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**THE GOVERNMENT MAJORITY IN THE SENATE:
A NAIL IN THE COFFIN OF RESPONSIBLE GOVERNMENT?**

A Paper
Dedicated to the memory of David Hamer, DSC
Former Senator and Deputy President of the Senate

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**THE GOVERNMENT MAJORITY IN THE SENATE:
A NAIL IN THE COFFIN OF RESPONSIBLE GOVERNMENT?**

This occasion is dedicated to the memory of David Hamer. It is appropriate that he be commemorated. Apart from his distinguished career of seven years in the House of Representatives, twelve years in the Senate and seven years as the Senate's Deputy President, he was a great parliamentarian.

By a parliamentarian I mean a member of parliament with a strong interest in preserving and enhancing parliament as an institution, particularly as an institution of accountability, that is, an institution able to require the holders of executive power to explain their actions and to provide the information necessary for their performance to be judged. It is fairly easy to be a parliamentarian when in opposition; indeed, an established routine of oppositions is to make regular noises about the need to protect the role of the parliament and to make the government accountable. The test of a real parliamentarian is devotion to supporting and improving parliament as an institution of accountability regardless of whose party holds the executive power. A genuine parliamentarian promotes the ability of parliament to hold *all* governments accountable and makes constructive contributions to parliament's accountability measures so as to ensure that governments of all persuasions in the future may be held accountable. David Hamer met that test. He promoted parliamentary accountability processes on the basis that governments of his own party had to be made to explain themselves.

Among his other parliamentary achievements, he was largely responsible for the adoption of new standing orders of the Senate in 1989 to update its procedures and processes; he virtually single-handedly preserved the Senate committee system in 1987 against a very determined effort to undermine it; and he was responsible for the adoption by the Senate in 1988 of a system for the regular referral of bills to committees for closer scrutiny than they could receive in the chamber. He believed that the proper performance of the legislative function by the parliament was essential to its survival as an institution and to the health of the country, and that legislation should not be left to executive governments to determine. He believed that a vital function of the Senate and its committees was to improve legislation by subjecting it to that higher level of scrutiny. The system he put in place was also intended to provide those affected by legislation and with an interest in it with an opportunity to contribute to the legislative process through committee hearings on bills.

He had a favourite saying which encapsulated this devotion to the cause of parliament. It concerned the inquisitive function of parliaments. The parliamentary inquiries most worth conducting, he said, were those that the government of the day did not want.

In his book *Can Responsible Government Survive in Australia?*, first published in 1994 and issued posthumously in a second edition in 2004, he surveyed the workings of the so-called Westminster system around the world and proposed some radical reforms for Australia. While radical, they were based on realistic appraisals of Australia's existing institutions, and sought to build on the role of the Senate as the legislative chamber and the scrutineer of government. He regarded lack of government control over the Senate as an ingredient in promoting parliamentary accountability.

His proposals reflected the responsibility/accountability dichotomy. In employing the term responsible government in his book title, part of his realism was in accepting that governments are responsible to, that is, removable by, only the electors at election-time. The lower house acts as the electoral college to effect that reality. Responsibility can only work, he also recognised, if the parliamentary institutions are adapted to exact accountability, to require executive governments to submit themselves to ongoing examination. If governments set the terms on which they are to be examined and the extent of the public's knowledge, responsibility is severely hampered.

Since the current government assumed its majority position in the Senate on 1 July 2005 as a result of the 2004 election, one question has been most often put to me: how has the government majority affected the Senate, particularly the ability of the Senate to require accountability of government?

The brief answer is that the government majority undoubtedly led to a decline in accountability. This is particularly noticeable in relation to parliamentary inquiries. The inquiries that David Hamer said were most worth conducting, those that the government does not wish to have, are now mostly not conducted. As he well knew, part of the dynamics of current politics is that government backbenchers see their role as defending their government and protecting it from the exposure of its mistakes and misdeeds, in the interest of their own self-preservation. This culture has always been very strong in the House of Representatives, for obvious reasons, but was less influential in the Senate. The great change in the political system since the time when he flourished in the Senate is that government control over its backbenchers is much tighter in the Senate as well as in the House of Representatives. It is more than ever true that governments are compelled to explain themselves only by their political opponents, who often lack the means, particularly the information, to perform that function. I will return to that subject in due course.

The effects of the government majority may readily be summarised. They fall into six areas:

- blocking of inquiries by committees, and control of inquiries
- restrictions on consideration of bills by committees
- restrictions on estimates hearings
- refusals of information and documents to the Senate and committees
- failure to answer questions
- rejection of amendments to bills, especially amendments designed to impose accountability.

In relation to inquiries by Senate committees, inquiries will now not be conducted if they are politically awkward for the government. Special inquiries into particular subjects by the legislative and general purpose standing committees must be initiated in the Senate by references to the committees, and motions not approved by the government now simply do not succeed. There have been many motions for inquiries negated by the government majority. Inquiries must be fairly politically innocuous to get through that barrier. Moreover, with the recent restructure of the standing committees, the government has an effective majority and occupies the chair of all of the legislative and general purpose standing committees, so is able to control those inquiries which the committees are able to initiate without a reference from the Senate, particularly evaluations of the performance of government departments and agencies. Having the numbers on the committees also allows the government to control the conduct of inquiries, the selection of witnesses and the arrangement of hearings.

The system promoted by David Hamer in 1988 for the references of bills to committees is still in place, including the Selection of Bills Committee which decides the bills that are to be referred. The government may use its numbers, however, to prevent the referral of any bills and to set the times for the committees to report. There has been a noticeable tendency for the shortening of the times for inquiries, which non-government senators see as an attempt to limit the effectiveness of the inquiries. The average time for an inquiry into a package of legislation has declined from 40 to 28 days. Bills are still referred to committees, including controversial bills, but it is not yet clear whether this is due to an intention to keep the system or merely a matter of keeping up appearances for the time being. Future developments will tell.

Estimates hearings, which have been described as the Senate's leading accountability mechanism, have continued, but there have been two negative signs. The days available for the committees to conduct their hearings are set by resolution in the Senate, and in 2006 the

total number of days provided for the committees for hearings was reduced by two. More seriously, ministers have made noises from time to time to the effect that estimates hearings have strayed from their original purpose of examining estimates, and ought to be confined to that supposed original purpose. There have been some refusals to answer questions, particularly the ban on all officers answering any question about the AWB affair. It is not clear whether the government intends to impose a more systematic restriction of the scope of questioning at estimates hearings. That would require a repudiation of a resolution of the Senate. In 1999 ministers attempted to confine the scope of questioning, but this led to a resolution of the Senate to the effect that all questions relating to the operations and financial positions of departments and agencies are relevant questions for estimates hearings. If ministers decide to restrict the types of questions they will answer, it will not be possible, because of the government majority, for this resolution to be enforced. It could effectively be repudiated by ministers simply ignoring it. Again, future developments will disclose whether this is the intention.

This situation draws attention to an especially serious consequence of the government majority. In the past where governments refused to produce information to committees, some remedy could be pursued in the Senate. Estimates hearings could be extended, particular witnesses could be ordered to attend committee hearings to give evidence and documents could be ordered to be produced. Procedural penalties could be imposed, such as extending the time for questions or denying time for to government business. It is now not possible to apply these remedies because of the government majority. As a result, information can be refused to committees, and indeed to the Senate itself, without fear of redress. There has been a noticeable increase in refusals of information to committees. Motions in the Senate for documents to be produced have been rejected without any reasons given. In spite of Senate resolutions declaring that ministers must raise some public interest immunity ground for refusing information, evidence has been withheld without any such grounds being raised, notably in the AWB affair.

One of the first steps taken by the government after gaining its majority was to rearrange question time to give itself more of the questions. Previously the allocation of questions had been determined by negotiation between the parties. Most of the time is taken up by ministers anyway, because answers are allocated four minutes and questions one minute. Of course, questions by government senators are always supportive; they are drawn up in ministers' offices, in fact. Question time is not a good accountability occasion; questions are notoriously not answered. More significant are questions on notice, lodged through the chamber and through estimates hearings, to be answered in writing. Although detailed statistics have not been compiled, there appears to have been an increase in questions not

answered, or answered only after longer delays, and in responses to the effect that questions will not be answered because of alleged confidentiality or resource constraints.

The government is also able to control the legislative process in the Senate. Few if any amendments to bills moved by non-government senators are likely to be accepted. Only four have been passed since 1 July 2005. Even amendments recommended unanimously by committees, with the support of government backbenchers, have been rejected by the government majority in the chamber. In the past many amendments carried in the Senate and put on the statute books related to accountability matters: amendments were passed requiring information about the operation of legislation to be produced; for reviews of legislation to be undertaken; for matters to be prescribed by regulation so they can be disallowed by either house; and for ministers to consult affected parties before making decisions. Even these kinds of amendments have been rejected: government prefers to give itself a free hand. The mention of regulations is a reminder that the government can now make law by regulations and other statutory instruments secure in the knowledge that they will not be disallowed by the Senate.

Much has been made of the possibility of “rebellions” by government backbenchers. There have been some, notably in relation to trade practices and migration legislation. Those incidents, however, were concerned with major questions of legislative policy, not accountability measures. The “rebellious” backbenchers are likely to have a limited quota of “rebellion” to expend, and are not likely to use any of it on accountability matters. This contrasts with previous periods of government majority in the Senate, when accountability measures were just as likely a source of “rebellions”. For example, in 1981 a motion was carried against the Fraser government for the establishment of the Scrutiny of Bills committee to scrutinise legislation on civil liberties criteria similar to those applied to delegated legislation by the Regulations and Ordinances Committee. The motion was passed with seven government backbenchers, including David Hamer, “crossing the floor”.

The danger for the future is that a government with the power to prevent any inquiries into its mistakes and misdeeds and to block the disclosure of unfavourable information can prolong its tenure by those means. The longer a government stays in office, particularly by the suppression of those parliamentary processes, the greater the likelihood of the processes atrophying. It will probably take a long time for accountability to be brought back to its pre-2005 level, quite apart from making any improvements.

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