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## The Australian Senate

The Senate is one of the most-analysed parts of the Australian political system. In 2003 Prime Minister Howard's proposals about the deadlocks procedure began another round of debate about its place in our Parliament. Debates about the Senate have therefore been always with us and will not end in the foreseeable future. This paper is designed to provide a concise background document to these debates, enabling Members of Parliament to understand the place of Australia's national upper house in the Australian political system.

Scott Bennett  
Politics and Public Administration Group  
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## Executive Summary

The Senate is one of the most-analysed parts of the Australian political system, particularly as Australia has long reached the point where it can be asserted that control of the upper house by non-government forces is the norm. The present-day doubts and concerns about the place of the Senate are not new, for such doubts were being expressed even before the Parliament began its operations. Debates about the Senate have been always with us and will not end in the foreseeable future.

For most of the Founders of the Australian Constitution the place of the national upper house was fundamental to their work, for it was seen as crucial to the acceptance of Federation by the smaller colonies. Accordingly, a large proportion of the time at the Federation Conventions of the 1890s was spent in hammering out the constitutional position of what has become the more controversial of the two houses of the Commonwealth Parliament.

All of the Senate's main features have been criticised at different times since 1901:

- equal representation for each state, seen by critics as undermining the principle of majority rule
- an elected body, elected under laws passed by the Parliament, where the voting systems used to date have been roundly criticised by some
- except when both houses are dissolved simultaneously, the Senate has a semi-continuous existence, an arrangement that has been criticised on the grounds that usually it can never be truly in touch with public opinion
- the Founders ensured that the Senate's legislative power was sufficiently great to make it more powerful than most other national second chambers, and therefore a potential bugbear for governments attempting to push legislation through the Parliament
- the arrangements for breaking deadlocks have been criticised for being cumbersome and only adding to the difficulty of governments seeking to push their legislation through the Parliament, and
- the fact that the size of the House of Representatives is tied to that of the Senate, in the so-called 'nexus', has been seen as an unnecessary restriction on ensuring a House size that is in keeping with population growth, and
- its role as a 'States' house' has rarely been a feature of its activity.

The Senate's history has played a part in accounting for its place in our political system. Three aspects of this stand out: the determination of the upper house to run its own affairs free from government interference, the fact that the parties soon made its role as a States'

house redundant, and the impact of the introduction of proportional representation as the voting system for Senate elections. An accurate understanding of the Senate cannot be gained without an appreciation of these developments.

The criticisms of the upper house show that it has become an important part of the national parliament. Its law-making and investigative functions are performed in such a way that commentators see it making a useful contribution to parliamentary activity, and its very existence means that it acts as an important venue for debates on questions of national importance. This is helped by the fact that Senators from outside the Liberal, National and Labor parties have been elected at every election since that of 1955. For some people, the Senate has taken on a new role as a protection against autocratic government.

As the Senate has cemented its place in the Australian political system, so have critics discussed ways of lessening its importance. For many years the ALP sought its abolition, but the modern focus has been on limiting its significance, most notably by removing the power to block or defeat Supply legislation. There have been calls to alter its electoral arrangements so as to limit the number of minor party Senators that are elected, while some have sought to alter the deadlock arrangements so as to enable governments to circumvent the Senate more easily. Whatever the proposal, however, reformers have difficulty in bringing about change due to the difficulty of amending the Constitution, particularly when it appears that a government is attempting to gain more power for itself. This difficulty is multiplied when it comes to questions surrounding the Senate, for Western Australian and Tasmanian voters, in particular, seem to resent attempts to weaken the upper house.

In fact, the Senate's position seems secure for the present, not least because of public support for its place in the system. Fifty years ago opinion polls revealed a great deal of popular discontent with the Senate, with many people apparently happy for it to be abolished. Over the years, however, this sentiment has largely disappeared, with polls suggesting a widespread popular support for the Senate and its activities. At least one recent political leader has suggested that perhaps the best thing is for people to leave the Senate alone, relying on an evolutionary process that he believes is occurring to shape the body in accord with public need.

## **Introduction**

The Senate is one of the most-analysed parts of the Australian political system, and the debate begun in 2003 by Prime Minister Howard about the deadlocks procedure stimulated another round of debate about its place in the Australian Parliament. If there is any single point that is highlighted by this paper, it is that the present-day doubts and concerns about the place of the Senate are not new, for such doubts were being expressed even before the Parliament began its operations. Debates about the Senate have therefore been always with us and will not end in the foreseeable future. This paper is designed to

give a concise background document to these debates to provide insights into the place of Australia's national upper house in the Australian political system.

The paper is divided into several sections:

- The first is a brief note describing the Founders' design, showing that they realised the significance of what they were creating when they shaped the Senate and its powers.
- The second section deals with three aspects of the Senate's history which need to be appreciated: the early and continuing development of what is here called an upper house 'ethos', the impact of the political parties' modes of operation, and the consequences of using different electoral systems for Senate elections over the years.
- The essential features of the operation of the modern Senate are then noted.
- The fourth part of the paper considers the long-standing urge of many politicians to alter the Senate, typically with the aim of weakening its place in the Australian Parliament.
- The next section notes that, although governments might have the urge to 'reform' the Senate, the actual achievement of substantial change is not straightforward.
- Finally the paper asks the simple question: 'should the Senate be left alone?'

Over the past few years the Parliamentary Library has published a number of papers on the Australian Senate (see Appendix).

## **The Australian Founders' Design**

The Founders of the Australian Constitution realised the centrality of the national upper house to the acceptance of a new constitution—it was, in the words of a Western Australian, 'the hinge of federation'.<sup>1</sup> Accordingly, a large proportion of the time at the Federation Conventions of the 1890s was spent in hammering out the constitutional position of what has become the more controversial of the two houses of the Commonwealth Parliament. All of its main features have been criticised at different times since 1901.

### **Equal Representation for Each State**

The US Senate, wherein each state has two members, was important as a model for the Australian Founders. Although the 1891 draft constitution gave eight Senators to each State, the final Constitution gave each 'Original State' six Senators. It was also stated that 'equal representation of the several Original States shall be maintained and ... no Original State shall have less than six senators'. Victorian Founder, and later High Court judge, H. B. Higgins, spoke of a 'strong minority' who looked upon the equal numbers principle

'with great suspicion and great apprehension', because it undermined 'the principle of majority rule'. Higgins forced a division at the 1897–98 Convention on the question, but was defeated by 32 votes to 5, indicating the strength of opinion on this question.<sup>2</sup>

## **An Elected Body**

The 1891 draft constitution gave the State Parliaments the responsibility of electing the Senate. By 1897, however, attitudes had altered, and popular election was provided for in the new draft with little opposition—as was noted, the Founders were establishing a legislative body which would feel 'the sap of popular election in its veins'.<sup>3</sup> It was, asserted Quick and Garran in their seminal study of the new Constitution, 'a great advance in a democratic direction' for upper houses anywhere in the world.<sup>4</sup> The first Senate election was held under colonial laws, after which the first Parliament passed legislation to establish a separate electoral system. The Constitution also spoke of the people of the States 'voting, until the Parliament otherwise provides, as one electorate'. The Parliament has never otherwise provided.

## **Semi-continuous Existence**

The House of Lords, the US Senate and the colonial Legislative Councils were 'continuous' bodies, not able to be dissolved. Of those Legislative Councils whose members were elected, their terms were longer than the lower houses of their jurisdiction. Longer terms and a continuous existence, it was said, gave the upper houses a permanence and thereby a stability that enabled them to take a longer-term approach to legislation than was possible in lower houses. Such an arrangement was favoured at the constitutional conventions of the 1890s, though the provision of a deadlocks clause that allowed for the dissolution of the Senate meant that the Senate could only be described as a 'semi-continuous' body. Despite some opposition to the idea, based on the view that a semi-continuous Senate could never truly be in touch with public opinion,<sup>5</sup> the principle of the semi-continuous upper house was widely supported, and was retained in the final Constitution (s.13).

Since 1901, the most controversial period when the Senate was said to be 'out of touch' occurred between the December 1972 House of Representatives election and the double dissolution election of May 1974. The Senate that confronted the Whitlam Government had been elected in the Senate elections of November 1967 and November 1970. This later influenced four unsuccessful attempts to introduce simultaneous elections for both houses in the referenda of 1974, 1977, 1984 and 1988.

## **Legislative Power**

The Constitution Founders believed that the Senate needed to be strong, partly for the purpose of review of legislation, and partly for the purpose of defending the smaller States. At the same time, it was felt necessary to fit it into the Westminster tradition by restricting its power in relation to 'laws appropriating revenue or moneys, or imposing



taxation'. Thus s.53 of the Constitution barred the Senate from initiating amending bills 'imposing taxation', or 'appropriating revenue or moneys for the ordinary annual services of the Government', nor could it amend bills 'so as to increase any proposed charge or burden on the people'. It could, however, request amendments to such legislation. Otherwise, the Senate was to have 'equal power with the House of Representatives in respect of all proposed laws'—including the power to reject any bill it did not accept.<sup>6</sup>

Some years after the achievement of Federation, the nation's first Prime Minister noted that 'the Constitution designed the Senate to be a House of greater power than any ordinary second chamber'.<sup>7</sup> It is the Senate's almost unlimited power to veto all legislation that makes it so distinctive among upper houses in other democracies, and such an important part of the Australian political system. Interestingly, an investigation of other national second chambers shows that few are as powerful. Many upper houses have no veto power over legislation at all (e.g. Ireland), or have only a limited veto over legislation (e.g. Russia). Despite the fact that many see the Australian system as Westminster-derived, it is clear that the model for our upper house was the powerful US Senate.<sup>8</sup>

## Deadlocks

The colonial Victorian and Tasmanian Legislative Councils had a long history of blocking legislation, and many of the Founders wished to avoid such problems in the Commonwealth Parliament. Although the view was not unanimous, many were determined that the new Constitution should include a mechanism for the breaking of deadlocks between the two houses.

The details of the deadlocks section (s.57), were hammered out as a compromise, partly at the 1897–8 Federation Convention, and partly at a Premiers' Conference in 1899. If legislation were blocked or defeated by the Senate, then blocked or defeated again after a three month break, a simultaneous dissolution of both houses could be undertaken, followed by an election for both houses. If the legislation still failed to pass, a joint sitting of the houses could be held. The blocked legislation could then be passed by 'an absolute majority of the total number of members of the Senate and the House of Representatives'.

## The 'Nexus'

Section 24 of the Constitution establishes the number of members of the lower house, but states that 'as nearly as practicable', the number of Representatives shall be twice the number of Senators. Known today as the 'nexus', this was seen by smaller colonies as part of the general defence system they were erecting in the Constitution. They were concerned about a reduction of the status of the States' house that might follow too large an increase in the size of the House. They also sought to avoid possible swamping of the Senate representatives in any joint sitting that might be held after a double dissolution election.<sup>9</sup> An unsuccessful attempt to remove the nexus provision from the Constitution occurred in 1967.

## The Impact of Senate History

The current place of the Senate in the Australian political system cannot be fully appreciated without an understanding of three key aspects of its history since its first meetings in May 1901. These include the development of a view that the upper house has a separate, and distinctive, existence apart from that of the House of Representatives, the impact of parties upon its operation, and the consequences of using various electoral systems for Senate elections.

## The Upper House Ethos

In the first years of the Parliament, both houses worked to establish their procedures. The House of Representatives saw itself as part of a wider tradition, symbolised by its first Standing Order which (still) says that if existing rules do not deal with a particular situation, then resort should be made to the practice of the House of Commons. By contrast, the Senate soon staked out a position of difference from the House of Representatives in procedural matters. Its first President was determined that the Senate should develop its own 'practice and procedure', rather than just follow Westminster practice. In doing so, the Senate established for itself 'a procedural independence which was to become a major factor in its subsequent history'.<sup>10</sup> This determination to be seen as a place separate from the House has permeated Senate thinking, even in times when it was controlled by the government of the day, and it forms an important backdrop to its latter-day relations with the lower house.

One interesting aspect of parliamentary politics in Australia has been the debate over the role and the place of the upper houses—the Legislative Councils as well as the Senate. Very important in this has been the expression of views by upper house supporters keen to defend what has been called an 'upper house ethos', which emphasises the integral part of the upper houses in the six bicameral parliaments, with particular emphasis upon their review role. This has complemented changes in the nature of all the upper houses—their members are younger than they once were, there are now substantial numbers of female members<sup>11</sup>, they are an arena for minority voices, and they have come to be seen as legitimate career targets for aspiring politicians:

The changes that have occurred in the composition of upper houses ... have provided a new sense of legitimacy to their role and have simultaneously increased their visibility and political influence.<sup>12</sup>

All of which means that whether the Senate is controlled by the government of the day or not, it is likely to remain a body that stands on its dignity, expressing its centrality to parliamentary government in this country.

## Parties and the Senate

Professor Fin Crisp, of the Australian National University, noted long ago that few Senators have displayed 'the degree of provincialism in their thinking' which the Founders expected.<sup>13</sup> By the end of the first decade after Federation two major parties were dominating both houses of Parliament, and they soon pushed aside any desires Senators might have had to act as major defenders of their States. On the Labor side, the requirement for Members of Parliament, from both houses, to pledge their adherence to the party line created a rigidity and predictability in their voting on legislation. Such political activity took longer to occur across the chamber, for the Liberal Party was still prepared in the 1960s to tolerate occasional opposition by individual Senators, but much earlier than this the general pattern of tight party control had become clear.

When the Senate was controlled by the government party it was therefore likely to become a tame organisation, often criticised for its lacklustre legislative performance, particularly when rushing bills through at the end of a session.<sup>14</sup> This was its history between 1910 and 1949, when the government party controlled both houses for all years except during 1913–14, 1929–31 and 1941–44. On the few occasions that it was not controlled by government, the nature of the relationship between the two houses instantly changed to one of confrontation—Prime Minister Cook's deliberate effort to engineer a double dissolution election in 1914 showed the frustration of one early Prime Minister. The nature of the modern relationship between the houses thus did not begin with the introduction of proportional representation in 1948. It had its origins in the preceding forty years of Senate history, and was very much a consequence of the way the parties played the parliamentary game, emphasising adherence to the party line above all things.

Party rigidity hurt the standing of the Senate during the years when the same party controlled both houses. Even as early as the end of the Parliament's first decade when the modern party system was settling down, one observer was noting that:

It is doubtful if at any time the Senate had really occupied the position contemplated by the framers of the Constitution—that of guardian of the interests of the States in all matters within Federal control. It had now certainly been stripped of any pretence of separate usefulness. It became merely an appendage, necessary to give statutory force to the decisions of the party which dominated the other House ... As a Chamber of review, as a check on hasty legislation, or, as that originator of statesmanlike measures of national utility, it had been a failure ... it succumbed to selfish party ends, and abnegated the distinctive character which had been projected for it.<sup>15</sup>

The tighter the government control exerted over the Senate in the early years, the greater the criticism of the upper house that came to be expressed. So ineffectual did it appear that a number of witnesses before the 1929 Royal Commission on the Constitution suggested that it ought to be reformed or else abolished. Although not making any firm recommendation on the matter, the Royal Commission concluded that:

... it may be said that the Senate has judged many ... proposals and claims from a party standpoint, and that in doing so it has not fulfilled its function of a States House and a chamber of revision.<sup>16</sup>

For many years it did not help the Senate's standing that the parties appeared to treat it with disdain. It was seen as a retirement club for party time-servers, and its elections gave scope for cynical intra-party manoeuvring. In 1937, for example, the Labor Party took advantage of the alphabetical listing of Senate candidates on ballot papers by nominating the 'Four As' on its New South Wales Senate ticket. Messrs Armour, Armstrong, Arthur and Ashley duly won the four Senate seats being contested. In 1944, by which time the standing of the Senate had apparently slipped even further, a journalist was able to write a savage piece under the scathing headline, 'Those meddling old men of the Senate'. It was difficult to know what to do about the Senate, he claimed, with its 'old boys' and 'their woollen stomachers', their 'weak, arthritic wrists and wheezing voices'. He noted that:

... It was intended to be a responsible, non-Party chamber of review, modelled on the American pattern. It has become, instead, a comfortable Home for Old Men, to which election can be lubricated if your surname begins with 'A'.<sup>17</sup>

Writing in 1949 a political scientist could observe of the Senate that, 'it enjoys little public interest and evokes no enthusiasm'.<sup>18</sup> In polls taken in December 1950 and April 1953, Australian Gallup Polls reported that 45 per cent of respondents supported the abolition of the upper house, with about only one-third supporting the retention of both houses of Parliament. There was little difference between Coalition and ALP voters on the issue.<sup>19</sup> Tight party controls had thus had a damaging effect upon the Senate's place in the Australian governmental arrangements, and probably accounted for the Gallup Poll finding.

The relationship of the Senate to the major parties has also been affected by shifts, inconsistencies and hypocrisies in party attitudes and strategies. The Australian Labor Party is the one party to have taken a consistently critical approach to the power of the upper house, and has long asserted the right of a government to govern without 'obstruction' by the Senate. Yet when in opposition, its Senators routinely oppose the core of a Coalition government's policy proposals, though consistency might have supposed that it would have supported any government's right to see its policies become law. In 1970, in fact, Labor even expressed its determination to use the Senate to defeat the Budget and force a new election.<sup>20</sup> It was also Labor during 1967–71 which attempted to embarrass the Coalition Government when Senator Lionel Murphy pushed the development of a more comprehensive and strong committee system in the Senate, a change that did a great deal to raise the status of the upper house, but which, according to opponents in the party, sowed the seeds of the Whitlam Government's troubles during 1974–75.<sup>21</sup>

Across the chamber, the Coalition tended to express support for the Senate as a major part of the Constitution put together by the Founders, and criticised Labor's desire to abolish it

as having the potential to undermine the great work done by the Founders. Such a view was expressed by former Country Party Senator, Tom Drake-Brockman, who saw the Senate as occupying a major part of the political system:

The great strength and the great value of the Senate is its independence, and the Constitution, as it now stands, gives it that independence. Take that away and the Senate would become a useless rubber-stamp of the Executive Government's decisions.<sup>22</sup>

Former Liberal MP and judge, Percy Joske, spoke of the power of the Senate as 'an essential feature of the Australian constitution'.<sup>23</sup>

Over the years Coalition Senators also used the Senate to defeat 'dangerous' ALP policies. When the Scullin Labor Government proposed amending s.128 of the Constitution in the early 1930s, for example, the Senate was said to be standing in the way of 'the accomplishment of those wild schemes of the militant section of the Labour party', which were part of a grand plan to wreck the federal system of government.<sup>24</sup> Over forty years later a Liberal Senate leader claimed that upper house opposition to the Whitlam Government was protecting the Australian people from a 'reckless' national government:

... in the present political climate, a non-Labor Senate is the only barrier the Australian community has between the liberties of the Australian electorate and the present Labor government in Canberra.<sup>25</sup>

It can be claimed that the trouble with the parties is that their views of, and behaviour towards, the Senate vary according to their own political circumstances. In 1987, Leader of the Opposition, John Howard, criticised a Constitutional Commission proposal to enable a government to move legislation blocked by the Senate straight to a joint sitting of the houses without the need for a double dissolution. It was, he said, a plan to reduce the upper house's role 'to that of a mere rubber stamp and to a mere cipher'.<sup>26</sup> Sixteen years later he supported an almost identical plan.<sup>27</sup> When in opposition, parties vehemently deny government claims to a mandate. Mr Howard is on record as saying that, 'The mandate theory of politics from the point of view of proper analysis has always been absolutely phoney'.<sup>28</sup> Yet once in government they use the 'mandate' claim as a weapon with which to attack the Senate: 'When you go to the people and you win a comfortable majority, you plainly have a mandate to implement policies and approaches that are consistent with your philosophy'.<sup>29</sup>

## Electoral Systems

The three electoral systems used for Senate elections have all had an important impact upon the Senate's performance and its public standing. The Block Vote (First Past the Post voting for multi-member electorates) was introduced in 1902. In thirty State results over five half-Senate elections (1903–17), 24 produced a result where all Senate seats were won by a single party—in 1910, for example, Labor won all eighteen seats that were

vacant. In the 1914 double dissolution election, although the Liberal Party managed a nation-wide Senate vote of 47.8 per cent, it won just five of the 36 seats being contested.

Such an outcome was clearly unfair and highlighted the need for reform. Despite the belief that preferential voting would 'provide for the proper representation of the two great political parties in Australia', its introduction for Senate elections in 1919 did not improve the situation.<sup>30</sup> Following the elections of 1931 and 1934, for instance, the non-Labor parties held 31 of the 36 (86 per cent) Senate seats; following the 1943 and 1946 elections the Labor Party held 33 of the 36 (92 per cent) seats. Ironically, the overall impact of the Block Vote and preferential voting was to provide the major party-preferred context in which the parties could usually expect to control both houses of the Parliament.

Some parliamentarians at the time of Federation had pushed unsuccessfully for proportional representation to be used for Senate elections. The 1929 Royal Commission into the Constitution suggested that the Senate 'would be better qualified to act as a chamber of revision', if it were elected by proportional representation.<sup>31</sup> Eventually, in 1948 the Single Transferable Vote model of this voting system was introduced. The use of this electoral system produced an immediate evening-up of party numbers in the chamber, for Opposition parties were now able to get a share of the seats closer to their share of the vote. Even in 1975 when its electoral fortunes were low, the Labor Party, which won barely one-quarter of the House seats, was able to win 42 per cent of Senate seats. With the Coalition and the Labor Party voting support evenly balanced over the years—since 1949 the average first preference margin between them in Senate elections has been just 4.2 percentage points—the seat margins between the major parties have always been narrow.

With lower quotas needed to win seats under proportional representation than under the Block Vote or preferential voting, minor party and independent candidates now had a much greater chance of winning Senate seats. The first occurrence came in the fourth election after the introduction of proportional representation (1955), and there has been at least one non-major party Senator elected in every election since. A gradual decline in the major party vote,<sup>32</sup> combined with another reduction of the quota for election when the Senate was further increased in size in 1983, has meant that the only periods since 1949 when a government has controlled both houses occurred in 1951–56, 1958–61 and 1975–81, or only one-quarter of the time. In fact, Australia has long reached the point where it is rare for the government to control the Senate. This is similar to upper house politics in New South Wales, Western Australia, South Australia and Tasmania.

## **The Modern Senate**

What are the most significant functions that the Senate has developed over the years?

## Law-making

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

## Investigation

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

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

Such work, he concludes, provides 'no small benefit to governance'.<sup>36</sup>

## Protection

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

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

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

## Accountability

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

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

## Debate

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

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



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

## The Urge to Alter the Senate

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

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

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

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

## Do we Need an Upper house?

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

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

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

The experience of other parliamentary democracies without a constitutional gatekeeper suggests that ultimately little useful purpose is served by a system requiring a double majority for the passage of all legislation when conflict is its mode of operation and policy gridlock is almost an inevitable consequence.<sup>49</sup>

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

## What About Democracy?

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

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

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

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

## Government Resentments

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

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

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

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

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

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

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

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

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

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

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

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

## The 'Supply' Problem

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

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

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

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

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

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

## Changing the Deadlock Arrangements?

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

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

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

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

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

## Changing the Electoral System?

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

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

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

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

## **No Ministers in the Senate?**

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

## **The Difficulty of Achieving Constitutional Change**

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

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

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

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

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

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

## Support for the Senate

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



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

### '... the Safeguard of the Commonwealth'

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

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

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

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

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

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

### Protection Against Autocracy

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

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

Former Labor staffer Don Russell has a stronger view:

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

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

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

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

### **Defender of the States**

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

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

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

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

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

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

## Representation

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

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

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

\* = double dissolution elections

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

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

Table 3: Major Party First Preference Votes (Senate)

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

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

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

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

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

## Public Attitudes

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

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

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

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

## Conclusion

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

## Endnotes

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