

The Senate and the House of Representatives

Readers may recall from the Introduction that Arend Lijphart has identified ‘strong’ bicameral systems as ones in which the two houses are symmetrical—their powers are comparable or nearly comparable—and incongruent—their members are elected in significantly different ways. But there may be another way to identify, though not define, strong bicameral systems without resorting to an analysis of constitutional powers or electoral laws. If the two houses enjoy dependably harmonious relations, that is a strong indication of weak bicameralism. Strong bicameralism, on the other hand, is likely to be accompanied by, and reflected in, recurring competition and tension between the two houses. By this measure, the Australian Parliament unquestionably is characterized by strong bicameralism.

The primary sources of strain are constitutional, political, and institutional. From time to time other, more idiosyncratic and transitory strains appear, but the essential tensions between the House of Representatives and the Senate are more or less built into the structure of Australia’s federal polity. In an important respect, relations between the two houses in Canberra are more complicated and difficult than they are between the two houses of the US Congress in Washington. In Washington, it often makes sense to speak about the relations between the House of Representatives and the Senate and then to change the subject in order to discuss the relations between the Congress and the President. In Canberra, in many respects, both subjects are conveniently discussed at the same time.

In many daily matters, the House and Senate interact with each other without regard to the government—for instance, in the transmission of legislative papers between the two houses.¹⁵⁶ In other

156 To every generalization there is an exception. To anticipate a later section of this chapter, the House’s standing orders (specifically, SO 248) provide that, if the House of Representatives disagrees to a Senate amendment, it is to return the amendment to the Senate with a statement of the reasons for the House’s decision. The Clerk of the Senate, Harry Evans, recalls instances in which these statements indicated why ‘the government’ disagreed to an amendment, not the House. He took this to mean that the decision to disagree had been made in a ministry office,

and more politically important respects, though, it can be difficult to distinguish relations between the Senate and the government from relations between the Senate and the House of Representatives. Disputes between the former often manifest themselves in the form of disputes between the latter. *Odgers' Australian Senate Practice* (2001: 75) goes so far as to say that:

In practice, under the system of government as it has developed in Australia, relations between the two Houses are relations between the Senate and the executive government, as the latter, through its control of a disciplined party majority, controls the House of Representatives. ... There is value, however, in treating the matter [the Senate's relations with the House] on the basis of the constitutional assumption of dealings between two representative assemblies, as this pattern may in certain circumstances, for example, a government in a minority in the House, reassert itself.

The reputation of the House

So much of the discussion in the previous chapters has focused on the Senate that it is fitting that we precede any further discussion of relations, procedural or otherwise, between the two houses with a brief digression into the reputation of the House. This digression will provide necessary context for our discussion of bicameral relations in this chapter and also for our examination of the role and value of the Senate in the next chapters.

Almost invariably, questions about bicameralism and bicameral parliaments quickly become transformed into questions about 'second' or 'upper' chambers—about 'senates.' Why is a bicameral parliament preferable to a unicameral one? What does a unicameral parliament lack that a bicameral parliament offers? In practice, such questions become translated into others. What is the value of the senate? What added value does the senate provide that justifies the additional complications, delays, costs, and duplication of effort that it entails? If the senate is elected in the same way as the lower house (for convenience, let us call it the assembly), why bother having it? If it is elected on a different basis—for example, if each state or province is guaranteed equal representation or representation that is not proportional to its population, then the senate's democratic legitimacy often is questioned. (Needless to say, these questions echo much more largely if the senate is not elected at all, as in Canada or Britain.) 'Why bicameralism?' usually means 'Why a senate?'

that the statement had been written by ministry officials, and that, through an oversight, it had not been revised to attribute the statement to the House.

We will address questions of this nature in the two concluding chapters. Here, let us take the opposite tack and ask, ‘Why the House of Representatives?’, or, more accurately, ‘What is the House of Representatives?’ The answer to this question is essential for understanding and assessing the Senate. We can examine the Senate in isolation from the House if we limit ourselves to asking how the Senate works and what it does. But if we also want to ask whether the Senate is a valuable institution, or whether there is anything that the Senate should do that it is not doing or something that it should do better, those kinds of questions can be answered only in relation to the House. Before we can evaluate what contributions the Senate has made to democratic governance in Australia, and whether the Senate should be abolished, strengthened, weakened, or left alone, we need to ask what it is that the House does and how well does it do those things. We cannot really know why (or even if) we need the Senate unless we know what we would have if there were no Senate.

When we turn our attention to the side of Parliament House where the House of Representatives lives, we immediately encounter a surprising problem. In all conventional accounts, the House is the more important of the two chambers because that is where, in principle, governments are made and can be destroyed. Yet, outside of textbooks, the House of Representatives has evoked far less interest than the Senate among political scientists and other analysts. The reason that immediately comes to mind is that they may not think the House is a very interesting place.

Much of what has been written about the House in recent years—except for what the House has written about itself—has been terse, critical, even dismissive, and sometimes downright impolite. Whatever questions there may be about the democratic legitimacy of the Senate, about whether it unduly interferes with the government’s ability to govern, and so on, at least the Senate is an interesting place, and arguments about it have generated a significant body of literature, much of it thoughtful. As for the House, however—well, here is a small sample of what has been said about it by people who otherwise seem to be temperate in their judgments:

The lower House in the Commonwealth Parliament is well and truly under the thumb of the government. By political usage governments consider themselves responsible to it and, as at Westminster, the parrot-cry ‘responsibility’ has made constructive parliamentary reform impossible. (Reid 1964: 93)

The House of Representatives has become an empty shell of a legislature. (Jaensch 1986: 90)

[The House] is totally useless as a legislature, merely acting as the rubber-stamp for the bills produced by the governing party. As an example of its performance, during the twelve years between 1976 and 1987, under two different governments, not a single Opposition amendment was accepted to any of the 2,000 bills passed (except for two bills which were handled by an experimental procedure which was soon stopped by the Government). Bills were contemptuously bulldozed through under a guillotine—for example, ten bills being allowed a total of five minutes for all stages of consideration. (Hamer 1996: 66)

An unwillingness to compromise, especially with the opposition, is an unfortunate side effect of the parliamentary process in the House of Representatives. There, the brutal fact of having the numbers encourages the government to have an arrogant disregard for the views of the opposition. This is reciprocated by an opposition that sees no reason to compromise when its major goal is simply to embarrass the government and keep its powder dry for the next election. (Sharman 1998: 8)

[D]espite the House's privileged constitutional position in financial legislation, it has conceded to the Senate the primary legislative role even in this area. It is not unreasonable to describe the House as a rubber stamp for the financial and all other legislation proposed by the government, and the Senate as the only part of the parliament which acts as an independent check on the government. (Solomon 2000: 9) In short, the House has become 'the government's lap-dog under our present system'. (Solomon 2000: 19)

Even a major study of Parliament that Parliament itself commissioned to mark Australia's bicentenary paints a dismaying portrait of a House that is dominated by the government by virtue of party discipline:

The effects ... have left their mark on the House in a number of different ways: by the record of comparatively few sitting days; by the limited opportunities for non-ministerial members to scrutinise legislation; by the constraints imposed upon members in initiating proposed laws or amendments to the proposed laws initiated by ministers; by the strong disposition of the House to stage discussions or permit statements without decisions rather than parliamentary debates; by 'the gag', 'the guillotine', and time limits on speeches; by a weak rather than a strong system of parliamentary questions seeking information from ministers; by the reluctance of the House to declare its privileges; and by its preference for a Speaker—its chief executive and presiding officer—who has strong ties to the majority party. (Reid and Forrest 1989: 470)

These quotations easily could be multiplied. I would happily have balanced them against an equivalent array of complimentary and optimistic assessments of the House—had I encountered them. The almost universal conclusion of outside observers is that the House is

ineffectual as a legislative body because of government dominance made possible by virtually perfect party unity on votes.

Furthermore, there are no realistic prospects for changing this condition; no government would allow significant change because every government is content with a quiescent House. Assessments of the House as a forum for scrutiny and oversight are not much more positive. Critics acknowledge that the Opposition has opportunities to make speeches and ask questions critical of government policies, but there are no comparable opportunities for it to use the potential resources of the House actually to evaluate and compel improvements in those policies.¹⁵⁷ Many critiques of the House convey almost a sense of anger at its failure to fulfill what are thought to be its constitutional responsibilities, and a profound sense of dismay combined with resignation at the stranglehold on the House that the government enjoys.

Neal Blewett, a former minister as well as member of the House of Representatives, offers a particularly lucid exposition of the political logic of government–House relations:

If a government only exists and can only survive if it controls the representative chamber, then the key political imperative is to ensure effective and continuing executive control of that chamber. The rise of the disciplined political party, a necessary phenomenon in mass electorates, has provided the instrument by which a party leadership through democratic elections gains control of the chamber, maintains that control, and seeks to use that control in that forum to continue in office through further electoral success. ... [T]he consequence of the rise of the party has been the diminution of the individual MP and the subordination of the Parliament to the dictates of the Executive. This is a universal characteristic, not a peculiarly Australian phenomenon.

Party solidarity within the Parliament and without therefore becomes a governing virtue because it is essential to the survival of government. Apart from this instrumental value, party solidarity is seen as a virtue in itself for it becomes, with media encouragement, one of the key criteria for determining fitness to govern. The consequence of this is that the critical parliamentary decisions are not made in the Parliament but in the party caucuses, and debates in the Parliament, at least in the House of Representatives, have little to do with legislative decisions and everything to do with election decisions. They are mostly predictable set-piece confrontations in which each side seeks to inflict as much electoral damage on the other as possible. (Blewett 1993: 3–4)

¹⁵⁷ An illustrative critique of the House is offered by David Hamer (1996), who served in the House for eight years and in the Senate for twelve more.

As a complement, Reid and Forrest (1989: 62) develop the logic behind what we might think of as a syndrome that directs the Opposition's attention away from the House chamber and from attempts to influence national policy from its side of the floor. Opposition leaders, they contend, 'have ... accepted the virtual inevitability of Executive control of the House in a party-dominated Parliament.'

In consequence the parties in Opposition have accepted the unlikelihood of defeating the Government on a division, and their activities as an Opposition, within the House, are openly directed towards the electorate. In seeking this audience the Opposition needs to enlist the assistance of the media which ... have become increasingly reluctant to cover the details of parliamentary affairs. With party leaders available to project their differences, media attention is unlikely to be attracted by the House's passage of legislation, the inquiries of its committees or its consideration of the estimates. In consequence the Opposition has made few objections when procedural and other opportunities in these areas have been denied to it. The routine of parliamentary business affords few opportunities for headlines or colourful exposure, and thus it has been neglected by members of the Opposition conscious of more 'profitable' ways of spending time to foster their re-election and the government's defeat.

So, Solomon (1998: 73) concludes, 'The energies of the opposition in parliament are directed primarily to the negative end of trying to destroy the government. The stars of the opposition are usually its best head-kickers.'¹⁵⁸

Although Solomon was speaking about the House, these assessments of Opposition strategy in the House may shed some light on our findings in Chapter 7 about the frequency and successes of Opposition amendments in the Senate. It would be surprising, to say the least, for the Opposition to adopt the posture just described in the House, but then to focus its energies in the Senate on amending or even defeating government bills. By this reasoning, the Opposition has little incentive to try to defeat government bills whenever it possibly can on second or third reading motions because its primary goal is not to block government legislation but to convince the electorate that that legislation is ill-conceived and detrimental to the average Australian. True, defeats can make the government look inept, but the costs in time and effort of arranging to block government bills is great when weighed

158 Not surprisingly in sports-crazed Australia, Anne Lynch, the Deputy Clerk of the Senate, has spoken of 'the tendency, in the House, to play politics like a rugby game, with two hard-playing front rows lined up against one another, forever trying to score.' (*Evening Post* (Wellington, NZ), 4 July 1994: 7)

against the pay-off that any successes produce for the Opposition. Unless the bill is a particularly important one, Opposition victories on divisions are more than likely to make no public impression worth measuring, especially in comparison with the mileage that the Opposition can hope to get from a press conference or a public event staged to press home the argument that whatever legislation the government is forcing through the Parliament is doing grave damage to the nation.

The same logic helps to explain the relative dearth of Opposition amendments in the Senate's committee of the whole, and its unimpressive track record in finding the Senate allies it needs to have those amendments pass. Solomon presumably would say that the process of negotiating agreements with the minor parties over the wording of Opposition amendments is what Americans would call 'inside baseball'—matters of obscure parliamentary manoeuvring that are assumed to be of no interest to the Australian public and, in any case, are virtually invisible to the public because the media usually fails to cover them and explain their significance. Motions and amendments and divisions in the Senate may not be unimportant but, according to this way of thinking, they have little impact on the outcome of the all-important next election. This argument smacks of hard-headed realism. And yet it is the Senate which is supposed to be the venue in which government legislation can be subjected to serious scrutiny and in which serious legislative business can be conducted. If that rarely happens in the Senate because the interest and attention of the Opposition is directed elsewhere, the Senate is weakened as a place where the government is held accountable.

But I digress. Returning to the House, Reid and Forrest (1989: 24) also argue that the government typically can ignore the Opposition in the House with impunity: '[A] government's strategy will be directed almost wholly towards its own side. If it can remain solid, and hence retain its majority in the House, then there is little need for concern with the other members. The acid test of responsibility is the ability to continue in office, and this will be determined not by the House as a whole but by the government members in it.' And so the concept of responsibility becomes perverted beyond recognition.

Taking these critiques together, it is small wonder that the House so often receives such low marks for autonomy and influence. Yet some of those inside the House respond that the critical assessments of their professional home fail to appreciate recent changes in the House and some of the subtleties and nuances of House activities that allow it to make more of a difference than is apparent to the naked eye. In truth, the House of Representatives sometimes is dismissed too quickly as

being only an 'electoral college' that chooses the government from among its members (and those of the Senate), and then subsides into quiescence, approving the government's legislative program without challenge or change. The government must remain attentive to the preferences and priorities of its parliamentary party; its members may give it a great deal of latitude, but even that latitude has limits.¹⁵⁹ The prime minister often may be able to announce government policy and assume, correctly, that his party in the Parliament will fall into line behind that policy. And he may be able to do that again and again. But if those policies are failing, or if they inflame public opposition, or if they take the party where many of its members really do not want it to go, the members of the governing party retain what might be thought of as a kind of 'reserve power' to change their own leadership. Still, it is in the nature of reserve powers that they rarely if ever are exercised, and only when a serious institutional failure makes recourse to them necessary.

Less drastically, a government sometimes does need to adjust its legislation in response to demands, pleas, and even the expert advice of its own backbenchers in the House. Before his apparently terminal disillusionment (see Chapter 9), Solomon (1986: 76–89) stressed the valuable role that party committees in the Parliament can play, in giving Members a forum in which to develop and express their expertise and in encouraging a government to take another hard look at its draft legislation before sending it through the formal stages of the legislative process. Government policy also can be affected by the debates that take place in the government's party room.¹⁶⁰ Furthermore, government bills do not always emerge unscathed from the House Chamber. While we would not expect an Australian government to lose a division in the House on an amendment, governments do accept the gist of some Opposition amendments in the House, or they may respond to Opposition arguments by offering corrective amendments in the Senate.

159 On the role of the Labor Party caucus during Whitlam's ministry, see Kelly (1976: 203–216).

160 What goes on inside the party room takes place behind closed doors and is revealed only in rumors and unattributed reports, so we cannot know for certain how often the government's backbenchers persuade their leaders to make changes in legislation, nor can we know how significant those changes are. For the same reason, these internal party debates do not contribute to the public understanding of government policies that is essential for preserving public support for democratic institutions. Furthermore, debates within the parliamentary parties are not activities of the Parliament as such; these internal party discussions could take place at party headquarters or in a hotel meeting room if it were not simply more convenient to hold them at Parliament House (Jaensch 1986: 43–44).

Even so, it is asking too much to think of the House of Representatives as a law-making place. But perhaps the problem is not with the House, but with our expectations. A perfectly reasonable argument can be made that the House and Senate are not to be judged by the same standards because they differ in the functions they are able to perform. Referring to Westminster, Griffith and Ryle (1989: 6) argue that 'It is ... as a debating forum ... not as a governing body, that Parliament should be assessed.' The same argument can be made with equal weight about the Australian House of Representatives.¹⁶¹ It is neither fair nor reasonable to evaluate either lower house on the basis of how much, how often, and how well it contributes to shaping the content of new legislation. Because of the strength of party discipline, which is a more powerful force in Canberra than in London, the House of Representatives is deprived of any realistic opportunity to have much of an independent effect on legislation. So the House must be evaluated against more realistic criteria. For example, how well do its legislative debates clarify the arguments for and against alternative policies, and how well do its other deliberations hold the government to account for its actions and decisions?

Because of the predictable presence of non-government majorities in the Senate, on the other hand, it can engage in serious legislative work, in the sense of participating actively and constructively in writing new laws for the nation. Government control of the House means that non-government Senators rarely can hope to see their own legislation enacted, but they can defeat government legislation when necessary or, more often, make passage of that legislation contingent on government acceptance of amendments to its original proposals. Just because the Senate can legislate, however, does not necessarily mean that it should legislate or that it should be evaluated as a legislative body. As we shall find in the next chapter, those who support the notion that the government, by virtue of its majority in the House, has an electoral 'mandate' to enact its legislative program, are not sympathetic to a Senate that actively asserts its legislative powers.

I should be explicit, therefore, in stating my position: because the constitutional and electoral systems combine to give the Senate the power and incentive to play an active part in the legislative process, it

161 Ward (2000a: 69–70) quotes Blewett as having written in 1993, for example, that 'It may be ... that instead of paying attention to reform of the House of Representatives we should accept that chamber as essentially a debating forum between two party teams, and particularly their leaders, designed to clarify choices for a mass electorate, and concentrate on perfecting the Senate as a House of legislative review and as the body for effective scrutiny of the Executive.'

should do so, and it is fair and right to evaluate the Senate on the basis of how well it does so, though not only on that basis. My view is that democratic governance benefits from a legislative process that involves more than parliamentary argument over, and then ratification of, government proposals, even if (actually, especially because) that process compels the government to make compromises that take into account different opinions and a wider array of interests. As a practical matter, the House cannot legislate so it should not be asked to do so. For equally practical reasons, the Senate can legislate; and since it can, it should. I state this clearly because those who do not agree with this position can be forewarned that there may be much in what follows, especially in the concluding chapter, with which they also will disagree.

At the risk of some oversimplification, the ironic problem for the Parliament is that the House of Representatives is criticized, loudly and often, for what it does not do (that is, legislate), while the Senate is criticized, equally loudly and equally often, for sometimes doing what the House does not. What the Senate sometimes does is what some critics of the House wish it would or could do. What the House does best (that is, debate) is just about all that some critics of the Senate think it should do.

So we have a situation in which neither house of the Parliament (at the risk of anthropomorphizing them) thinks that its virtues and value are sufficiently appreciated, certainly not by the other house or by ostensibly sophisticated observers, and, what is worse, not by the Australian people. Members of the House, and especially backbench Members, who spent any amount of time reading the House's reviews in the press might well wonder why they bother getting out of bed in the morning, much less running for re-election. The institution in which they work and with which they are identified is 'contemptuously bulldozed' so often that it is 'totally useless.' It is derided as 'an empty shell' and 'a rubber stamp,' and as being so much 'under the thumb of the government' as to be nothing more than 'the government's lap-dog.' And these are the evaluations of scholars with a professional commitment to, and appreciation of, national legislatures!

On the other side of Parliament House sit Senators whose institution has been criticised regularly as an inconvenient and potentially dangerous growth on the Australian body politic. Having never fulfilled its intended role as the House of the States, it makes its presence felt only when it interferes with the government's ability to fulfill its electoral mandate and satisfy the will of the people. A prime minister (Paul Keating) described Senators as 'unrepresentative swill' and for many years, one of the nation's two major political parties (the ALP) made the call for its abolition a regular part of its election manifesto. If

the House is dismissed as ineffectual, the Senate often is rejected as having become too effective in hampering the proper operation of parliamentary government.

Under these circumstances, is it any wonder that bicameral relations in Canberra sometimes are less than harmonious?

Aspects of bicameral relations

Putting aside for the moment the relations between each house and the government, there are aspects of House-Senate relations in Canberra that both resemble and differ from the relations between the two houses of the American Congress. In Washington, the members of the House of Representatives and the Senate are elected from different constituencies and for different terms of office. That is true in Canberra as well, but the differences in Canberra are greater because Australian Representatives and Senators, unlike their US counterparts, also are chosen by different modes of election. In Washington, the same political party may not control both houses. That is true in Canberra, but in Washington it is a sporadic, though familiar, phenomenon; in Canberra, careful students of Australian politics believe it will remain a permanent condition unless and until Commonwealth election laws are amended.

In Washington, members of the two houses often have different ambitions. Many Representatives hope to become Senators or perhaps state governors; many Senators hope to become President and some believe that is their destiny. In Canberra too, members of the two houses often have different ambitions, but Representatives hope to become ministers, not Senators, and some easily can envision themselves as prime minister. Australian Senators also seek ministerial appointments, but fewer of these positions are available for Senators, so Senators may seek election to the House in their quest for political advancement. Only once has a Senator been chosen as prime minister and he quickly sought election to the House.¹⁶² So in Washington, the movement within Congress is from the House to the Senate; in Canberra, not surprisingly, it is the reverse. A US Senator has not voluntarily relinquished his seat to run for a seat in the House since well before the American Civil War. An Australian Senator's prospects for advancement to ministerial ranks may be better today than it was decades ago, but there still is some truth to Denning's (1946: 55) observation, made more than a half-century ago, that:

¹⁶² Though the Constitution is silent on the matter, traditionally the prime minister is a member of the House of Representatives.

If it should appear that a young Senator has the makings of a future Prime Minister, from the viewpoint of his party's interest in seeking eventual successors to the leaders of the day, it is much more likely that he would resign his Senate seat at an opportune moment and find a seat in the House of Representatives, than that he would at some time attempt to lead a ministry from the Senate.

In their legislative activities, each house exercises its constitutional authority to devise its own procedures, primarily in the form of written standing orders. In their essentials, the procedures of both houses, like the general design of the two chambers, are similar because they both reflect Australia's British parliamentary inheritance. Yet there are some significant differences. Some are attributable to the fact that the House, by constitutional requirement, has twice as many members as the Senate. Others reflect differences in the standing of the government in the two houses—enjoying unquestioned control in the House but confronting a non-government majority in the Senate. Not surprisingly, therefore, the procedures of the House are somewhat more protective of the government's political interests and accommodating to the needs of its legislative program.¹⁶³

Some observers also claim to have discerned a stylistic difference in the two houses that reflects the government's continuing lack of working majorities in the Senate and, consequently, the requirement for majority coalitions composed of Senators from more than any one party. For example, Fred Chaney (1988: 170), who served in both houses, found that 'there is a degree of enforced reasonableness in the Senate, which provides some contrast with the more confrontational, gladiatorial mood which characterizes most if not all Australian Lower Houses. There is a sanction on unreasonable behaviour—at least as far as governments are concerned, and official oppositions which will one day be in government.' (Chaney 1988: 170) More than a decade later, Sharman (1999: 157) came to much the same conclusion:

[T]he polarisation between government and opposition that characterises most debate in the lower house is moderated in the Senate. This, in turn, can lead to a consensus style of politics in which compromise and the accommodation of different points of view are regarded as the normal way of doing business. This is both effective policy-making and good politics. The abrasive style of lower house politics has done much to bring

163 In the Senate, for example, a minister has only four minutes in which to reply to a question. In the House, a minister can respond at length. So the effect of the Senate's standing orders is to provide time for more questions to be asked. In neither house, however, is the minister's reply required to directly address the question that was asked.

parliamentary politics into disrepute. The Senate can do much to restore faith in the process of representative democracy.

Reid and Forrest (1989: 467) surely go too far when they say that the Senate is 'a chamber totally different in character from the House of Representatives.' There is no question, though, that the requirements for decision-making in an organization can affect the tenor of its proceedings. Close observers of the US Congress certainly appreciate the truth of this observation. The style of debate in Washington's House of Representatives also tends to be more combative than in the Senate, and undoubtedly this is due in part to the House's procedures which allow its agenda and decisions to be controlled by simple majority vote—that is, by vote of the majority party when it remains sufficiently united. The style of debate and decision-making in the US Senate, by contrast, tends to be more accommodative, partly because the Senate's rules empower the minority party (or even smaller groups of Senators) to delay votes and even kill bills by preventing the Senate from voting to pass them.

As organizations, the two houses in Washington, like the two houses in Canberra, operate autonomously in many respects. Each house, for example, has its own collection of highly-skilled officials, including those who staff its committees. However, there is a somewhat wider array of joint services and shared facilities in Canberra than in Washington. In part, this reflects differences in scale of operations. In Canberra, the House of Representatives and the Senate live together in the same building, and both houses share their building with the government—the offices of the prime minister and other government ministers (though the overwhelming majority of public servants are located elsewhere, of course). This situation creates incentives for joint arrangements; duplication can be inconvenient and costly, but triplification is many times worse. In Washington, on the other hand, the President and the entire executive branch are located 'downtown,' not on 'the Hill' (even if 'downtown,' in some cases, is just a few blocks away). House and Senate plenary sessions take place in the same building, but all personal offices and most committee offices and meeting rooms are located in separate office buildings occupied exclusively by one house or the other. The situation in Washington, therefore, makes it both more feasible and more natural for each house to manage its own facilities (and divide responsibility for managing the Capitol building itself).

The steady pressures for economy and the increasing requirements of security are causing the two houses in both cities to consider—sometimes happily, sometimes not—new forms of cooperation, coordination, or even consolidation in providing non-legislative

services. When possible, however, autonomy is preferred. *House of Representatives Practice* (2001: 34–35) describes the relations between the House and Senate in Canberra in terms that would apply without significant change to bicameral relations in Washington:

Each House functions as a distinct and independent unit within the framework of the Parliament. ...

The complete autonomy of each House, within the constitutional and statutory framework existing at any given time, is recognized in regard to:

- its own procedure;
- questions of privilege and contempt; and
- control of finance, staffing, accommodation and services.

This principle of independence characterises the formal nature of inter-House communication. Communication between the Houses may be by message, by conference, or by committees conferring with each other. The two Houses may also agree to appoint a joint committee operating as a single body and composed of members of each House.

As in Washington, each house accepts the principle that one house should not intrude into the exclusively internal affairs of the other. ‘As an expression of the principle of independence of the Houses, the Speaker took the view in 1970 that it would be parliamentarily and constitutionally improper for a Senate estimates committee to seek to examine the financial needs or commitments of the House of Representatives. In similar manner the House of Representatives estimates committees, when they operated, did not examine the proposed appropriations of the Senate.’ (*House of Representatives Practice* 2001: 35)

The primary sources of inter-cameral strain derive from conditions that we already have discussed at length. The first is their sharing of legislative powers under the Constitution, and the recurring disagreements about what powers the Senate actually has; when, if, and how it actually should exercise its legislative powers; and, most fundamentally, whether the two houses are and should be essentially equals or whether the Constitution ordains the primacy of the House of Representatives. Not surprisingly, each house has its eloquent and determined advocates. The second source of strain reflects the seemingly permanent state of divided government in Canberra, with a government majority in the House and a non-government majority in the Senate. There is no need here for another round of extended discussions of either subject. Suffice it to say that they combine in Parliament House today to ensure that there almost always is some underlying degree of tension between the houses as institutions, and that the tension is intensified by the intensely adversarial nature of the public relations between the major parties.

In Washington, a leader in the House of Representatives reputedly once communicated his opinion of a colleague within the more florid standards of parliamentary discourse then in vogue by saying that he held the other Member in minimal high regard. Perhaps that is an apt way in which to think about how Australian Representatives and Senators sometimes think about each other.

[T]he rivalry between the two chambers ... permeates every level of this building This House chauvinism is manifest in many ways. The House considers that senators are the second XI, frustrating smooth government. The view from the Senate is that the House is full of rowdies dropping artillery shells of personal abuse on each other. The truth is that the rather childish mutual recrimination prevents a more rational solution of problems. (Childs 1992: 43)

Recall that the most famous inter-cameral slur of the modern era was contributed in 1992 by Labor Prime Minister Paul Keating who, in the course of House debate, referred to the Senate as 'unrepresentative swill'.¹⁶⁴ Needless to say, the phrase has continued to reverberate through the halls of Parliament House. But the House has not been immune from barbed comments originating in the Senate. The Clerk of the Senate, Harry Evans, substitutes a pointed pen for a sharp tongue; for example:

[U]nder cabinet government [in Australia] members of parliament are not legislators or scrutineers of the executive, but occupants of or pretenders to executive office. In effect, there is no legislature. (Evans 1984: 275)

We have thus embraced the very situation which our founding philosophers warned us against as the very epitome of tyranny: the concentration of legislative and executive powers in the same hands. Indeed, we have come to permanent submission to what they saw as the disease of elected government: rule by faction. (Evans 1992a: 2)

The founders did not envisage a situation whereby the leaders of the group which controls 51 per cent of the faction which controls 51 per cent of the parliamentary party which receives 40-odd per cent of the electorate's votes have absolute power to control the country. ... [This situation] has resulted in prime ministers who behave like emperors, even bullying speakers of the House of Representatives in public in sittings of the House, without people being aware that representative and parliamentary government as such has been repudiated. (Evans 1997a: 5)

¹⁶⁴ *Commonwealth Parliamentary Debates* (House of Representatives), 4 November 1992: 2540. Keating continued 'There will be no House of Representatives Minister appearing before a Senate committee of any kind while ever I am Prime Minister ...'

Bicameral unhappiness manifests itself in many ways, large and small. Two examples, one early and one more recent, will illustrate some of its less consequential manifestations. Souter (1988: 58) explains that, when the newly-created Commonwealth Parliament first began to meet in Melbourne, its *Parliamentary Debates* (commonly known as *Hansard*) was published 'at weekly intervals ... and was also published cumulatively in bound volumes.'

In both forms the Senate appeared before the lower house, just as it was named first in the Constitution, presumably on some analogy with the House of Lords and its propinquity to the Sovereign. As the Senate did not share that privilege, the vertical dimension of 'upper' and 'lower' houses rang rather false in a federal legislature. In Volume 1 of *Parliamentary Debates* the index for the House of Representatives appeared before that of the Senate. But tradition prevailed, and from then on the States' House somewhat irrationally took precedence over the more numerous house on all occasions.

Although *Hansard* continues to be published, technology moves on and Parliament tries to decide how, and how closely behind, to follow. Whereas *Hansard* is an essential form of communication within Parliament House, each house has become increasingly concerned with how well the Australian public understands what it does and appreciates how well it does those things. In this respect, the House of Representatives and the Senate compete for the attention of the public and the media.¹⁶⁵

Paul Bongiorno (1999) has argued that the Senate's 1990 decision to permit its floor proceedings to be televised put intense pressure on the House to do likewise, just as many Washington observers believed that

165 Each house has an informative website that provides online access to its records and to information about its members, procedures, activities, and history. Each house also has its own publications program (and many of those publications also are accessible online). The House of Representatives recently has been concentrating on communications with the general public through a glossy magazine, a collection of easily digestible factsheets, and a series of other publications written at different levels of detail and sophistication. The Senate has its own factsheets and brochures, but the Senate has been putting more emphasis on communicating with a more elite audience through seminars for public servants, a program of public lectures, and published essays of scholarly tone. The cornerstone publication about the Senate, though not officially endorsed by it, is *Odgers' Australian Senate Practice*, which has been cited and quoted frequently in these pages and which is now in its tenth edition. I understand that the decision by the House of Representatives to produce *House of Representatives Practice*, now in its fourth edition and often quoted here, was provoked in no small part by the evident value and visibility of the Senate's volume. (See the bibliography for information on some of these publications.)

the House of Representatives' 1979 decision to televise led some Senators to fear that the House was coming to dominate public perceptions of Congress (an outcome that naturally was intolerable to Senators). Seven years later, the Senate followed the example of the House. In the same paper (p. 165), Michelle Grattan observed that 'a powerful Senate in which control is not in a government's hands is obviously one of the media's favourite places', in part because of 'the large amount of horse-trading and compromise that can occur,' which in turn 'exposes the political process to more public scrutiny ...' Question time may receive better coverage in the House than in the Senate because of the formal responsibility of government to the House and because the tenor of the exchanges there is even more combative than in the Senate; however, Grattan contends, policy debates may be covered better in the Senate because they are more likely to matter.¹⁶⁶

Several other manifestations of inter-cameral strain deserve our brief attention because of their significance for governance. Two only will be mentioned here because we will discuss them at some length in the next chapter. One is the practice of having Senators serve as ministers and the question of whether it would be advisable, from the Senate's perspective, to discontinue this practice. Each modern government draws some of its ministers, usually about one-third of them, from among its party ranks in the Senate. In addition to his or her own ministerial responsibilities, each Senate minister represents one or more House ministers and responds to questions in the Senate about matters for which those House ministers are responsible. It might seem that having Senators as ministers can only enhance the Senate's powers. Yet, as we shall see, a thoughtful argument can be made that the Senate really needs to set itself apart from the government if it is to be as effective as it might be in holding the ministry accountable for its execution of the laws.

A second related issue is the established understanding, or convention if you prefer, that Senators are accountable only to the Senate, not to the House, and, more to the point, that Representatives are accountable only to the House, not to the Senate. It is for this reason that neither house has provisions in its standing orders to permit ministers who are members of one house to appear in the chamber of the other to respond directly to questions relating to their portfolios. In

¹⁶⁶ Grattan also opined that 'The minor players are accustomed to relying on publicity as part of their limited political tool box. Open government is actually something that governments almost never really believe in. This is not to say that minor party and independent senators who hold the balance of power are more virtuous or more public spirited than other senators, but just that they have different interests.'

some parliamentary systems, there is no requirement that ministers must be members of the parliament. Consequently, those parliaments typically allow ministers some rights to participate in parliamentary proceedings—perhaps only to respond to questions, but perhaps also to participate actively in debates to explain and advocate legislation affecting their portfolios.¹⁶⁷ In Canberra, however, Senators cannot pose questions directly to a minister who is a member of the House; and if they want to hear that minister's explanation of some government policy, they must listen to the debates in the House or, more likely, the minister's statements to the media. Proposals have been made from time to time for a less rigid policy, but such a change obviously would make life less convenient and comfortable for the government, even if it also would promote the accountability of that government to the Parliament.¹⁶⁸

This convention also extends to meetings of Senate committees which are expected to refrain from trying to secure testimony from any minister who is a Representative (including, therefore, the prime minister). That minister may appear voluntarily, though he or she is unlikely to do so, but it would be considered an affront to the House if a Senate committee were to invoke its powers in an attempt to order a House of Representatives minister to appear before it. The result is that a principle that is based in bicameral comity—affecting how each house treats members of the other—has been extended to protect ministers against being held accountable in the Senate for their actions and decisions as ministers because of their standing as Representatives. We will return to this issue as well in the next chapter, where we shall review several proposals for 'reform' that would affect the Senate.

A third issue arose in the Senate on the very day that I began writing these words. On 5 February 2003, Senator Faulkner, Leader of the Opposition, moved that the Senate censure the government because of its purported policies and intentions regarding military intervention in Iraq, and that the Senate also 'declare that it has no confidence in the

167 Executive branch officials in Washington are constitutionally barred from also serving in the Congress, but there is nothing that would prevent one or both houses from allowing Cabinet secretaries from appearing in the House or Senate chamber to defend Administration policies and actions. Proposals have been made to institute a question time in Washington, but they have not received serious consideration.

168 Not surprisingly, therefore, the House's Standing Committee on Procedure advocated in 1986 that all ministers should be members of the House and that, 'as far as the accountability of Ministers at question time was concerned, Ministers who were Members of the House should be responsible to the Parliament and the people through the House of Representatives only.' (*House of Representatives Practice* 2001: 115)

Prime Minister's handling of this grave matter for the nation.' (*Journals of the Senate*, 5 February 2003: 1448) Such motions have been moved in the past, but they serve primarily as an outlet for Senators' disagreement or anger with government policy. When the Senate agrees to such a motion, there is no serious expectation that the censured minister must resign, as he or she almost certainly would do if censured by the House of Representatives. This is one point on which the two houses agree:

The Senate has on several occasions passed motions of censure of Ministers (both Senate and House Ministers). In none of these cases did the Minister concerned feel compelled to resign as a result. These instances would seem to reinforce the principle inherent in the system of responsible government that Ministers collectively and individually (unless they are Senators) are responsible to the lower House. (*House of Representatives Practice* 2001: 49)

Although a resolution of the Senate censuring the government or a minister can have no direct constitutional or legal consequences, as an expression of the Senate's disapproval of the actions or politics of particular ministers, or of the government as a whole, censure resolutions may have a significant political impact and for this reason they have frequently been moved and carried in the Senate. ... Almost all such motions have been expressed in terms of censuring either individual ministers or the government. There have been no motions proposing want of confidence in the government and very few expressing want of confidence in particular ministers, none of which was successful. No motion of want of confidence in a minister has been proposed since 1979 and the practice now is to frame such motions in terms of censure. (*Odgers' Australian Senate Practice* 2001: 475–476)¹⁶⁹

Censure motions in the Senate are not necessarily empty gestures. No government wants to see a formal vote to disapprove one of its members or one of its policies. The government finds itself on the defensive at a time and place that is not of its choosing. Also, the debate in the Senate is likely to attract media attention precisely because of the seeming importance of the motion and the dramatic appeal of the event. So Elaine Thompson has concluded that:

'The Senate, through the use of its power of censure, has developed an important role in holding ministers answerable. It will censure a minister if

¹⁶⁹ There is a clear difference in the tone of these two statements. Furthermore, *Odgers' Australian Senate Practice* (2001: 476) goes on to offer the judgment that 'ministers are held accountable in the Senate but not in the House of Representatives to which the ministry is supposed to be responsible.' The fact that a publication so closely associated with the Senate would comment critically on the House is, in itself, indicative of the strains that persist between the two houses.

it believes a minister has not acted with propriety, has failed to declare an interest in a matter, has refused to produce documents in compliance with a Senate order, has misled or lied to the Senate.

The power of censure is taken very seriously by the Senate *and* by the government because a Senate censure can have, and has had, repercussions on the credibility of the government as a whole. (Thompson 1999:47)

Still, it needs to be emphasized that the effect of a censure motion in the Senate is based on its political impact; the effect of a comparable motion in the House has a constitutional force, at least as the Constitution is supplemented by the conventions of ministerial responsibility to the House of Representatives.

A fourth and final issue of interest in the context of bicameral relations is of more direct legislative significance and one that has raised the collective hackles of the government and the House. For years the Senate would complain that masses of legislation, including important bills, were arriving from the House at the last minute. So, Senators argued, they were denied adequate time to review and respond intelligently to those bills and, consequently, to fulfill their constitutional responsibilities as legislators. Governments, in turn, would respond that they were doing the best they could to move their legislative program through the House and on to the Senate as promptly as the complexity and importance of the bills permitted. Finally, in the 1980s, the Senate changed its own procedures in a way that virtually compelled a change in the practices of the House, a development that the Prime Minister at the time, Paul Keating is reported to have dismissed in typically diplomatic fashion as a 'constitutional impertinence' (quoted in Margetts 1999: 2).

John Uhr explains what the Senate did and why:

[I]n the mid-1980s ... Australian Democrats Senator Michael Macklin successfully moved what became known as the 'Macklin motion', a resolution declaring that the Senate would defer until the next period of sittings consideration of any bills received after a specified deadline. The purpose was to counteract the trend in which government legislation was forced through in the last few weeks of a ten to twelve-week sitting. The budget sittings are typical: in 1972 some 40 per cent of bills were passed in the final fortnight; by 1987 that figure had risen to nearly 68.8 per cent. (Uhr 1998: 146)¹⁷⁰

Notice that the 'Macklin motion' as originally adopted was concerned only with when the Senate received a bill from the House. It

¹⁷⁰ In modern practice, Parliament has three sitting periods each year, each of which is, in the case of the Senate, defined as 'a period during which the Senate adjourns for not more than 20 days.' (Odgers' *Australian Senate Practice* 2001: 255)

did not propose to affect the legislative process in the House except to impose a consequence if the House failed to complete that process in a timely fashion. As Uhr goes on to explain, this restrained approach had unanticipated consequences, as reforms so often do. 'Unfortunately, the effect of this resolution was that the government began to comply with the Senate cut-off date but at the cost of reducing the initial time available for consideration of the bills in the House of Representatives, with a dramatic increase in the use of the guillotine.' In reaction, the Greens successfully proposed a revision of the 'Macklin motion' in 1993 to include a 'double deadline'. In its current form, what is now the Macklin rule provides that:

A bill introduced by a minister or received from the House of Representatives is deferred to the next period of sittings unless it was first introduced in a previous period of sittings and is received by the Senate in the first two-thirds of the current period (SO (Standing Order) 111).¹⁷¹ At the Government's request, the Senate may exempt individual bills from these deadlines and it frequently does so, but it does not grant these exemptions automatically and 'the onus is on the government to convince the Senate to lift the ban on a case-by-case basis. (Uhr 1998: 147)

This is an excellent example of the adjustments and accommodations that bicameralism can require.¹⁷² That the Senate would think that it had some ability to affect the government's legislative timetable, and that it would have the temerity to adopt and enforce this Standing Order, is evidence of a Senate that has become more self-confident and self-assertive and that, through its non-government majority, is somewhat less inclined to think of itself as subservient to the government's preferences and convenience.

171 The reaction of the House deserves to be shared in full. On 19 August 1993, the House sent to the Senate a message asserting that:

(a) the Senate order is a completely unwarranted interference by the Senate in the business of this House; (b) the Senate is a house of review and has no place dictating to this House, the house of government, on the conduct of its business; (c) the order of the Senate is a gross discourtesy by the Senate to the people of Australia in that the order demonstrates a presumptuous desire not to allow the house of the people to have its proper control over the management of its business; and (d) the public interest is not served by the effect of the Senate order, which is to curtail proper debate on legislation in this House by forcing the Government to progress legislation rapidly through the House in order to meet a Senate imposed deadline ... ' (*Votes and Proceedings of the House of Representatives*, 19 August 1993: 174)

172 For a discussion of how the houses of the US Congress have coped with a problem in their bicameral relations, see my 1982 article on 'Germaneness Rules and Bicameral Relations in the US Congress,' in *Legislative Studies Quarterly*, v. 7, n. 3.

Resolving legislative disagreements

Enactment of a law requires that both houses of Parliament pass it in exactly the same form.¹⁷³ As we have seen, most bills originate in the House of Representatives (and money bills must originate there), but the Senate often has amended them (or requested amendments to money bills). As we also have seen, the authors of the Constitution recognized that the Senate's legislative powers could give rise to legislative disagreements, which is why they included sec. 57, with its procedures for double dissolutions and joint sittings, as the ultimate mechanism to resolve such disagreements. However, the standing orders of both houses contain elaborate procedures by which they can, and often do, try to prevent their legislative disagreements from reaching the stage of deadlock. It can easily be argued, in fact, that there is greater need for such procedures in Canberra than in Washington because parliamentary deadlock over legislation potentially has more severe consequences in Australia than in the United States. In Washington, it is only the fate of the legislation in question that is at stake; in Canberra, as former Prime Minister Whitlam can attest, it can be the life of the government itself.

Procedures for resolving legislative disagreements are necessary when one house of the Parliament considers a bill from the other house and passes that bill with one or more amendments. Such procedures are equally necessary to govern how the House and Senate address Senate requests that the House agree to certain amendments to money bills that the Senate cannot amend directly. The House cannot simply ignore these Senate requests or dismiss them out of hand in part because the Senate makes its requests before completing the process of bicameral

173 Constitutional amendments, however, can be proposed by either house acting alone. Whereas a bill requires only a simple majority vote for passage (that is, a majority of those present and voting, assuming they constitute a quorum), a constitutional amendment requires the support of an absolute majority (that is, a majority of all those eligible to vote). But whereas a bill must be passed by both houses, subject to the double dissolution and joint sitting procedures of sec. 57 of the Constitution, sec. 128 provides that if the two houses deadlock twice over a proposed constitutional amendment (just as they must do over legislation in order for that bill to trigger a double dissolution), the Governor-General may submit the amendment for ratification by popular referendum in the form it was passed by the house that first proposed it, 'with or without any amendments subsequently agreed to by both Houses ...' even though both houses have not passed it in the same form. Note that the Governor-General *may* submit the amendment to a referendum; he is not required to do so. In the normal course of events, therefore, we would expect him to take this action only at the behest of the government of the day. Consequently, he is very unlikely to submit an amendment that the Senate passed twice and the House rejected on both occasions.

passage which is a prerequisite for enactment. Therefore, as we saw in Chapter 2, advocates of Senate power find little difference between the Senate's right to amend and its right to request amendments when it cannot amend.¹⁷⁴

Procedures of the House and Senate

In brief, the procedures the two houses have adopted for resolving their legislative disagreements, short of deadlocks, double dissolutions, and joint sittings, and which are quite similar in the House and Senate, provide for exchanges of messages, positions, and amendments between the two houses with the hope that these exchanges will produce an agreement acceptable to a majority in each house.¹⁷⁵

Odgers' Australian Senate Practice (2001: 252) encapsulates the procedures of both houses:

Bills originating in one House of the Parliament are forwarded to the other House for concurrence. If they are amended by the other House, they are returned to the originating House with a request for agreement to the amendments. If there is disagreement over amendments, bills may be moved between the two Houses a number of times until the Houses finally agree to them in the same form or they are abandoned. Bills which have been agreed to by both Houses are forwarded by the originating House to the Governor-General for assent.

Readers who are familiar with the US Congress will have noticed immediately that if we replace the concluding reference to assent by the Governor-General with signature or veto by the President, this brief description would aptly summarize Congress' procedures as well, but with one glaring omission: note that this summary makes no reference at all to conference committees. We will consider the implications of this toward the end of this chapter.

These procedures are complex, and not a subject for the faint-hearted. What follows is only a bare summary of some of their key

174 '[T]hese requests are effectively the same as amendments, particularly as the Senate usually makes sure that it does not give the third reading to a Bill to which it is requesting changes, until it has had a positive response to its request.' (Solomon 1986: 103)

175 As in Congress, the two houses communicate formally with each other through exchanges of written messages by which, for example, the House transmits its bills to the Senate for its concurrence and the Senate returns House bills to that body with amendments that the Senate has adopted. There is no requirement in the Senate's standing orders that it must consider messages from the House, even messages conveying government legislation. In practice, however, the Senate does so, even when the Senate has a non-government majority.

elements.¹⁷⁶ Since most bills originate in the House, let us begin with a bill that the House has passed and sent to the Senate and that the Senate has passed with amendments. Under Senate SO 131, the Senate returns the bill to the House after third reading with a request that the House concur in the Senate's amendments which are annexed as a schedule 'containing reference to the page and line of the bill where the words are to be inserted or omitted, and describing the amendments proposed ...' At a time decided by the government, the House then considers the Senate amendments individually, or it may consider some of them in groups if the same motion is to be made to dispose of each amendment in a group.

As the House acts on the Senate amendments, according to House SO 245, it has five key options.¹⁷⁷ First, it may agree to the Senate amendments, in which case there are no disagreements and the bill can be presented for assent. Second, the House may agree to the Senate amendments with relevant amendments of its own, in which case the House returns the bill to the Senate with a schedule of the House's amendments (House SO 247 and 249). Third, the House may simply disagree to the Senate amendments, and so inform the Senate by a message that explains the reasons for the House's disagreement¹⁷⁸ and requests that the Senate reconsider the bill with respect to its amendments (House SO 247). Fourth, the House may postpone consideration of the Senate amendments.¹⁷⁹ And fifth, the House may order that the bill be laid aside. It is the second and third options that interest us here because they create the need to resolve the legislative disagreement arising from the Senate amendments and the House's initial action in response to them.

176 The procedures summarized here are discussed in ample detail in chapters 12 and 13 of *House of Representatives Practice* (2001: 423–468) and in chapters 3, 12, and 13 of *Odgers' Australian Senate Practice* (2001: 75–80, 273–279, 320–328). Any reader who thinks the abbreviated explanation presented here is unnecessarily complicated is invited to consult these chapters and the related House and Senate standing orders.

177 Actually more; for example: 'A Senate amendment may be agreed to with or without amendment, agreed to with a consequential amendment, agreed to in part with a consequential amendment, agreed to with a modification, agreed to with a modification and a consequential amendment, disagreed to, or disagreed to but an amendment made in its place.' (*House of Representatives Practice* 2001: 425)

178 'When the House disagrees to any amendments of the Senate to a bill, the Member who moved the motion—That the amendment(s) be disagreed to—shall present to the House written reasons for the House not agreeing to the amendments proposed by the Senate. A message returning the bill to the Senate shall contain any such reasons.' (House SO 248)

179 Of course, the House may take different actions with respect to different Senate amendments.

If the House simply disagrees to the Senate's amendments (option 3 above), the Senate may, under Senate SO 132, reconsider its amendments and decide not to insist on them, in which case the bicameral disagreement is resolved and the bill can be presented for assent. Alternatively, though, the Senate may insist on the amendments to which the House has disagreed, or the Senate may adopt different amendments in place of them. In either case, the disagreement continues because the Senate has chosen not to agree to the House's preference that, in congressional parlance, the Senate recede from its amendments.

If the Senate has proposed new amendments instead of those to which the House previously had disagreed, the House has the same options with respect to those amendments as it had with respect to the Senate's original amendments. If, instead, the Senate has insisted on its original amendments, the House now may agree to those amendments (under House SO 250), thereby resolving the disagreement, or the House may insist on its disagreement to the Senate amendments, or it now may amend the Senate amendments to which it previously had disagreed. In response, the Senate may continue to insist on its amendments to which the House has continued to disagree, or the Senate again can adopt different amendments in their place. If, instead, the House has amended the Senate amendments, the Senate can accept the House amendments or amend them or insist on its original amendments to the House bill (SO 250).

If the House amends the original Senate amendments (option 2 above), the Senate has several options under its SO 132, among which are to accept those amendments, which avoids any further legislative disagreement, or to amend the House amendments, or to insist on its original amendments to the House bill, or to disagree to the House amendments to those original Senate amendments. In the latter case, the Senate includes in its message to the House a statement of its reasons for doing so.¹⁸⁰ In turn, House SO 250 gives the House an equally complex set of options by which it can respond to the most recent Senate action. If the Senate has disagreed to House amendments to the Senate's amendments, for example, the House may withdraw its amendments, or insist on them, or adopt different House amendments instead. Or if the Senate has amended the House's amendments, the House may agree to those new Senate amendments, or amend them, or disagree to them and insist on its original amendments.

180 'The reasons shall be drawn up by a committee appointed for that purpose when the Senate adopts the report of the committee of the whole disagreeing to the amendments, or may be adopted by motion at that time.' (Senate SO 133)

Fortunately for Members and Senators this process cannot continue indefinitely.¹⁸¹ Under House SO 250, if whatever action the House takes at the stage just discussed does not inspire the Senate to agree, the House may no longer propose new amendments.¹⁸² Instead, at this stage, the House ‘may return the bill to the Senate, or order the bill to be laid aside, or request a conference.’ And ‘If the bill be again returned by the Senate with any of the requirements of the House still disagreed to [in other words, if the Senate still refuses to agree to the House’s most recent position] the House shall fix a time for the consideration of the message and, on its consideration, shall order the bill to be laid aside or request a conference.’

There is an equally complicated and roughly comparable set of stages and options that are triggered when a bill originates in the Senate and the House then amends that bill in ways that are not immediately acceptable to the Senate. Because relatively few bills begin life in the Senate, and out of consideration for the reader, I will refrain from reviewing all the various possibilities in detail.¹⁸³ Instead, I point only to a provision of Senate SO 127. That rule lays out the Senate’s options after the House has amended a Senate bill, the Senate has refused to accept those House amendments (at least in the form the House proposed them), and the Senate has made one more proposal to resolve the disagreement. In that circumstance, Senate SO 127 states, that, if the House rejects that proposal and the bill is ‘again returned by the House of Representatives with any of the requirements of the Senate still disagreed to, the Senate shall order the bill to be laid aside, or request a conference.’

181 According to Jaensch (1997: 107), ‘This process will continue until either a consensus (or compromise) has been achieved, or until the government decides it is unable to proceed because of intransigence in the Senate, at which point the latter either rejects the Bill, or it lapses.’ This comment suggests that the process rarely continues through all the stages for which the standing orders provide. Furthermore, the House has been known to suspend SO 250 so that the process could continue beyond what the standing orders allow.

182 However, Senate SO 127 and House SO 250 permit amendments between the two houses that go one step beyond the congressional principle that each house has one opportunity to amend the amendments of the other house (in addition to the initial right of one house to amend the bill itself that originated in the other house).

183 *Odgers’ Australian Senate Practice* (2001: 274) points out that ‘Amendments made by the House to Senate bills usually have the effect of reversing amendments which the Senate has made to government bills in the Senate and to which the government has disagreed.’ In other words, if the government is unsuccessful in opposing a Senate amendment to one of its bills that it introduced in the Senate, it can try to reverse that outcome through a later House amendment to the Senate bill. On House amendments to Senate bills generally, see *Odgers’ Australian Senate Practice* (2001: 274–277) and *House of Representatives Practice* (2001: 440–441).

To illustrate these procedures in action, let us look very briefly at the actions that the House of Representatives and the Senate took during the last sitting day of 2002 on one of the most important bills they considered during that year. On 24 September, and in response to the terrorist bombing in Bali that killed many Australians and shocked the nation, the House passed the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002. The Senate received the bill on 15 October. After receiving a report from its Legal and Constitutional Legislation Committee, the Senate passed the bill on 12 December, which was supposed to be the last sitting day of the year. Before passing the bill, the Senate made 58 amendments to it, of which 19 were proposed by the Government, 38 by the Opposition, and one by the Australian Democrats.

When the House completed its initial consideration of the Senate's amendments in the early morning hours of 13 December, it had agreed to 15 of the amendments, disagreed to 35 others, and made 14 new government amendments to the bill instead of the remaining eight Senate amendments. The Senate responded by insisting on all of the 43 amendments to which the House had not agreed. In turn, the House agreed to only three of those 43 amendments. It insisted on disagreeing to the remaining 40 Senate amendments and also insisted on five of the 14 replacement amendments to which it had agreed a short time earlier. The Senate, however, was adamant, and once again insisted on all 40 of its original amendments to which the House had insisted on disagreeing.¹⁸⁴ The Senate was saying to the House, in effect, that it would prefer having no bill at all to a bill that did not include those 40 amendments or compromise provisions that were acceptable to both houses. Confronted with this stark choice, and with little reason to think that the Senate would change its mind in the next few hours, the House laid the bill aside. This action marked the government's decision to abandon the bill. However, there is little that is final about the legislative process. The government introduced another bill on the same subject early in 2003, and a heavily-amended version passed both houses in June of that year.

Special procedures for Senate requests

When the Senate cannot amend a bill directly, it can request that the House make certain amendments instead. The Senate votes on what amendments, if any, it wants to request and it then returns the bill to the House before the third reading stage in the Senate. Consequently, the

¹⁸⁴ This information is taken from the 2002 edition of *Business of the Senate*.

Senate and House must agree on how to dispose of the Senate's requests before the Senate completes its initial legislative action on the bill. If the Senate does decide to request amendments, it returns the bill to the House with the requested amendments attached as a schedule, in the same way that the Senate attaches as schedules the amendments it makes to other bills.¹⁸⁵ The House then 'may make the amendments requested, not make them, or make them in modified form.'¹⁸⁶ After making its decisions, the House returns the bill to the Senate with a message specifying what it has decided with respect to each requested amendment. 'However, if completely unwilling to comply with a Senate request, instead of responding the House may simply lay the bill aside' (*House Guide* 1999: 75), but doing so would kill the bill.

Assuming the House returns the bill to the Senate, the Senate then may pass it with the amendments that the House has made at the Senate's request and without the requested amendments that the House has refused to make. Alternatively, the Senate may refuse to pass the bill. The Senate's third alternative is to insist on the amendments that were unacceptable to the House by pressing its request that the House make those amendments.

As we saw in Chapter 2, the House accepts this practice but, in language reminiscent of the American Senate's posture toward the 'Origination Clause' of the US Constitution,¹⁸⁷ tries to preserve its constitutional position that the Senate has no right to press requested amendments. A publication of the House explains to the general public that:

185 Sometimes the Senate acts on a bill by making some amendments and requesting others. In such a case, 'The message forwarding the requests ... also sets out the amendments which the Senate has made to the bill. The rationale of this procedure is that the House should know of all the amendments required by the Senate before it deals with the Senate's requests. The House cannot actually deal with the Senate's amendments, however, until the requests have been disposed of and the Senate has passed the bill.' (*Odgers' Australian Senate Practice* 2001: 321; see also *House of Representatives Practice* 2001: 427–428)

186 Notice that the House does not amend a Senate request in the same way it would amend a Senate amendment to an amendable bill; instead, the House agrees to a modification of the Senate's request. However, the House may decide to amend a bill directly rather than agreeing to a Senate request for an amendment to the bill. If the House chooses to agree to a Senate request for an appropriation amendment, it may first have to receive a message from the Governor-General recommending the appropriation. In practice, however, this is a formality.

187 In Article I, clause 1 of section 7 states that 'All Bills for raising Revenue shall originate in the House of Representatives, but the Senate may propose or concur with Amendments as on other Bills.'

The House has never recognized the power of the Senate to insist on or press a request and may decline to consider a Senate message purporting to do so. However, the House has on most occasions taken the Senate's message into consideration [i.e., acted on it] after passing a preliminary resolution refraining from determining its constitutional rights. In recent years, when a message has been received from the Senate purporting to press requests for amendments, it has been the practice of successive Speakers to make a statement referring to the principles involved and which the House has endorsed, whether declining to consider the message or not. (*House Guide* 1999: 76)

Odgers' Australian Senate Practice (2001: 326–327) acknowledges the House's position and offers its own litany of arguments to support the Senate's right to press requests.

Between 1901 and 2000, a total of 155 bills gave rise to Senate requests for one or more amendments (*Odgers' Australian Senate Practice* 2001: 625–661). When we break down the data by decade, we find that almost half (actually 45.2 per cent) of these incidents occurred during 1991–2000. That is considerably more than three times as many as during the previous decade (19 during 1981–1990), and more than five times more than in any of the other eight decades. In only 19 instances did the Senate press one or more of its requests, doing so eight times during the last two decades of the century. Interestingly, the decade in which there were most pressed requests (though only five) was during the first decade of Federation, 1901–1910, when the Senate was concerned to establish the reach of its constitutional powers relating to money bills. In 12 of the 19 instances, the Senate was at least partially successful in that the House ultimately accepted some or all of the Senate's pressed requests or accommodated them in the texts of alternative amendments or replacement bills (*House of Representatives Practice* 2001: 435–436).

A different but related issue arises when the House thinks that a Senate amendment should have taken the form of a request (*House of Representatives Practice* 2001: 428–432). This conflict is particularly likely to arise because of ambiguity about precisely what qualifies as a prohibited Senate amendment that would 'increase any proposed charge or burden on the people' under sec. 53 of the Constitution. In such a case, the House has several options. First, it may consider the amendment anyway, but perhaps only after asserting its interpretation of sec. 53 and implying, if not directly asserting, that the Senate has exceeded its constitutional authority. Second, the House may refuse to consider the amendment and inform the Senate that the House will consider instead a request for the amendment. Third, the House may disagree to the amendment and, after receiving a new message from the

Governor-General if it considers that necessary, make a similar or identical House amendment and request the Senate to concur in it.¹⁸⁸

The committee that isn't there

The procedural stages and options that we have been discussing correspond, in broad outline and in many details, to those governing the process by which the US House of Representatives and Senate attempt to resolve their legislative differences. But there is one difference that is most striking. In Washington, the House and Senate may decide, at any point after they have disagreed with each other's position on a bill, that it makes sense to hand the bill over to a conference committee comprising interested Representatives and Senators who meet together to develop a settlement of all the bicameral differences. A conference committee is a temporary joint committee that is set up to write the final version of a particular bill. The committee is composed primarily, and usually only, of members of the House and Senate committees that had been responsible for developing the versions of the bill that each house debated, amended, passed, and then sent to conference. After this committee reaches agreement and submits its report, each house votes to accept or reject the report as a package.

Conference committees are not used for all bills. In fact, at least three-quarters of all bills that become law, and sometimes as many as 90 per cent of them, complete the legislative process in the Congress through an exchange of messages, positions, and amendments between the houses, and without resort to negotiations in a conference committee. On the other hand, conference committees are established to negotiate the final terms of all the most important and controversial bills, except when the imminent arrival of a deadline, such as the end of the two-year constitutional term of a Congress, leaves insufficient time. Furthermore, the House and Senate in Washington essentially never wait to create a conference committee as a last resort, after having exhausted the possibility of reaching agreement through the exchange of messages, positions, and amendments. Instead, the two houses of the US Congress typically agree to create a conference committee on a major bill as soon as each house has passed its own version of the bill.

By contrast, the standing orders of the Australian House and Senate relegate conferences to an option of last resort.¹⁸⁹ The standing orders of the House mention the possibility of a conference as an option only at

188 In this complex process, these do not exhaust the House's options. For example, it always has the problematic option of laying the bill aside and letting it die.

189 The Parliament may create conferences, but it does not create conference committees.

the last stage of the process of trying to resolve bicameral differences regarding a House bill that the Senate has amended. And the standing orders of the Senate first raise the possibility of a conference on a Senate bill that the House has amended only after the opportunities for exchanging amendments have been exhausted. For the Senate, a conference is only possible ‘when agreement cannot be achieved, by an exchange of messages, with respect to amendments to Senate bills’ (*Odgers’ Australian Senate Practice* 2001: 77). The effect of the two houses’ standing orders (Senate SO 127 and House SO 250) is that only the Senate may request a conference on a Senate bill that the House has amended and, conversely, only the House may request a conference on a House bill that the Senate has amended. Since most legislation, and certainly almost all of the most important legislation, originates in the House, the decision to request a conference rests in practice with the House, not the Senate. Other standing orders in each house govern, in almost identical terms, how conferences are to be requested, arranged, and convened (House SO 373–384 and Senate SO 156–162).¹⁹⁰

Yet what is much more noteworthy than what these standing orders provide is the fact that they never are invoked. In *Odgers’ Australian Senate Practice* (2001: 77), the reasons for creating conferences are laid out in terms that sound very familiar to the American ear: ‘Conferences between the two Houses provide a means of seeking agreement on a bill or other matter when the procedure of exchanging messages fails or is otherwise inadequate to promote a full understanding and agreement on the issues involved.’ However, only two such conferences have been formally created since the founding of the Commonwealth to negotiate the resolution of legislative differences.¹⁹¹

In 1930, the House requested a conference after the Senate had insisted on its amendments to the Commonwealth Conciliation and Arbitration Bill 1930. Each house appointed five managers and the conference met in the Senate Committee Room. The managers

¹⁹⁰ For example, both sets of standing orders require that there be an equal number of members from each house on a conference. House standing orders contain an interesting provision that the Senate standing orders do not. House SO 383 imposes this duty on its managers: ‘It shall be the endeavour of the managers for the House to obtain either a withdrawal, by the managers of the Senate, of the point in dispute between the Houses, or a settlement of the same by way of modification or further amendment; but, in the case of bills, no amendment (not being a consequential amendment) shall be suggested by them to any words of a bill to which both Houses have so far agreed, unless these be immediately affected by the disagreement in question.’ This prohibition against proposing to amend something to which both houses already have agreed has its counterpart in US congressional rules and precedents.

¹⁹¹ See *House of Representatives Practice* 2001: 444–445.

proposed that the House should agree to some of the Senate amendments, that it should not agree to others, and that the House should agree to still other Senate amendments with modifications. The Senate evidently acted first on the conference recommendations,¹⁹² and both houses agreed to those recommendations. In the following year, a conference on the Northern Territory (Administration) Bill 1931 was arranged and held in the same way (*Odgers' Australian Senate Practice* 2001: 78; *House of Representatives Practice* 2001: 444–445). During the more than 70 years that followed, no other conferences have been held.

There was a third instance in which the Senate requested a conference on a Senate bill, the Social Services Consolidation Bill 1950. The House had amended the bill and insisted on its amendment, and the Senate had insisted on its disagreement to the amendment. However, the House did not agree to the conference. Instead, the House 'desired the reconsideration of the bill by the Senate' and the Senate ultimately agreed to the House amendment.¹⁹³ The House's own explanation of its procedures acknowledges (in *House Guide* 1999: 75) that, 'in practice the conference procedure is not used, and if it is recognized that further negotiation by message would be pointless it is usual for the House to order the bill to be 'laid aside'—that is, abandoned and removed from the Notice Paper.'

One reason for the lack of conferences—or perhaps one indication that conferences have been expected to be rare—is Senate SO 158, stating that 'During a conference the sitting of the Senate shall be suspended,' and the corresponding House SO 376.¹⁹⁴ Another lies in the difference between the effect of adopting conference reports in Washington and Canberra. In Washington, the two houses must vote on the managers' recommendations without change; the conference report cannot be amended in either house. And if both houses agree to that report, the effect is to complete the legislative process because all legislative disagreements with respect to that bill have been resolved. In

192 This is consistent with the congressional practice that the house which agrees to the request from the other house to establish a conference committee normally acts first on the committee's report.

193 *House of Representatives Practice* (2001: 445) records that, on one occasion in 1921, three members of each house met informally to discuss an amendment that the Senate had requested to an appropriation bill. The Prime Minister reported the recommendation that these members had reached and both houses endorsed it. Consequently, the Senate did not press its request for the amendment.

194 In 1930 and again in 1931, the House waived this standing order (*House of Representatives Practice* 2001: 444). At least in 1931, the Senate did not (*Odgers' Australian Senate Practice* 2001: 78).

Canberra, by contrast, the report of a conference committee, even after it has been adopted, only constitutes a set of recommendations that are subject to further legislative action. ‘The adoption of the report of a conference *does not necessarily bind the Senate to the proposals of the conference*, which, with reference to amendments in the bill, come up for consideration in committee of the whole.’ (*Odgers’ Australian Senate Practice* 2001: 79; emphasis added)

Why? The Australian Senate advertises itself as the second-most powerful upper chamber in the world, with the US Senate obviously being first. So if both Australia and the US have bicameral national assemblies with legislatively-powerful upper chambers, why have conference committees developed as an essential mechanism for resolving legislative disagreements in one of them, but not the other? For the explanation we have to look beyond the standing orders of Canberra’s House and Senate. To be sure, these rules do reduce the value and practicality of conferences—by prohibiting plenary sessions when conferences are meeting, and by allowing the adoption of a conference report to leave legislative disagreements still unresolved. However, these and any other rules could be changed if majorities in both houses concluded that those rules were standing in the way of a useful organizational and procedural innovation. No, it is much more plausible to conclude that conferences have not flourished in Canberra because they are not well-suited to the political context of the Commonwealth Parliament, notwithstanding its similarities as a bicameral assembly with the US Congress.

It is always difficult to account for a non-event, for something that has not happened. In this case, though, I think the place to start is with what is perhaps the first questions that arise in thinking about the process of resolving legislative differences in bicameral assemblies. Just how many players are involved, and who are they? When the House of Representatives and Senate in Washington create a conference committee, the members of that committee from each house are supposed to advocate and defend the legislative positions that their house already has taken. At least that is the theory. In practice, it is universally understood that all members of the conference committee have their own interests, preferences, and priorities, as well as those of their political parties, that will have at least as much, and usually more, effect on their negotiating strategies and behaviour than the position of the House or Senate that they ostensibly were appointed to support. In this sense, there are many more players than just the House and the Senate. Neither house’s delegation to a conference is at all monolithic, so it is not much of an exaggeration to say that, in any conference

committee negotiation in Washington, there are as many players as there are negotiators.

In Washington too, it also is universally understood that what formally are bicameral negotiations between the House and Senate—or to put it better, between members of the House and Senate—actually involve three parties: not just the two houses of Congress, as a reading of the Constitution and of House and Senate rules would suggest, but the President as well. After all, what point is there in the House and Senate reaching agreement between themselves without knowing, or trying to learn, whether the President will accept their handiwork or whether he will veto it? The two houses may not allow the President's preferences to control their decisions. Sometimes, in fact, and especially in times of divided government, a congressional conference committee may deliberately craft a bill that the President almost certainly will not sign into law, preferring what the majority party's members on the conference committee hope will be an effective campaign issue to half-a-loaf legislation. But even in such circumstances, the members of the conference committee, and all interested Representatives and Senators for that matter, surely have a powerful interest in understanding what the President's preferences are before they start drafting the final version of their bill.

The same question arises in Canberra, but in a different form. On Australia's Capital Hill, the question is not whether the government needs to be recognized as a third party in the negotiations between the House and Senate. Instead, the question is whether the final text of Australian legislation actually is the product of bicameral negotiations at all, or whether it is more the handiwork of negotiations between the government and the Senate (actually, perhaps only a small fraction of the Senate), with the House as an institution remaining a bystander or at best acting as the agent of the government, and with Representatives attempting to exert whatever influence they can through their fellow partisans in the government or the Senate, as the case may be.

Admirers of the House of Representatives, not surprisingly, bristle at such assessments, and reject them as coarse over-simplifications that fail to appreciate the much more complex and nuanced relationship that exists between the government and its majority in the House. Be that as it may, it does seem fair to say that the most prominent and knowledgeable advocates of legislation that passes the Australian House are the government's ministers, not House members without ministerial rank. In Washington, the congressional 'experts' on a bill usually are the senior members of the House and Senate committees that may have conceived of it in the first place, and that were very likely to have been instrumental in formulating the detailed provisions

of the separate versions of the bill that the House and Senate passed. The President may have put the issue on the congressional agenda and proposed a version of the bill that influenced the subsequent legislative deliberations. However, his specific legislative proposal sometimes is almost unrecognisable when the final version of the bill is written in conference. Successful presidents make a habit of settling for what often is less than half of the proverbial loaf, and then stepping before the cameras to claim victory.

It is natural and appropriate, then, for the final texts of US national laws to be written in conferences composed of senior House and Senate committee members who would pass legislative paternity tests with flying colours. Who would be their counterparts in Canberra? Conference committees have not thrived in the Commonwealth Parliament because they would involve negotiations between the Senate and the House when, in truth, the House is a minor player when compared with the government. Conference committees are not a suitable forum for final-stage legislative negotiations because, when such negotiations are necessary, they usually involve government ministers and Senators. Furthermore, the negotiations may include only minor party and Independent Senators when a mutually acceptable agreement between the government and the Opposition is not a realistic possibility.

There is a second, related explanation that also is plausible. Conference committees in the US Congress involve negotiations between representatives of two institutions, the House and the Senate, that enjoy virtually the same powers and legitimacy. A natural tendency, therefore, is for their negotiations to result in split-the-difference compromises. Even if a middle ground is neither sought nor found on every individual disagreement, the final package of compromises usually allows the representatives of each house to claim that they won more than they lost in the conference negotiations. To submit final legislative decisions to a House-Senate conference in Canberra, or even a government-Senate conference if such a thing could be envisaged, would require the government to accept the Senate as an equal partner in policy-making. And this is something that I doubt any Commonwealth government would be prepared to do.¹⁹⁵

195 In a somewhat broader context, another American observed that negotiation is not exactly at the heart of the Australian legislative process: 'What seems odd to me ... is that after fifty years of proportional representation in the Senate and the states, Australian governments have still not internalised the art of negotiation. ... Negotiation is dragged out of governments here like pulling teeth. The experience of parliaments in Europe is that a proportional representation election generally precedes a period of negotiation. It is not a prelude to a slanging

Perhaps for these reasons, conference committees have not developed in Canberra to supplement or replace the formal exchanges of messages, positions, and amendments as the only procedure for resolving legislative disagreements.¹⁹⁶

match between people who need each other, which is the Australian way because political relationships are dominated by the customary confrontational behaviour of government and opposition in the lower house.' (Ward 2000a: 14)

196 There is another consideration. If a bill dies in Washington because the House, the Senate, and the President cannot agree on the final version of its text, months (and as much as two years) of effort largely go to waste because the entire legislative process must begin again, and usually not until the next Congress convenes with somewhat different political divisions and a somewhat different cast of characters. In Canberra, there can be advantages to the government if it cannot reach agreement with the Senate on a bill. As we saw in Chapter 3, the House can pass the bill again and if the same deadlock occurs, the government gains the trigger it needs to secure a double dissolution.