Parliament. Paul Keating called Senators 'swill' and John Howard wants to gut its powers, but it is only through the Senate and its committees that Australians have a chance to discuss proposed laws, and where there is some possibility of arguments being assessed on the merits.⁹⁸

Former Labor staffer Don Russell has a stronger view:

The Prime Minister [of the day] does not worry that much about the House. As with all these things, the only real check and balance that we have in our system is the Senate. If the Senate disappeared tomorrow, or if we changed the powers of the Senate so it could no longer perform the role it does, and the Prime Minister of the day had 40 or 50 staff it would be all over, red rover—it [i.e. government] would all be run out of the [prime ministerial] office.⁹⁹

Sir George Pearce, the longest-serving Senator (37 years), linked such views to the idea of there being a government mandate to legislate for change. He believed that a government had a mandate to govern, but not much more:

It is useless for the Government to talk to me about mandates, because during the last few months it has done things which indicate that it places a very elastic interpretation upon that blessed word 'mandate'. Under the guise of acting on a mandate from the people, all sorts of things can be done.¹⁰⁰

According to a view such as Pearce's the Senate must be preserved and protected in order that it can, in turn, protect Australians.

Defender of the States

It has long been a truism that the Senate's domination by parties has undermined its function as protector of the States. Apart from rare examples of a state's members all voting the one way on an issue, the overwhelming picture is of an upper house in which the parties are as dominant as in the House of Representatives.

Despite this, there is a political argument, that is sometimes aired, which speaks of proposed changes to our governmental arrangements involving the Senate, as an attack upon the States. The argument is used in two ways. Applied generally, it speaks of the Senate as continuing to act as a barrier to central government power. In the official case against breaking the 'nexus' in 1967, voters were advised to:

Always think of the Senate as the States Assembly, which was its name in the draft Constitution. It is your House, designed to protect the interests of your State. Thus any attack on the Senate is an attack on the protection of the interests of your State in the Federal Parliament.¹⁰¹

The 'Protector of the States' argument is also heard in relation to particular states. A typical claim was that by Professor Greg Craven of Perth's Notre Dame University, when he warned that Western Australia would be hurt by Prime Minister Howard's 2003 plan to 'water down the powers of the Senate'.¹⁰² Tasmanian Senator Brian Harradine (Ind) has spoken of the Senate giving 'a voice to the people of the smaller states'.¹⁰³ The effect of such arguments can be seen in the way Western Australian and Tasmanian voters have reacted to attempts to change parts of the Constitution that affect the Senate. In six amendments between 1967 and 1988 the average YES vote across the nation was 51.3 per cent, yet Western Australia's and Tasmania's combined YES vote averaged just 40.8 per cent. Five of the six referenda were defeated. Even in the Senate vacancies case, the Western Australian and Tasmanian YES vote of 56.2 per cent was over 17 per cent below the national figure.

It is clear that a government seeking to amend those parts of the Constitution dealing with the Senate is, in effect, trying to secure four affirmative votes out of four States only—Western Australia and Tasmania are likely to vote NO if the Senate seems to be under

threat. Harradine's 1988 view that voters 'resented Federal Government attempts to undermine the Senate', seem to be shared by many in the West.¹⁰⁴

Representation

Proportional representation is designed to remedy the claimed electoral injustices that occur in electoral systems using single-member electorates, where it can be difficult for minority voices to gain any legislative seats. When proportional representation is used, a grouping of like-minded people, that has a reasonable level of community support, can often gain a fair share of power and representation in a legislative body. Minor party and independent candidates have much more chance of gaining representation in the Australian Senate than in the House of Representatives. In double dissolution elections minor party chances of success are even higher. Since 1949, 73 of 897 vacant Senate seats (8.1 per cent) have been filled by Senators from parties other than the Coalition parties or Labor. Since 1980 the figure has been 13.3 per cent. Successful parties have ranged from the Democratic Labor Party (first elected 1955), through the Australian Democrats (1977) to the Pauline Hanson One Nation Party (1998). There have also been various independents, including the Tasmanian trio, Reg (Spot) Turnbull (elected 1961), Michael Townley (1970) and Brian Harradine (1975) (Table 2):

Table 2: Minor Party and Independent Senators Elected 1955–2001

Election	DLP	AD	Green	ON	Other	Total elected/ number elected
1955	1					1/30
1958	1					1/32
1961					1	1/31
1964	2					2/30
1967	2				1	3/30
1970	3				2	5/32
1974*					2	2/60
1975*					2	2/64
1977		2				2/34
1980		3			1	4/34
1983*		5			1	6/64
1984		5			1	6/46
1987*		7			3	10/76
1990		5	1			6/40
1993		2	1		1	4/40
1996		5	1			6/40
1998		4		1	1	6/40
2001		4	2			6/40

* = double dissolution elections

Source: Gerard Newman, 'Federal Election Results 1949–2001', *Research Paper no. 9*, Department of the Parliamentary Library, 2001–02

Such Senators and the interests they have represented have therefore benefited from the mechanics of proportional representation, combined with an increasing propensity for people to vote for parties other than the Coalition or the Labor Party (Table 3):

Table 3: Major Party First Preference Votes (Senate)

Period	Number of elections	Average major party vote
1940s	4	93.0
1950s	4	92.0
1960s	3	88.3
1970s	4	86.7
1980s	4	84.4
1990s	4	80.5
[2001]	1	76.1

Sources: Colin A. Hughes and B. D. Graham, *A Handbook of Australian Government and Politics 1890–1964*, ANUP, Canberra, 1968; Gerard Newman, 'Federal Election Results 1949–2001', *Research Paper no. 9*, Department of the Parliamentary Library, 1998–99.

An important consideration for minor party Senators is just how far they should take their representation role. In particular, how far should they be prepared to go in opposition to government legislation? The Democratic Labor Party, which had Senators in every parliament between 1956 and 1974, tended not to take this power very far. In more recent times the minor parties have been much more prepared to try to block or alter government Bills. In the face of much government hostility to this development, the Australian Democrats have developed the idea of two mandates co-existing within the Parliament. One is said to be held by the party or parties that have won the most recent election, and the other is held by those elected to the Senate on policies that differ from those of the government. Former Australian Democrat leader, Cheryl Kernot, stated this view after the 1996 election, an election in which the Coalition won office by a clear margin, yet in which the Australian Democrats more than doubled their Senate seats (to five):

Clearly, there are two mandates resulting from this election: one for government to be changed, and one for a balance of power check on that Government in the Senate.¹⁰⁵

Such a view pushes the Senate closer to the US-style of upper house than has been the accepted view since Federation.¹⁰⁶

Public Attitudes

As noted earlier, there was a period in the early 1950s when opinion polls were suggesting that a great many Australians saw no need to retain the Senate. By the time of a 1969 survey, however, Democratic Labor Party and independent Senators had been a presence in the upper house for 13 years and governments had begun to complain about their legislation being 'held to ransom'. There seemed to be no major public concern about this, however, for the survey suggested that only 14 per cent now favoured abolition, while just

over half supported retention of the Senate. Ten years later the respective figures were 18 and 60 per cent.¹⁰⁷ By 1988 another survey was suggesting barely one in ten supported abolition of the Senate, though about one-quarter supported a reduction of its powers.¹⁰⁸ That latter figure has lessened, as Professor Murray Goot has noted in his summary of survey findings of the late 1990s:

... all evidence points to a better educated, more politically aware electorate, welcoming the check on executive power and wanting the Senate to stay.¹⁰⁹

Another way to assess public opinion in regard to the Senate and its performance is to note the voting behaviour of Australians since 1949. Two aspects of this stand out. The most obvious, noted above, is that people have given enough votes to particular minor party and independent senators to ensure the election of at least one Senator in every election since 1955. A less-obvious second aspect is the fact that the major party vote has fallen steadily in every decade since the 1940s, with the 2001 election showing a continuing drop. It seems that an increasing number of people clearly do not accept the major party claim that a vote for a minor party in a Senate election is a wasted vote—nor are they bothered when government legislation is roughly handled in the upper house.

Conclusion

The Australian Senate is a strong legislative body that has made an important mark on the Australian polity. Despite many criticisms made against its work and the fact that it delays governments' plans, it has come to hold a high place in the esteem of many Australian voters, and seems likely to remain a significant part of our political system. Its place is not guaranteed, however, for governments have repeatedly expressed their frustration with its impact on their legislation and it would be relatively easy to alter some of its arrangements, most notably its voting system. Defenders of the upper house will need to remain vigilant.

Endnotes

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