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# The Senate: Blessing or Bane?\*

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In the view of John Adams, one of America's founding fathers:

Reliance on a single legislature was a certain road to disaster, for the same reason reliance on a single executive—king, potentate, president—was bound to bring ruin and despotism ... . [T]here must, in a just and enduring government, be a balance of forces. Balance, counterpoise and equilibrium were the ideals [America] turned to repeatedly.<sup>1</sup>

Bicameralism tends to be the norm for parliamentary democracies. It is the result of historical evolution, but that history also reveals why upper houses can be difficult.

In Australia we have two major sources for our constitutional arrangements, the United Kingdom and the United States.

The bicameral system has its genesis in England. The upper house in England is the House of Lords, which represented the power and protection of the landed aristocracy. The title 'upper' house suggests that it was a superior house in what was an aristocratic system of government. In the beginning, there was only one parliamentary chamber and it sought to protect the interests of the aristocracy against the power of the king. The second chamber, the Commons, emerged in the 14th Century—a recognition of the separate and different interests of the burghers and knights.

The Parliament of the United Kingdom remains the model for parliaments and the mother of all parliaments.

Australia, however, took many of the constitutional arrangements for its upper house from the United States, another federal system of government, created in a more democratic time. In the framing of their constitution, the Americans relied on checks and balances in the distribution of power. But even the US Senate was structured so as to protect property and to be a conservative brake on the democratic house. The founding fathers of the United States sought, through the Senate, to 'contain the

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<sup>1</sup> David McCullough, *John Adams*. New York, Simon and Schuster, 2001, p. 376.

majority tyranny'<sup>2</sup> of the House of Representatives. Alexander Hamilton, one of the framers of the US constitution argued:

All communities divide themselves into the few and the many. The first are the rich and the well born, then the mass of the people. The people are turbulent and changing. Give therefore to the first class a distinct and permanent share in the government. They will check the unsteadiness of the second.<sup>3</sup>

The US Senate was, and is, a powerful institution: it has power over budgets, legislation, treaties and appointments; its members sit for longer periods—six years—than the members of the House—two years. However, the US Senate was not directly elected until 1913, well after the directly elected Australian Senate came into being.

So these are the threads of continuity which anchor us to a conservative tradition of bicameralism.

In Australia, while the US model was influential, there are differences particular to our circumstances and time. The Australian Senate was always elected. However, like the US Senate, the Australian Senate was conceived as a conservative brake on the rule of the people. And the Senate here too was meant to protect the power of the states. Giving the states equal representation was intended to protect the smaller states against the more populous states, which would inevitably dominate the representative chamber.

The debates about the formation of the Australian constitution were characterised by the reluctant ceding of as little state power as possible. Procedures for constitutional amendment—a majority of people in a majority of states - were calculated to make change as difficult as possible and to make any change reliant on the power of the states.

Our constitution was, early in the history of the Commonwealth, described as 'a feeble compromise between contending ideals' and 'an iron instrument with none of the elasticity of the unwritten British constitution'.<sup>4</sup>

As Manning Clark saw it, the constitution itself was the product of conservatism—the founders of the constitution were men of 'sound, sober and reliable control'.<sup>5</sup> They

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<sup>2</sup> Gore Vidal, *Inventing a Nation: Washington, Adams, Jefferson*. Carlton, Vic., Melbourne University Press, 2004, p. 24.

<sup>3</sup> Ibid. p. 51.

<sup>4</sup> A.N. Smith, *Thirty Years: the Commonwealth of Australia 1901–1931*. Melbourne, Brown, Prior, 1933, p. 22. This is an early perspective made in 1931 when only one amendment referendum had been passed—on the guaranteeing of State debts. Alteration has taken a different path—through High Court rulings on the taxation powers or the treaty powers of the Commonwealth or through the changes to the electoral systems which have changed the composition of the Senate and subsequently its role. It should also be noted that even if the constitutional arrangements were conservative and some policies such as immigration restriction notably so, not all policies of the early parliaments were. Early female suffrage, social security arrangements and compulsory education are indicative of an experimental bent.

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were not rash; they were men of pragmatic compromise. As Greg Craven wrote, while:

America's constitutional architects were dashing men in tight breeches ... [with] a romantic, faintly raffish appeal. ... our founders ... were large men—bulky, stodgy, profusely hairy ... Appallingly, they were regularly photographed in all their Victorian horror, peering awkwardly at us like a herd of walruses washed into a parliamentary chamber.

Our pragmatic, stodgy founding fathers bequeathed to us a Senate with power equal to the House of Representatives except for money bills. In order to preserve the pre-eminence of the democratic house, the Senate is set at half the House's size and government is formed in the House of Representatives. However, Senators have a longer tenure (six years) than members of the House (three years).

In the beginning there were six senators per state; it increased after 1949 to 10 and in 1983 rose from 10 to 12. Two senators per territory were introduced in 1975. The Senate now comprises 76 senators.

From the beginning the Senate divided on party lines, and became a second house reflecting party interests. But it was, nevertheless, one that disproportionately favoured the representation of the small states. The smallest state, Tasmania, with a population of 477 000 has the same Senate representation as the largest state, NSW, with a population of 6.77 million. The ACT, with a population of 325 000, is represented by only two Senators, whereas Tasmania, with only a slightly larger population, has 12.

Therefore the Senate does not reflect that fundamental, democratic, Chartist principle of one vote, one value. Nor does the Senate protect the rights of States, as was originally intended. It is a States House that never was.

Is there then any justification for the Senate at all?

Early last century, many Australians might have answered no. Winner-take-all voting systems made the Senate irrelevant to the legislative process and a political backwater where party members could dwell unperturbed by the conflicts of the day. It evoked little public support; in polls in the 1950s, a majority of Australians wanted to abolish the Senate.

However, the Senate has changed and evolved.

The voting system has changed over time. Voting was first-past-the-post to 1919, then preferential voting to 1949. This meant that either of the major parties could dominate the Senate. They were winner take all systems. Senate results exaggerated the swings in the electorate. In 1919, the ALP got 42 per cent of the vote but only returned one

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<sup>5</sup> C.H. Manning Clark, *A History of Australia, Volume V: The People Make Laws, 1888–1915*. Carlton, Vic., Melbourne University Press, 1962–1999, p. 185.

senator; the Nationalists got 45 per cent of the vote but won 17 of the 18 seats. Naturally, Labor believed this system of voting for the Senate was fundamentally flawed and sought the Senate's abolition. Throughout the 1920s and 30s the non-labor parties continued to hold the Senate by large margins; Labor was in a similar position after the 1943 and 1946 elections.<sup>6</sup>

Because these systems favoured the government party so heavily, deadlocks were rare. There was only one double dissolution in the first half of the Twentieth Century, when these winner-take-all voting systems prevailed. There have been five<sup>7</sup> since Chifley changed the voting system from preferential voting to proportional representation in 1949.<sup>8</sup> These changes, made in the interest of fairer representation, have not favoured the ALP and Labor has never since had control of the Senate. Although since federation, Labor has controlled the Senate after only six elections, and, by contrast, non-Labor Governments have controlled the Senate after 25 elections, it must be said that since 1949, both major parties have found control of the Senate a rare experience.

Of greater significance for the nature of the modern Senate, Chifley's move to proportional representation made it easier for minor parties to be elected. The first was the DLP, two of whose senators were elected in 1955. The DLP reached its maximum electoral success in 1970 with five senators and then it disappeared.

Since 1983, a variety of independents, Australian Democrats, Greens, and nuclear disarmament candidates have held the balance of power. This has worked to the extent that outcomes have been able to be negotiated with the minor parties, although it is notable that governments have sought double dissolutions on two occasions, in 1983 and 1987.

Many Labor figures have, from time to time, expressed a less than favourable view of the Senate. For a long time, from 1919 to 1979, Labor argued for the abolition of the Senate. More recently, it has been described as 'unrepresentative swill', an 'anarchic swamp'. Some of the Labor Party's opposition to the Senate reflected the usual government frustration with a program blocked or severely amended by the upper house. Much of it was, I prefer to believe, a genuine adherence on the part of Labor to democratic principles.

The blocking of Supply in 1975 and the sacking of the Whitlam Government created for the ALP another order of disillusionment with the Senate. The actions of the Liberal Opposition during the Whitlam Government were the actions of a party that had ruled Australia for 23 years, had developed a belief in its entitlement to govern and could not accept the result of the 1972 election. In three years, between 1972 and 1975, 93 bills were rejected—25 more than had been rejected for the 71 years of the Senate's history.

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<sup>6</sup> Labor had 22 and 33 of the 36 senators.

<sup>7</sup> 1951, 1974, 1975, 1983 and 1987.

<sup>8</sup> It came into effect in 1951 with the double dissolution election of that year.

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This was Labor's lowest point and our most negative view of the role of the Senate. With some justification, at that time we saw the actions of the Coalition opposition in the Senate as obstructive, undemocratic and procedurally dubious.

I don't believe that the Coalition has ever faced up to what it did in 1975. Mr Howard, who was part of that Opposition, has since said that the blocking of Supply was wrong, but only because it made the government of Malcolm Fraser too tentative when it was in power.<sup>9</sup>

For all the frustrations of governments facing hostile or obstructive Senates, the experience of the Howard government in its last three years would also suggest that the control of the Senate by a government is not an unqualified good. Some have argued that, if the Coalition had controlled the Senate in the period before 2004 and if legislation such as the GST, industrial relations changes, and anti-terrorism bills had not been made more palatable by Senate amendment, the Howard government might have fallen earlier than it did.

The changes that Chifley made created a more representative Senate. This has given the Senate more legitimacy in the eyes of the public and it has given minor parties a permanent place in the federal political landscape. A poll in 1997 reported that 72 per cent of voters were opposed to any electoral change that would make it easier for major parties to control the Senate. Voters are becoming used to having minor parties in the Senate—and used to them holding the balance of power.

Two other changes stemming from the 'new' Senate have meant that, since 1970, the Senate has begun to assume a more positive role within and despite its constitutional restrictions. The Senate has transformed itself into a more active and more effective house of review and scrutiny. These reforms did not require constitutional change. The most significant was the establishment of the Senate Committee system. However, procedural changes have also played a part.

Senate procedures have developed which favour scrutiny: time limits for ministers' answers and supplementary questions in question time, orders for the production of documents, publication of an extensive range of government documents, and generous debating rights for individual senators on both bills and other general matters.

With votes on measures invariably close, debates in the Senate can be dramatic at times—more drama than will be found in the House of Representatives outside of Question Time. I can recall a variety of serious matters where the outcome of the vote in the Senate was uncertain until very late in proceedings. Speeches made by senators have been passionate efforts to persuade the Senate of their point of view.

Bills may be debated clause by clause. The legislative process is taken very seriously in the Senate.

Two examples suffice:

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<sup>9</sup> Gerard Henderson, *Menzies' Child: the Liberal Party of Australia*. rev ed., Pymble, NSW, Harper Collins, 1998, pp. 258–259.

- The Native Title Amendment Bill of 1997 was debated for the longest time of any Bill before the Senate—over 105 hours of debate. In the light of the further pronouncements of the High Court, known as the Wik decision, the Bill sought to amend the legislation, which had implemented the Mabo decision.

The outcome of the debate was not to the liking of the Labor Party, the Democrats or the Greens, but it represented the most concentrated focus of the Senate on a piece of legislation. The government successfully negotiated with the independent Senator, Brian Harradine in order for the Bill to pass the Parliament. Three hundred and fourteen amendments were made to the government's Bill, greatly softening it.

It was an intense debate conducted in the aftermath of the rise of Pauline Hanson. Senator Harradine's stated reason for negotiating his position was to 'avoid [in the coming election] a divisive double dissolution election which would have torn the fabric of our society and set race relations back 40 or 50 years.'<sup>10</sup> It was, I think, a view sincerely held.

- The ASIO Amendment (Anti-terrorism) Bill 2002 involved another prolonged debate on an essential issue of competing rights. In two stages<sup>11</sup> the Parliament, and particularly the Senate, defined and refined, argued and compromised over a period of thirty-four and a half hours. The Chair of the Parliament's intelligence committee stated that 'the Bill in its original form would undermine the key legal rights and erode the civil liberties that make Australia a leading democracy.'<sup>12</sup>

The Senate, after recommendations from two parliamentary committees, limited the time during which a person might be detained, provided for legal representation for people being questioned or detained, raised the age of detention from 10 to 16 years and provided for a sunset clause and review mechanism. The final outcome ameliorated the worst excesses of the original bill.

But it is in the committee system, established in 1970, that the Senate has developed the most effective accountability mechanism in the Australian Parliament.

In 1970, Senator Lionel Murphy proposed the establishment of general purpose standing committees. Senator Kenneth Anderson, a liberal senator, put a counter proposal for the establishment of estimates committees. Both proposals, initially not widely supported by their respective parties, passed with the support of minor parties and independents.

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<sup>10</sup> *Commonwealth Parliamentary Debates* (Senate) 8 July 1998, p. 5195.

<sup>11</sup> The first bill was set aside on 12 Dec 2002. A second bill was reintroduced in 2003 and passed at the end of June 2003.

<sup>12</sup> Joint Parliamentary Committee on ASIO, ASIS and DSD, *A Review of the ASIO Legislation Amendment (Terrorism) Bill 2002*, p. vii.

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The committee system of the Senate is now well established and comprehensive. It has made the Senate a genuine house of scrutiny. Senate committees review legislation, consider government policies and administration, and thoroughly examine government expenditure.

In my experience, it is in Estimates Committees, where there is time to question government officials in detail and at length (sometimes at great length) that the greatest accountability occurs. It was in Estimates Committees that the truth of whether children were thrown overboard was revealed, and the state of Australian knowledge about Abu Grahیب was explored.

In Estimates, senators regularly test the detail and the worth of expenditure. Answers to questions on notice are publicly posted on web sites. Estimates can teach a conscientious senator how government works, or does not work. Carefully framed, probing and methodical questioning keeps a government on its toes. While not all such attempts are successful, the estimates process can provide a scalpel for those able to use one. Senate Estimates Committees are the best accountability mechanism we have in any parliament in this country.

I believe the Senate could be better still, but fundamental changes require constitutional amendment. This is one of many areas where our constitution creaks.

The ALP has always been the party of reform in a way that our opponents have never been. We have a strong record of promoting democratic principles in our electoral system and in our parliament. This is part of our 'light on the hill'.

I still believe the Senate's power to block Supply needs to be resolved. This is not just a matter of sour grapes; it is a fundamental principle that the government formed in the lower house must not be forced from office by another, less democratically elected house. New deadlock provisions should be canvassed.

Fixed, simultaneous four year terms for both the members of the House and the Senate, would also enhance our democracy. The Joint Standing Committee on Electoral Matters in 2001 recommended four-year terms on the ground they would 'facilitate better long-term planning for government and ensure consistency with state jurisdictions and cost savings.'<sup>13</sup> I agree.

Australia has three-year parliamentary terms in name only. According to a Parliamentary Library Paper, the Australian Parliament in the quarter century before 2004 lasted on average only 28.5 months,<sup>14</sup> in contrast to six year terms for senators.

House and Senate terms of equal length would make the Senate more reflective of the will of the electorate at the most recent election. In addition, such a reform would eliminate the long-standing anomaly whereby senators elected six years earlier, who

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<sup>13</sup> Joint Standing Committee on Electoral Matters, *The 1998 Federal Election, June 2000*, p. 152; *The 2001 Federal Election, June 2003*, p.xlviii.

<sup>14</sup> Scott Bennett, *Four-year Terms for the House of Representatives*, Canberra, Department of the Parliamentary Library, Research Paper 2, 2003–04, p. 10.

have chosen not to recontest their seat or who lost their seat, continue to sit, to vote on and to determine the fate of legislation until the following July.

I also strongly believe that election dates should be fixed. Such a reform would address some of the uncertainties and limitations of our current political system. Enabling the government to choose the most advantageous moment to go to the polls does not enhance governance or government decision-making. It is simply an advantage of incumbency.

It may be that fixed, simultaneous, four year terms may be too much, too soon, to receive the level of broad bipartisan support that is a prerequisite for any referendum to be successful. Any step along the way would be beneficial. Simultaneous terms for both senators and members of the House of Representatives would be a significant step forward. New senators taking their seat straight after an election would be a significant step forward. Four year terms for both senators and members of the House of Representatives would be a significant step forward. A fixed election date would be a significant step forward.

The Labor Party has often expressed disdain for the role of the Senate, for the inherent flaws in a chamber that lacks a truly democratic basis. But there is now broad acceptance of the Senate's permanence and strong support for its transformation into a powerful force for review and scrutiny. To return to John Adams: it [the Senate] can be 'a security against ambition and corruption'.<sup>15</sup> The Australian Senate today is more respected and more powerful than at any time since Federation. The challenge, perhaps, not only for governments, but also for the Senate itself, is to ensure that it exercises that power constructively and for the national good.

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<sup>15</sup> The Founders Constitution/Bicameralism/John Adams, Vol 1, Chapter 12, Document 14. <http://press-pubs.uchicago.edu/founders/documents/v1ch12s14.html>