

THE AUSTRALIAN SENATE

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The framers of the *Australian Constitution* were well aware of the conceptual difficulties in accommodating responsible government with federalism. Under the system of responsible government, a government is formed from and is accountable to the popularly elected House of Parliament. It ceases to hold office when it loses the confidence of that House. Federalism entails a division of power and a system of checks and balances. As Brian Galligan has put it more recently, '[t]he purpose of responsible government is to unify and consolidate political power whereas that of federalism is to fragment and circumscribe its

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exercise.¹ The modern Australian Senate continues to manifest the tensions between these principles. But it does so as a House thoroughly dominated by Party allegiances and in which territorial representation is vastly attenuated. It is able (and motivated) to check government much of the time, not because it represents discrete state interests, but because the government rarely controls the Senate.

I THE CONSTITUTIONAL DESIGN

A Composition and Representation

Section 1 of the *Australian Constitution* (1901) establishes the Senate as one of the three components of the Federal Parliament in which the legislative power of the Commonwealth is vested (the others are the Queen and the House of Representatives). In accordance with the traditions of British bicameralism, the concurrence of all three components of the Parliament is necessary to enact legislation.

The *Constitution* entrenches the basic structural principles regarding the composition of the Senate and the method by which it is to be elected, but enables the Parliament to prescribe (by ordinary legislation) most of the details.

Section 7 of the *Constitution* provides that the Senate 'shall be composed of senators for each State, directly chosen by the people of the State'.² This precludes the use of an electoral college or the selection of senators by State Parliaments. Senators are chosen for a six year term on a rotating basis – half are elected every three years (section 7).³ Section 7 also provides that 'the equal representation of the several Original States shall be maintained and that no Original State shall have less than six senators'. However, subject to these provisions, the Parliament may determine the number of members of the Senate⁴ and the method by which they are chosen.

Section 8 provides that the qualification of electors for the Senate shall be the same as the qualification for electors of the House of Representatives.⁵ Thus, there is to be no distinction between the franchise for the 'popular house' and the franchise for the Senate. Section 8 effectively precludes the Federal Parliament from adopting a property or educational qualification for electors for the Senate along the lines of the qualifications for electors for some of the State Upper Houses that existed at the time of Federation. The Parliament is otherwise free to determine the qualifications and disqualifications for electors provided that they

¹ Brian Galligan, *A Federal Republic: Australia's Constitutional System of Government* (1995) 47. See also *ibid* 48 ('Federalism enshrines complicated procedures and conflicting institutions within the democratic process in order to refine and restrict the majority will. Responsible government consolidates the majority will of the people for its effectiveness.')

² In what follows I leave out the initial provisions that applied under the Constitution until the Commonwealth Parliament enacted its own legislation on these matters.

³ The maximum term of the House of Representatives is three years but it may be dissolved at any time: section 28. The Senate is not affected by a dissolution of the House unless the special procedure for resolving deadlocks (section 57) is invoked: page 4 below.

⁴ Section 24 provides that the number of members of the House of Representatives 'shall be, as nearly as practicable, twice the number of the senators'.

⁵ Section 8 also explicitly outlaws plural voting.

can still be characterised as ‘the people of the Commonwealth’ and ‘the people of [each] State’.⁶

Section 16 provides that the qualifications of a Senator shall be the same as those of a member of the House of Representatives. Section 34 allows the Parliament to prescribe those qualifications but provides a default provision that requires only that members be aged 21, qualified to be an elector, resident within the Commonwealth for three years, and a subject of the Queen. Certain disqualifications are listed in section 44. Members of State and Territory Parliaments are not disqualified under the *Constitution* but are disqualified under statute.⁷

B Legislative Powers

Section 53 provides that, except in relation to certain financial legislation, the powers of the House and the Senate are the same. Thus, subject to the provisions relating to financial legislation, the Senate may initiate legislation and amend or reject legislation proposed in the House. The provisions relating to financial legislation are as follows.

- Taxation laws: Bills for laws that would impose taxation must originate in the House of Representatives rather than the Senate.⁸ The Senate may not amend such Bills.⁹
- Laws imposing proposed charges or burdens on the people: The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people.¹⁰
- Spending laws: Appropriation Bills must originate in the House of Representatives rather than the Senate.¹¹ The Senate cannot amend a smaller class of Bills – those appropriating revenue or moneys for the ordinary annual services of the Government.¹² That class of bills is not defined in the *Constitution*. Rather, it is defined politically by agreement between the Houses.¹³

These limits on the Senate’s powers are not justiciable.¹⁴

The Senate’s powers are protected by sections 54 and 55, which prevent the House of Representatives from attaching (‘tacking’) extraneous provisions to the proposed law for the ordinary annual services appropriation (section 54) or attaching provisions imposing taxation to other legislative proposals (section 55, which is justiciable). Moreover, the Senate ‘may at any stage return to the House

⁶ For a recent discussion by a single Justice of the High Court, see *Hwang v The Commonwealth; Fu v The Commonwealth* [2005] HCA 66 (28 October 2005).

⁷ *Commonwealth Electoral Act 1918* (Cth) s 164.

⁸ Section 53, para 1.

⁹ Section 53, para 2.

¹⁰ Section 53, para 3.

¹¹ Section 53, para 1.

¹² Section 53, para 2.

¹³ The Parliament adopts procedures to identify the annual Appropriation Bills that the Senate can amend and those it cannot (see I C Harris (ed), *House of Representatives Practice* (5th ed, 2005) 415-416; Harry Evans (ed), *Odgers’ Australian Senate Practice* (11th ed, 2004) 282-284.

¹⁴ *Western Australia v Commonwealth* (1995) 183 CLR 373 (the Native Title Act case) approving *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 578.

of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein'.¹⁵

As one would expect, the power of the Senate in relation to financial legislation was one of the most controversial issues in the drafting of the *Constitution*. The smaller colonies – fearing the dominance of the larger colonies in the House of Representatives – pressed for the general right to amend financial legislation; the larger colonies opposed any such power, except perhaps in emergency situations. The more populous colonies argued that, if the Senate could amend financial legislation, the government would, in effect, become accountable to both Houses – an unworkable distortion of the principles of responsible government. This tension between responsible government and democratic bicameralism remains a significant influence on Australian constitutional politics. The provisions outlined above represent an 11th hour compromise.

The Senate's (almost) co-equal legislative powers and its democratic credentials raise the prospect of deadlock between the Houses. How this prospect was to be addressed was also debated exhaustively when the *Constitution* was being drafted. The solution adopted is now contained in section 57. It provides an alternative legislative procedure, departing from the ordinary bicameral process for enacting legislation. Briefly, the section 57 procedure can be invoked when a Bill has been passed by the House and is (expressly, or it seems, constructively) rejected by the Senate, a three month period has elapsed, and the Bill has been again passed by the House and rejected by the Senate. The Prime Minister can then (if he or she chooses) advise the Governor-General to dissolve both Houses of Parliament. Following the ensuing election, if the House again passes and the Senate again rejects the Bill, the Prime Minister can (if he or she chooses) advise the Governor-General to convene a joint sitting of the two Houses. The Bill becomes a law if it is approved by an absolute majority of the total number of members of the two Houses.

The section 57 procedure strikes a delicate balance between the government (and the House that it controls and to which it is responsible) and the Senate. If the Senate persists in its objection to the government's legislation, it faces the prospect of dissolution and an early election for the whole Senate at a time of the government's choosing. Equally, a government that chooses to invoke section 57 must subject itself to an early election and the public opprobrium that attaches to such an imposition.¹⁶ The political calculation is complicated by several further factors. For reasons that will be outlined below, minor parties and independents will find it easier to have Senators elected at such an election. Moreover, the section 57 procedure need not be invoked immediately there is a deadlock. This means that the government can stockpile deadlocked legislation as potential 'double dissolution triggers' in case it later finds an election for the whole Senate expedient. A government returned after a double dissolution need not proceed with the legislation that provided the basis for the early election and indeed only one has ever done so. (There have been six double dissolutions (1914, 1951,

¹⁵ Section 53, para 4

¹⁶ See above n 3, regarding the term of the House of Representatives.

1974, 1975, 1983 and 1987) although there has only been one joint sitting (following the 1974 double dissolution.) It is not surprising then that governments have seen section 57 as an impediment to efficient governance and Senates have seen it as a vital safeguard of their constitutional powers in relation to legislation.¹⁷

C Relations with the House of Representatives

I have already noted the facility for the Senate to request the House to amend legislation that it cannot itself amend. Messages are also used to transmit Bills initiated in the Senate to the House and to return Bills to the House.

The presence of Ministers in the Senate allows for direct communication with the government. Since Federation, Australian governments have followed the practice of appointing some Senators as Ministers. This practice has been criticised on the grounds that it undermines the Senate's capacity to function as an independent 'House of Review' and dilutes the responsibility of the government to a single house (the House of Representatives), but seems firmly entrenched. It facilitates not only direct communication about the government's position in relation to legislation but also accountability through the ability to ask questions of Ministers in the Senate and to demand that they produce documents, both in the Chamber and in Senate Committees.

There are currently 12 joint Committees established under statute or resolution of both Houses. Cognate Committees of the two Houses sit together only very occasionally. The reluctance to do so is explained in Odgers:

The independence of each House from the other, and their differing composition and history make joint meetings of committees [other than the cognate domestic Committees] a rarity not lightly authorised by the Senate, which values particularly the advice of its own committees. Practical difficulties in reaching agreement on rules for joint meetings and in securing agreed reports are also grounds for the traditionally strong resistance in the Senate to such joint meetings.¹⁸

Finally, there is a facility under Standing Orders for conferences between the Houses. In principle, and quite apart from section 57, the Houses can request (by message) a conference at which the Houses or their representatives will meet together to attempt to resolve disagreements about Bills or other matters. In fact, this procedure has been employed only two times (there has been one informal conference as well).¹⁹ Two other requests for conferences (one by the Senate and one by the House of Representatives) have been rejected by the other House. Odgers' Senate Practice conjectures that the procedure is not employed because it is more straightforward to communicate directly with Ministers.²⁰

¹⁷ I discuss proposals for the reform of section 57 below, text at 62.

¹⁸ Harry Evans (ed), *Odgers' Australian Senate Practice* (11th ed 2004) 411 (available at <<http://www.aph.gov.au/senate/pubs/odgers/index.htm>>). Evans is the Clerk of the Senate and his writings are (as one would expect) partisan in their defence of the prerogatives of the Senate against the demands of government.

¹⁹ *Ibid* 537-9.

²⁰ *Ibid* 540.

D Assessment of the Constitutional Design

The constitutional provisions regarding the qualifications of Senators and electors meant that it never embodied Madison's conception of a Senate in which a trust of a different kind was reposed from the popular chamber, 'requiring greater extent of information and stability of character' and that Senators be 'thoroughly weaned from the prepossessions and habits incident to foreign birth and education'.²¹ (Given the breadth of the default provision, it was unlikely that the Parliament would adopt a substantially more restrictive set of qualifications and so it has proved.)

Nor did the Australian Senate ultimately embody Madison's aspiration that the members of the US Senate represent a 'select appointment', despite the support of some Framers for a Senate of this kind.²² The framers did consider whether members of the Senate should be appointed by the State legislatures. That was the position adopted in the draft *Constitution* that emerged from their first meeting in 1891. But it was rejected in favour of popular election in 1897-8. It appears that the Framers never seriously considered that State *governments* should appoint the members of the Senate.²³

Structurally, then, there are elements that tend to suggest that the Senate is framed around principles of territorial representation: Senators are 'Senators for [a] State', they are elected at elections for which State Governors issue the writs (section 12) and for which State laws prescribe the times and places (section 9), and the equal representation of the original States is guaranteed (section 7). This was the view of Quick and Garran, the authors of the leading contemporary commentary on the *Constitution* and its drafting:

It is the chamber in which the States, considered as separate entities, and corporate parts of the Commonwealth, are represented. They are so represented for the purpose of enabling them to maintain and protect their constitutional rights against attempted invasions, and to give them every facility for the advocacy of their peculiar and special interests, as well as for the ventilation and consideration of their grievances.²⁴

With a nod to Madison, Quick and Garran wrote at another point:

In one capacity such a person is described by the Constitution as one of 'the people of the Commonwealth;' in the other he is one of 'the people of a State.'

²¹ *The Senate*, Federalist Paper Number 62.

²² See, e.g. Sir Henry Parkes, Convention Debates, 4 March 1891, 26 ('What I mean is an upper chamber, call it what you may, which shall have within itself the only conservatism possible in a democracy – the conservatism of maturity of judgment, of distinction of service, of length of experience, and weight of character – which are the only qualities we can expect to collect and bring into one body in a community young and inexperienced as Australia is; and a house of representatives upon a thoroughly popular basis.')

²³ Except briefly by Deakin (Convention Debates, 2 April 1891, 591-2) and to the extent that some State upper houses were nominee (rather than elective houses) at the time of federation. The Premier of Queensland has recently suggested that a government-appointed Senate be considered among other reforms to the Senate, which in his view had 'failed the states': 'Beattie calls for constitutional convention', *The Australian*, 11 October 2006, <<http://www.theaustralian.news.com.au/story/0,20867,20562272-1702,00.html>> at 16 October 2006.

²⁴ John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 414.

From this dual citizenship, and, in order to assist in its preservation, every person living under such a form of government has a duality of political rights and powers. He is entitled, not only to assist in carrying on the government of his State, as a part of the Commonwealth, but to assist in the government of that wider organization of the nation itself. In the latter work, taken and considered by itself, he has also a dual right and power; viz, to join in returning members to the House of Representatives in which centralizing, consolidating, nationalizing, and progressive elements of the community are represented, and also to assist in returning members to the Senate, in which the moderating, restraining, conserving and provincial elements of the community are represented. The duty of a citizen having these dual functions, and of the Federal Parliament so dually constituted, will be to reconcile and harmonize all these apparently conflicting yet necessary and inevitable forces.²⁵

But there are also elements that tend to suggest that the Senate is framed around principles that emphasise democratic choice, linking it with the popular house in which party politics was emerging as the dominant organising principle. Some of the framers certainly regarded the idea that the Senate would be a States' House as fanciful. Deakin said in 1897:

The contest will not be, never has been, and cannot be, between states and states. ... It is certain that once this constitution is framed, it will be followed by the creation of two great national parties.²⁶

The democratic elements include the wide franchise, determined by the Commonwealth Parliament and required to be the same as for the House of Representatives and nationally uniform; the method of election, to be determined by the Commonwealth Parliament and nationally uniform (section 9); the broad qualifications for members, again determined by the Commonwealth Parliament and required to be the same as for the House of Representatives and nationally uniform; and finally the requirement that Senators be 'directly chosen' just as the members of the popular house must be (section 24).

Whether Deakin was prescient in foreseeing the emergence of the strongly disciplined parties that exist today, or was envisaging a more limited role for parties, is controversial.²⁷ The concept of 'party' is certainly not explicit in the original constitutional text²⁸ and its role in the thinking of the framers is far from clear. Most framers seem to have regarded the Senate as having a role of representing and protecting the States, especially the smaller states. But their intentions and understandings also seem rather beside the point. The Senate does not represent the States in any meaningful way, and has not consistently done so for at least 90 years. The following sections consider why.

²⁵ Ibid 450.

²⁶ Convention Debates, 10 September 1897, 335.

²⁷ See Stanley Bach, *Platypus and Parliament: The Australian Senate in Theory and Practice* (2003) 148-150. This book is an excellent analysis of the Senate by a US legislative affairs specialist.

²⁸ Only in the new section 15 adopted in 1977 to deal with vacancies in the Senate between elections, however, do political parties directly appear in the constitutional text. State legislatures must now fill these casual vacancies with a member of the same party as the party of the former senator whose death or resignation caused the vacancy. John Nethercote reports that immediately prior to the new Senators taking their places on 1 July, 2005, 31 of the 76 Senators first entered the Senate under s 15 or its Territory equivalent: 'Senate Vacancies: Casual or Contrived?', Proceedings of the Seventeenth Conference of The Samuel Griffith Society, 2005, Ch 4.

II LEGISLATIVE DEVELOPMENTS

A *The Coming of Proportional Representation*

Prior to 1948, Senators were elected in each state voting as one electorate on a preferential system (a first past the post system prior to 1918). The result was that one party generally had a commanding majority in the Senate, usually the party in government. One party or other had at least 60% of the seats in the Senate except following the 1931, 1937 and 1940 elections; and one party or other had more than 80% of the seats on seven occasions.²⁹ The government party had a majority except during the periods 1913-14, 1929-31 and 1941-44. The Senate hardly operated as a check on government outside those periods.³⁰

In 1948, the Labor government (apparently in the belief that it would lose control of the Senate at the next election) initiated changes to the voting system. From the 1949 election, Senators have been elected by a form of proportional representation. A candidate is elected if they receive a quota of votes in a state-wide election. The quota is calculated as follows:

$$1 + \frac{\text{total number of formal votes}}{1 + \text{number of senators to be elected}}$$

Once a candidate receives a quota, his or her surplus votes are transferred (at a reduced value) to the candidates for whom the voters expressed their next preference until the desired number of candidates is elected. A candidate is not required to receive a threshold level of primary votes to remain in the count.

The result has been twofold. Commanding majorities have disappeared. Indeed, governments have rarely had majorities in the Senate: the government party has only had a majority during the periods 1951-56, 1958-61, 1975-81 and 2005-present. And independents and minor parties have become a feature of the Senate (see Table 1 below). One contributing factor is that 10-15% of voters split their vote between the two Houses, seemingly preferring to have opposition or minor party control of the Senate as a check on the powers of the government. This contributes to the Senate's accountability function. But Harry Evans argues that it promotes territorial representation as well. In his view, the change to proportional representation has meant that at each election, every state is vital to the major political parties and cannot be ignored.³¹

Senate election	Minor party / independent Senators elected	Total number of Senators elected
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²⁹ Figures are provided in Bach, above n 27, 50.

³⁰ The capacity of a non-government controlled Senate to obstruct government was vividly demonstrated during the 1929-31 parliament when the Senate repeatedly disallowed regulations made by the Executive government relating to union preference in the shipping industry: see Geoffrey Sawer, *Australian Federal Politics and Law 1929-1949* (1963) 30-31, 37.

³¹ Harry Evans, 'Federalism and the Role of the Senate', in *Upholding the Australian Constitution* (vol 8), Proceedings of the Eighth Conference of The Samuel Griffith Society (1997).

1949	0	42
1951	0	60
1953	0	32
1955	1	30
1958	1	32
1961	1	31
1970	5	32
1974*	2	60
1975*	3	64
1977	2	34
1980	4	34
1983*	6	64
1984	6	46
1987*	10	76
1990	6	40
1993	4	40
1996	6	40
1998	7	40
2001	6	40
2004	3	40

* Double dissolution election of full Senate; other elections are of half the Senate.

Table 1: Minor party / independent Senators elected since 1958

(Source: Gerard Newman, 'Federal Election Results 1949-2001', Research Paper No 9, Department of the Parliamentary Library, 2001-02, 70; updated to 2004)

B Expansion

The Senate has expanded in size, from the original 36 (six Senators from each of the six original states) to 76 today (twelve Senators from each of the six original states and two Senators from each of the Northern Territory and the Australian Capital Territory). As the House of Representatives expands to represent the growing population so must the Senate because of the nexus established in section 24.

There has been a corresponding drop in the quota required for election, making it easier for independents and minor party candidates to be elected. At a half Senate election, the quota in each State is 14.3%. In Tasmania, the smallest state, that translates into roughly 45,000 votes. At a full Senate election following a double dissolution under section 57 the quota is 7.7%.

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
LNP	6	6	7	6	6	6	1	1*
ALP	5	4	4	4	5	4	1	1
AD		1	1	1	1			
G	1			1		2		
FF		1						

LNP = Liberal and National Parties; ALP = Australian Labor Party; AD = Australian Democrats; G = Greens; F = Family First; * Country Liberal Party

Table 2: Composition of the Senate as at 1 July 2005

(Source:Parliament of Australia, Senate)

C Group Tickets and Above the Line Voting

Prior to 1984, a formal vote in a Senate election required voters to indicate a preference for each of the (perhaps many of dozens of) candidates. That option remains. However, more than 95% of voters now vote 'above the line'³² – that is, they indicate their preference for one of the party groupings of candidates. Their preferences are then distributed in the order specified by the party in a document registered prior to the election. This disadvantages independent candidates, who do not have equal access to preference distribution.³³

D Representation of the Territories

Particular controversy has attended the representation of federal territories in the Senate. The *Constitution* distinguishes between States and Territories. The Original States are the constitutional successors of the Colonies that came together to form the Commonwealth of Australia. Their constitutional integrity is guaranteed: the Commonwealth cannot unilaterally alter their constitutional arrangements or curtail their capacity to function as independent governments. And section 7 of the *Constitution* provides that 'The Senate shall be composed of senators for each State'.

The Territories consist of 'territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth.' Section 122 of the *Constitution* provides for the government of the Territories. In particular:

The Parliament may make laws for the government of any territory ... and may allow the representation of such territory in either House of the Parliament, as it thinks fit.

There is a clear tension between section 7 and section 122, if not an outright inconsistency. It was brought into sharp relief by 1973 legislation which provided for the first time for the representation of the Northern Territory and

³² Australian Electoral Commission, *Behind the Scenes: The 2004 National Election Result* (2005) 149.

³³ For discussion, and the conclusion that the differential treatment of unregistered political parties is constitutionally valid, see *Mulholland v AEC* (2004) 220 CLR 181.

the Australian Capital Territory in the Senate by two Senators apiece.³⁴ In the First Territory Senators Case,³⁵ a 4:3 majority of the High Court decided that the provisions for the representation of the ACT and the Northern Territory in the Senate were valid. In the Second Territory Senators Case,³⁶ a 5:2 majority of the High Court (with two new members replacing members of the majority from the earlier case) refused to depart from the result of the First Territory Senators Case, although a majority of the Court was of the view that the earlier case was wrongly decided.

The sharp division in the First Territory Senators Case, though couched in part in close analysis of the text of the *Constitution*, reflects equally sharp divisions about the nature of Australian federalism. The majority emphasised (Justice Murphy more explicitly than the other Justices) the democratic orientation of the *Constitution* and the incongruity that would arise if Parliament were precluded from deciding that some territories had reached the stage of development where representation of their people in the Senate was appropriate.³⁷ Chief Justice Barwick's dissenting judgment, by contrast, emphasises the Senate as a 'States' house' and as such an essential element in the federal design:

The essentially federal nature of the new polity, the Commonwealth of Australia, is manifest throughout the Constitution. ... To that federal nature, the maintenance of the relationship of the House of Representatives and the Senate and of the relationship of each respectively to the people of the Commonwealth and the States and of the Senate as the States' House is indispensable.³⁸

III THE SENATE IN PRACTICE

A National Political Parties

The Australian political system is dominated by two major groupings: the Australian Labor Party (ALP) and a coalition of two conservative parties, the Liberal Party and the National Party (formerly the Country Party). Since 1944 (when the Liberal Party was established), every government has been formed by either the ALP or the coalition. All of these parties are organised federally; that is, they are national parties with state and territory branches. (The legal relationships between the branches and policy-making forums of the parties do differ somewhat.) The National Party primarily appeals to non-urban voters and has been rather more successful electorally in Queensland and New South Wales than in other states. But the overall picture is of national political parties rather than regional political parties.

The immediate implication is that party representation in the Senate does not track territorial representation. For the individual Senator, on occasions this may

³⁴ *Senate (Representation of Territories) Act 1973* (Cth). The Northern Territory and the Australian Capital Territory are still the only territories represented in the Senate, each by two senators.

³⁵ *Western Australia v The Commonwealth* (1975) 134 CLR 201.

³⁶ *Queensland v The Commonwealth* (1977) 139 CLR 585.

³⁷ (1975) 134 CLR 201, 270, 283-5.

³⁸ *Ibid* 227-8.

mean a choice between party allegiance and territorial allegiance. I discuss the effects of party discipline on this choice below.

But the significance of this choice should not be overstated. Australia is largely politically homogeneous (in the sense that levels of support for the various parties are roughly comparable across the country – see Table 3 below). National political parties could hardly survive if it were not.

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
LNP	44.12	44.10	44.9*	50.2*	47.49**	46.13**	37.87**	45.40***
ALP	36.37	36.12	31.65	32.52	35.49	33.54	41.10	41.37
AD	2.20	1.86	2.20	2.00	2.39	0.82	2.14	4.73
ON	1.89	0.72	3.14	2.45	1.14	–	–	–
G	7.34	8.80	5.40	8.06	6.60	13.29	16.36	7.60

LNP = Liberal and National Parties; ALP = Australian Labor Party; AD = Australian Democrats; ON = One Nation; G = Greens

* The Liberals and Nationals run separate tickets in Queensland and Western Australia. I have combined their separate votes. ** Liberal only ticket. *** Country Liberal Party ticket.

Table 3: Percentage of first preference votes cast at Senate election 2004

(Source: Australian Electoral Commission, Senate Results, First Preferences by Groups³⁹)

Of course, there have been some exceptions. The Democratic Labour Party, formed by predominantly anti-Communist Catholic defectors from the ALP in the 1950s, enjoyed some representation in the Senate until the 1970s, but only in Victoria and NSW. The Australian Democrats, a centre-left party formed by a defector from the Liberal Party in the 1970s, has had greater success in South Australia than elsewhere. The Greens have had greater success in Western Australia and Tasmania, at one point returning two Western Australian Senators under the banner of a distinctively Western Australian Greens party. One Nation, a populist anti-immigration backlash party formed by a dumped Liberal candidate for the House of Representatives, returned one Senator from Queensland (as well as representatives in the NSW and Queensland Parliaments). But the overall picture remains one of a Senate composed of representatives of national parties who are elected on the one set of election promises to implement a single electoral mandate.

B *Party Discipline*

This picture is reinforced by the strength of party discipline. The Australian Labor Party requires its members to pledge that they will support decisions reached at meetings of the parliamentary party (the caucus) and suspends or expels those who cross the floor. The Liberal Party (the main conservative party)

³⁹ Available at <<http://results.aec.gov.au/12246/results/SenateStateFirstPrefsByGroup-12246-NAT.htm>>.

does not require the same formal pledge but its modern approach appears increasingly rigid.⁴⁰

Tight party discipline is bolstered by the professionalisation of politics. Increasingly, Australian politicians are recruited from within the party structure itself. Many parliamentarians begin their political careers at university, and rise through the ranks without ever experiencing a working life outside politics. In a recent speech before the NSW Fabian Society, Labor Senator Robert Ray observed that ‘a whole production line of soul-less apparatchiks has emerged: highly proficient and professional’.⁴¹ When politicians are drawn from a pre-existing political class, they are already instilled with a strong sense of party loyalty; the elected politician ‘votes as the leadership instructs [and] confirms for another parliamentary term the hegemony of the processes that made her possible.’⁴²

Researchers in the Australian Parliament House library recently carried out a study of floor crossing – intentionally voting against one’s own party – from 1950 to 2004.⁴³ They found that of the 14,243 divisions (formally recorded votes) in the two chambers, there were 439 instances in which members and Senators crossed the floor. As a result of the ALP pledge, crossing the floor was far more common among Liberal and National Party members than among Labor members (427 to 18 divisions). Crossing the floor was more than twice as common in the Senate than in the House of Representatives, both in raw numbers (297 to 141) and frequency (5% of divisions compared with 2% of divisions), perhaps because the stakes are lower (a government defeat in the Senate does not signal a loss of confidence in the government) and party control of Senators is looser and less focussed than party control of Members of the House (Senators are preselected by State-wide party committees rather than local committees and serve for six years rather than three). Crossing the floor is usually a lonely activity: 48% of instances involve a single dissenter; 26% of instances involve two or three members or senators. Two Senators accounted for 37% of all the instances in the Senate. One of them, Senator Reg Wright, initiated 40% of the divisions in which he dissented from his government’s position.

It is possible to see crossing the floor as an instance in which party representation is subordinated to territorial representation. Commentators have suggested

⁴⁰ John Warhurst, ‘Are the major parties now control-mad?’, *Canberra Times*, 1 February 2002 quoted in Deirdre McKeown and Rob Lundie, ‘Crossing the floor in the Federal Parliament 1950 – August 2004’, Research Note no. 11 2005–06, 10 October 2005, Australian Parliamentary Library. Party discipline is much weaker in the Australian Democrats. The resulting disunity has been identified by the party’s founder as one reason for their serious electoral decline: Chipp challenges Democrats senators ahead of next election”. Australian Broadcasting Corporation, 20 May 2006, <<http://www.abc.net.au/news/newsitems/200605/s1643385.htm>> at 16 October 2006.

⁴¹ The Senator’s address was extracted in ‘Robert Ray: Also-rans in the vanguard’, *The Australian* (Australia), 21 September 2006 <<http://www.theaustralian.news.com.au/story/0,20867,20447244-7583,00.html>> at 28 September 2006.

⁴² Rodney Cavalier, ‘Could Chifley win Labour preselection today?’, Address to the NSW Fabian Society seminar at Gleebooks on Wednesday April 20, 2005’, *The Sydney Morning Herald* (Sydney), 21 April 2005 <<http://www.smh.com.au/articles/2005/04/20/1113854257655.html>> at 28 September 2006.

⁴³ McKeown and Lundie, above n 3540.

that members rarely cross the floor except where that action is in accordance with the view of the local, state or territory branch of their party that will be responsible for selecting them as a candidate at the next election, even if it is at odds with the view of the national parliamentary party.⁴⁴ The most recent instance is consistent with this thesis. On 15 June 2006, a government party (Liberal) Senator from the Australian Capital Territory voted with the opposition (Labor) Party and minor parties to disallow a government measure that had nullified Australian Capital Territory legislation allowing for same-sex civil unions.⁴⁵ However, Bach (quoting Souter) identifies only two instances prior to 1988 where all Senators from a particular State voted along State lines rather than party lines.⁴⁶

C Territorial Representation: Mavericks and Independents

Some Senators, however, strongly identify themselves as representatives of their State and assert their primary loyalty as being to the State rather than to the national parliamentary party. Today, at least the rhetoric usually brackets the state together with the state branch of the Senator's party.⁴⁷ The parochial tradition, referred to by Senator Kep Enderby in a 1975 lecture, has faded among the major parties, and it would be extraordinary to encounter an incident like that recounted by Enderby in which a conservative Queensland senator opened a speech in the Senate by asserting that a Western Australian Senator had no right to speak about Queensland.⁴⁸

There have also been a few independent Senators. Almost all have been defectors from one of the major parties and have not survived a subsequent election as an independent. However, Senator Brian Harradine carved out a successful and lengthy career as an independent Senator with a clearly delineated agenda that saw him exercise his balance of power position to support government measures, in return for support for Tasmanian and socially conservative issues.

⁴⁴ Chaney and Hamer, quoted in McKeown and Lundie, above n 40.

⁴⁵ Commonwealth of Australia, Parliamentary Debates (Hansard), Senate, 15 June 2006, 24 (proof pagination) ('It is a very difficult decision for a person who has been a representative of the Liberal Party in two parliaments over 17 years to say that he cannot, for the first time, agree with his colleagues on a matter of this nature, but I feel that today is a day when I must say just that. I indicate that there are many duties that a member of parliament has to perform and there are many loyalties that he or she owes, but mine must primarily be to the people who elect me: the people of the Australian Capital Territory. I recognise that they have, in effect, through the democratic process, made a decision, and I believe that we need to respect and honour that decision.')

⁴⁶ Bach, above n 27, 55 quoting Gavin Souter, *Acts of Parliament: A Narrative History of the Senate and House of Representatives*, Commonwealth of Australia (1988) 470.

⁴⁷ Thus, Senator Barnaby Joyce recently said 'Oh no, we have a clear direction from the people of Queensland and the National Party in Queensland as to what they want and we're just going about representing it and if we have to get a few bruises on the way then we do.' Alexandra Kirk, 'PM issues call for Nats to step into line PM seeks to play down Coalition tensions', Australian Broadcasting Corporation Transcripts, 10 August 2005.

⁴⁸ Kep Enderby, 'Barriers To Reform-The Politics Of Opposition', John Curtin Memorial Lecture 1975, available at <<http://john.curtin.edu.au/jcmemlect/enderby1975.html>>.

D Territorial Representation: Party Room and Premiers

The strength of party discipline and the dominance of the Parliament by Australia's two major national parties means that the Senate rarely functions as a site for territorial representation. At least from 1910 (when the anti-Labour parties merged), if not before, territorial representation has been a marginal phenomenon in the Senate.

This does not mean that there is no site for territorial representation in the Australian Parliament or in Australian politics; just that this does not take place in the Senate.⁴⁹ Representatives from outlying States are as likely as Senators to use the Parliament to press State interests.⁵⁰

The party room forms one important parliamentary site for territorial representation. One of the mechanisms (and particularly significant manifestations) of strong party discipline in the Australian Parliament is the practice of holding regular meetings of the entire parliamentary party whenever the Parliament is in session. Communication between the backbench and Ministers (or Shadow Ministers) is not mediated through the whips but is direct and face-to-face. It is often robust, allowing an outlet for dissent that is prohibited (for Labor members) or strongly discouraged (for others) outside the party-room.⁵¹ Dissent is usually ideologically rather than territorially-based (large parties must accommodate a broad range of ideological positions). Recent instances of dissent have included backbench opposition to the government's policies on asylum seekers⁵² which led to policy changes and moves to change the regulatory regime for the abortifacient RU486.⁵³ But, occasionally, party-room debate does coalesce around regional issues, particularly where the issue exposes a fault-line in the party's composition. Sometimes, this debate is conducted publicly between the federal party and the state or territory party. A recent example is the federal (opposition) Labor party's plan to prevent logging in old-growth forests in Tasmania, staunchly opposed by the state party and the industrial wing of the party, but supported by the party's mainland environment-focused supporters.⁵⁴

⁴⁹ And it does not mean that there have been no examples of State interests predominating through Senate debate. See, eg, Brian Galligan's discussion of the original Commonwealth Electoral Bill 1903 in which two States' racially restrictive policies were incorporated into the Commonwealth Bill: Brian Galligan, 'Parliament's Development of Federalism' in Geoffrey Lindell and Robert Bennett (eds), *Parliament. The Vision in Hindsight* (2002) 1, 21. More recent examples are harder to find.

⁵⁰ See, eg, Galligan, *ibid.*

⁵¹ Some reports suggest that the modern Liberal party is less tolerant of dissent in the party room. One Liberal backbencher described colleagues who contemplated crossing the floor as political terrorists: 'Backbench detention revolt "political terrorism"', *The Age*, 15 June 2005.

⁵² ABC Television, 'Liberal rift forming over Immigration Bill', *Lateline*, 9 August 2006 <<http://www.abc.net.au/lateline/content/2006/s1711143.htm>> at 28 September 2006; Dennis Shanahan, 'Rattled by rats in the ranks', *The Australian* (Australia), 24 June 2006, 23; John Kerin and Tracy Sutherland, 'Liberal MPs rebel over asylum', *The Australian Financial Review* (Australia), 9 May 2006, 3; David Humphries, 'Lib MPs rebel over hard line on asylum', *The Sydney Morning Herald* (Sydney), 17 April 2006, 1.

⁵³ Peter Hartcher, 'The bitterness behind a civil debate', *The Sydney Morning Herald* (Sydney), 17 February 2006, 13; Samantha Maiden, 'Pressure for conscience vote on abortion drug', *The Australian* (Australia), 17 November 2005, 5; Annabel Stafford, 'Abortion pill splits coalition', *The Australian Financial Review* (Australia), 17 November 2005, 12.

⁵⁴ See, eg, Gerard McManus, John Ferguson and Geraldine Mitchell, 'Latham Revolt: Union, industry, leaders blast forests deal', *Herald-Sun* (Melbourne), 5 October 2004.

A similar fault-line in the Liberal-National coalition divides free-trade oriented Liberals and (predominantly Queensland) Nationals who want protection for Australian sugar and banana growers⁵⁵ and to retain partial government ownership of the dominant telecommunications carrier Telstra unless and until regional services are improved and guaranteed.⁵⁶

Finally, the regular meetings of intergovernmental ministerial councils form an important set of sites for representation of territorial concerns by State and Territory Ministers to Commonwealth Ministers. As noted above, the framers of the *Constitution* rejected the model of a Senate appointed by State parliaments and never seriously considered the model of a Senate appointed by State governments. But the modern practice of executive federalism (as understood in common law federations) shares some characteristics with that model (the most striking difference being the closed deliberations that are characteristic of executive federalism). There are over 40 Ministerial Councils in which Commonwealth, State and Territory (and sometimes New Zealand) Ministers participate. They meet annually or biannually (and in some cases more frequently) but can agree on matters by correspondence outside of formal meetings. The outcomes of the meetings may be recorded in more or less formal intergovernmental agreements that may in turn provide for legislative action by one or more Parliaments.⁵⁷ The details of the political dynamics of these meetings are beyond the scope of this paper. But what is clear is that, while one of the key functions of these meetings is national policy coordination,⁵⁸ the States and Territories regard them as an opportunity to present local concerns (and requests for action) to the Commonwealth government and to represent those concerns to an external audience through the media. And at least some Premiers want them to take on a more democratic cast: control over the agenda devolved and including devolution of more deliberative procedures.⁵⁹

IV THE FUNCTION OF THE MODERN SENATE

What function, then, does the modern Senate serve, given the predominance of party interests over State interests? In this paper I will focus on two important groups of functions: the Senate's legislative scrutiny function and its executive accountability function.

⁵⁵ See, eg, Lachlan Heywood, 'Nats plot revolt over excise', *The Courier-Mail* (Queensland), 13 June 2006.

⁵⁶ See, eg, 'Nash Backs Coonan's Rejection of Telstra Bush Plan' (2006) *The Nationals* <http://nsw.nationals.org.au/html/nash_backs_coonans_rejection_of_telstra_bush_plan.cfm> at 3 October 2006.

⁵⁷ See Cheryl Saunders, 'Intergovernmental Agreements and the Executive Power' (2005) 16 *Public Law Review* 294 for a recent survey of some of the processes and their shortcomings.

⁵⁸ Peter Beattie, 'The Immediate Challenge Regarding COAG Reform' (2002) 61 *Australian Journal of Public Administration* 57, 57.

⁵⁹ *Ibid* 59.

A Legislative Scrutiny

1 *Legislative Scrutiny, Responsible Government and Federalism*

Ministers, especially Australian Prime Ministers who have been in government for some time, tend to prefer a compliant Senate; one that does not obstruct their legislative programme or seek to examine the conduct of the government formed from the House of Representatives. Prime Minister Paul Keating famously described the Senate as ‘unrepresentative swill’.⁶⁰ The Keating government and the Howard government have both floated proposals to alter the size of the Senate (and therefore the House) to reduce the number and influence of minor parties.⁶¹ The Howard government also appointed a panel to enquire into proposals for changing section 57.⁶² One proposal put forward by government was that deadlocks could be broken by a joint sitting without having to face an election for the House of Representatives.⁶³

This raises an important question: on what basis and in what circumstances may the Senate legitimately impede the legislative programme of the government? Bach highlights the contrast between the views of the Clerk of the Senate in 1966 and 2001. In 1966, Odgers wrote:

If it disagrees with [the] policy [of the House of Representatives], the Senate has the right, indeed the duty, to project its viewpoint by the process of amendment or suggestion, but it is submitted that the Senate should not – *except where state interests are seriously threatened* – insist upon amendments disagreed to by the policy-making Chamber.⁶⁴

In 2001, Odgers’ successor Harry Evans emphasised the largely coequal legislative powers of the Senate, and noted that those powers are to be used ‘circumspectly and wisely’, taking into account various matters including:

Whether the matter in dispute is a question of principle for which the government may claim electoral approval; if so, the Senate may yield. The Senate is unlikely to resist legislation in respect of which a government can truly claim explicit electoral endorsement, *but the test is always likely to be the public interest*.⁶⁵

The protection of States’ interests appears to have dropped away as a condition of the exercise of the Senate’s blocking power. One indirect indication is that the language of States’ rights is far less prevalent today than even 25 years ago. The

⁶⁰ Hansard (House of Representatives), 4 November 1992, 2547 (‘Then you want a Minister from the House of Representatives chamber to wander over to the unrepresentative chamber and account for himself. You have got to be joking. Whether the Treasurer wished to go there or not, I would forbid him going to the Senate to account to this unrepresentative swill over there’.)

⁶¹ If the Senate consisted of 10 Senators for each state rather than 12, the quota would be larger and at most half-Senate elections, one major party would most likely get three Senators, the other two.

⁶² See Commonwealth of Australia, *Resolving deadlocks: A discussion paper on section 57 of the Australian Constitution* (2003); *Resolving Deadlocks: The Public Response* (Report of the Consultative Group on Constitutional Change) (2004).

⁶³ In opposition, Prime Minister Howard had opposed a similar proposal: Mr Howard (Lib), Debates (House of Representatives), 15 September 1987, p. 57, quoted in Scott Bennett, ‘The Australian Senate’, Australian Parliamentary Library Research Paper No 6 2003-04.

⁶⁴ Quoted in Bach, above n 27, 359 (emphasis added).

⁶⁵ Quoted in Bach, above n 27, 359, with Bach’s emphasis.

Senate Hansards bear this out: the phrase ‘States’ rights’ was used 106 times in the five year period 1 January 1981 to 31 December 1985 and only 28 times in the five year period 1 January 2001 to 31 December 2005. In part, this reflects the move of the Liberal party in government away from its commitment to States’ rights in favour of using Commonwealth legislative and financial powers to impose solutions to its substantive policy concerns. Concern with States’ interests is no longer (if it ever was) a precondition of, or a primary rationale for, Senate obstruction of government legislation. What is legitimate remains – probably inevitably – a deeply contested political question.

2 *Committee-based Legislative Scrutiny*

The Senate’s legislation committees also considered proposed legislation. The Selection of Bills Committee decides which legislation should be referred to Committees, the terms of reference and reporting dates. However, the government has proposed very recently that decisions about references to Committees will be taken by the government itself. The government has frequently expressed its impatience with the delay that references to committees causes to its legislative agenda. The fragmentation and decentralisation of power produced by a second chamber frustrates its desire for control over timetable and outcomes. Senate Committees regularly recommend substantial changes to the government’s legislative proposals.

All legislation and subordinate legislation is also considered by one of the Senate’s two specialist Scrutiny Committees: the Regulations and Ordinances Committee (established 1932) and the Scrutiny of Bills Committee (established 1981). Each scrutinises legislation against criteria set out in its terms of reference. Broadly, those criteria relate to parliamentary propriety, fair administrative procedures, and civil liberties.⁶⁶ Each addresses any concerns to the responsible Minister and reports its concerns and the Minister’s response to the Senate as a whole. An adverse report from the Regulations and Ordinances Committee (accompanied by a motion to disallow a piece of delegated legislation) results in the delegated legislation ceasing to have effect after 15 sitting days if the Senate does not decide to reject the disallowance motion.⁶⁷ It appears that the Senate has never rejected a disallowance motion resulting from a negative report by the Regulations and Ordinances Committee.

This respect for the reports of the Regulations and Ordinances Committee is often attributed to the traditional non-partisan approach of that Committee. Both Scrutiny Committees have refrained from commenting on the policy of the legislation that they are considering. Sometimes this makes their reports appear rather tepid, merely ‘drawing matters to the attention of the Senate’ where rather more robust comment might be warranted. But the ongoing political effectiveness of these committees appears to require this technical and muted tone and a

⁶⁶ The Regulations and Ordinances Committee is required to consider whether delegated legislation is authorised by the empowering statute; does not trespass unduly on personal rights and liberties; does not unduly make the rights and liberties of citizens dependent upon non-reviewable administrative decisions; and does not contain matter more appropriate for parliamentary enactment: SO 23(3).

⁶⁷ *Legislative Instruments Act 2004* (Cth) s 42.

rather narrow civil liberties-oriented approach to considering the human rights implications of legislation.⁶⁸

These recommendations (if acted on) can be significant in protecting rights and freedoms given that Australia has no national constitutional or statutory Bill of Rights. If the government does not control the Senate, the Senate may amend legislative proposals in line with the recommendations and attempt to win over the government and the House. It is more likely to do so if the recommendations are supported by government members of the Committee. This is far from unheard of. Party discipline is somewhat attenuated in Committees: dissent is less immediate and less obviously political in a written, reasoned report, compared with dissent on the floor of the Senate. Moreover, the technical approach of the Scrutiny Committees sometimes leads government to accept the need for technical amendments to legislation to minimise or avoid impacts on civil liberties. If the government does control the Senate, the dynamic is somewhat different. Instead of the government calculating the costs and benefits of a standoff with the Senate, it must calculate the costs and benefits of a standoff with some of its own members. A current example is a set of amendments to migration legislation which the government has put on hold following an adverse Senate Committee report and backbench unease.⁶⁹ The government's recent proposals to change the basis on which committee chairs and members are assigned may in part be motivated by a desire not only to eliminate non-government chairs (of the references committees) but to have more pliable government chairs of the legislation committees.⁷⁰

B Accountability

The other significant function of the modern Senate is in pursuing government accountability through the provision of information about government conduct. There are three important sites that I will focus on here: Question Time, parliamentary committees and orders for the production of documents. However, the effectiveness of each is subject to important limits and each is vulnerable to a government that controls the Senate.⁷²

1 Question Time

On most sitting days, approximately one hour is set aside to allow Senators to put questions without notice to ministers.⁷³ Unlike the system in the UK House

⁶⁸ See Carolyn Evans and Simon Evans, 'Legislative Scrutiny Committees and Parliamentary Conceptions of Human Rights' [2006] *Public Law* (forthcoming).

⁶⁹ See, eg, Samantha Maiden and Cath Hart, 'Backbench revolt on refugees and stem cells', *The Australian* (Australia), 22 June 2006.

⁷⁰ For summary and comment see John Wanna, 'Musical Chairs', *The Courier Mail* (Queensland), 23 June 2006.

⁷² The following sections draw on Simon Evans, 'Continuity and Flexibility: Executive Power in Australia' in Adam Tomkins and Paul Craig (eds), *The Executive and Public Law: Power and Accountability in Comparative Perspective* (Oxford: Oxford University Press 2005) 89-123.

⁷³ A similar practice is followed in the House of Representatives.

of Commons, for example, all available Ministers attend. Questions are allocated proportionally between the various parties, groups and independent Senators.⁷⁴

Whatever the historical position, Question Time today is a relatively ineffective tool for holding government to account. This is particularly clear in the House, where the government necessarily has a majority and control of proceedings, but it is also true of the Senate. Oppositions use Question Time to score political points rather than to seek information. The style is confrontational rather than inquisitorial. There is no obligation on Ministers to actually *answer* questions.⁷⁵

2 Document Production

The Senate has the power to request government and others to table (produce) documents.⁷⁶ The power is regularly exercised by the Senate⁷⁷ and constitutes one of the 'most significant procedures available to the Senate to deal with matters of public interest giving rise to questions of ministerial accountability'.⁷⁸ The Senate requires government to table (a) a list of all statutory provisions that have not been proclaimed and come into operation, reasons that those provisions have not been proclaimed and a timetable for when they will come into effect; (b) up-to-date indexes of departmental and agency files, facilitating requests for specific documents by the Senate and under freedom of information legislation; and (c) details of government contracts worth more than \$100,000 including the reasons for any confidentiality provisions contained in each contract. Governments generally complied with these orders until the current government gained control of the Senate in July 2005. However, a recent Senate Procedural Information Bulletin (produced by the Clerk's office) notes that since that date, there have been 'consistent government refusals to accept such orders', a 'drought' broken only by agreement to produce a set of relatively uncontroversial documents in February 2006.⁷⁹ The Senate can deal with non-compliance by passing a censure motion (the usual response) or by invoking its powers to punish for contempt (a rare occurrence, perhaps given the risk that those powers will be turned on the opposition when in government).

3 Committees

The parliamentary committee system, particularly the Senate standing committee system established in the 1970s and restructured in 1994 and again in 2006, has been an important and reasonably effective mechanism for ensuring executive accountability.

⁷⁴ Harry Evans (ed), *Odgers' Australian Senate Practice*, (Canberra Department of the Senate 11th edn, 2004) 485ff.

⁷⁵ Moreover there is nothing to prevent a Minister in one House refusing to answer a question on the basis that it is more appropriately directed to a Minister in the other House or to officials who will be appearing at a Committee of the other House. See, eg, House of Representatives, Hansard, 15 February 2005, 1-5, where the Prime Minister referred a series of questions concerning the interrogation of Iraqi prisoners to the Defence Minister Senator Robert Hill.

⁷⁶ Senate, Standing Order 164.

⁷⁷ Evans, n 74 above, 454.

⁷⁸ *Ibid* 460.

⁷⁹ Department of the Senate, *Procedural Information Bulletin No 198 for the Sitting Period 7-9 February 2006 Estimates Hearings 13-17 February 2006*, (20 February 2006) 1.

Prior to 2006 there were eight pairs of committees, a references committee and a legislation committee responsible for particular subject areas.⁸⁰ The references committees (chaired by non-government Senators) conducted enquiries into the matters referred to them by the Senate. The legislation committees (chaired by a government Senator) enquired into proposed legislation. The legislation committees also enquired into 'budget estimates' (the proposed expenditure items listed in the Budget Statements and the Additional Estimates Statements produced in May and November respectively) and the annual reports of agencies.⁸¹ The enquiry was public, wide-ranging and a significant accountability mechanism. Although the terms of reference required that questions be relevant to forward estimates of (future) expenditure, this was interpreted as allowing questions relating to *past* performance, particularly as revealed by annual reports.⁸² The responsible minister, or his or her representative in the Senate, and officers of the relevant agencies, appeared before public meetings of the estimates committees to answer questions. Estimates committees (at least in principle) could call particular officers as witnesses and did not have to depend on Ministers making officers available. The Auditor-General and officers of the Australian National Audit Office could also brief estimates committees on audit matters or comment on audit reports raised in committee hearings. Estimates committees resisted attempts to limit the scrutiny of statutory authorities.⁸³

In late June 2006, the government foreshadowed its intention to use its control of the Senate from July 2006 to restructure the committee system. The ostensible rationale was to 'achieve greater efficiencies and effectiveness'. The eight pairs of legislation and references committees would be reduced to a single set of 10 committees. Legislation would not be referred to committees unless the government approved. All committees would be chaired by members of the government parties. (It seems that the government not only sought to oust non-government chairs but also to replace some of its own chairs who were displaying a independence of thought.) Opposition and minor parties described the changes as undermining the fabric of Australian democracy.⁸⁴ Separately, the government announced its intention to insist that estimates committees take a stricter (and narrower) approach to their terms of reference rather than conducting a roving enquiry into the past performance of agencies.⁸⁵

⁸⁰ Standing Order 25.

⁸¹ This draws on Evans (ed), n. 74 above, 379ff. The annual report accountability framework is established by the *Commonwealth Authorities and Companies Act 1997* (Cth) and the *Financial Management and Accountability Act 1997* (Cth).

⁸² A Senate Resolution in 1999 confirmed that 'any questions going to the operations or financial positions of departments and agencies are relevant questions in estimates hearings'. Department of the Senate, *Procedural Information Bulletin No 201 for the Sitting Period 9-11 May 2006* (12 May 2006) 1.

⁸³ Evans, n. 74, 498, 512 ('there are no areas of expenditure of public funds where these corporations have a discretion to withhold details or explanations from Parliament or its committees': summarising a 1971 committee resolution).

⁸⁴ See eg Australian Broadcasting Corporation (7:30 Report), *Senate changes threaten democracy: Beazley*, TV Program Transcript (broadcast 21 June 2006), <<http://www.abc.net.au/7.30/content/2006/s1668754.htm>>.

⁸⁵ Senate Hansard 11 May 2006 (Senator Ellison) ('[E]stimates are for questions on expenditure. Over time that has become a rule more honoured in the breach than in the observance'); Senator

Ultimately, the Senate adopted the recommendations of its Procedure Committee and simply amalgamated the paired legislation and references committees, thus reducing the number of Senate committees from 16 to eight (rather than to 10 as sought by government). It also adopted the recommendation that all committees be composed of eight members (four nominated by the Leader of the Government, three by the Leader of the Opposition and one by minority groups and independent Senators) and accepted the government's proposal that the Chair of each committee be a government-nominated member elected by the committee.⁸⁶

While the committee system in general, and estimates committees in particular, clearly have enormous potential to hold the executive to account, they also suffer a number of significant limitations. The Senate has been able to develop an effective scrutiny role through its committees primarily because the governing party has rarely controlled the Senate in the period since 1949 (see above). This has enabled it to exercise its power (see *Constitution* section 49) to compel witnesses (including officials⁹¹ and Ministers) to attend, to answer questions and to produce documents. However, even when government did not control the Senate, these powers were not unlimited. Ministers who were members of the House of Representatives (and former Ministers who had been members of the House) have refused to appear when asked to do so⁹² and have even argued that their immunity extends to their personal political staff.⁹³ Ministers can delay providing answers to questions until the day before the next round of hearings.⁹⁴ And Ministers have directed officers and agencies not to appear at, to answer questions from or make submissions to committee enquiries.⁹⁵ Unless the Senate

Minchin ('There has been a tolerated flagrant disregard for standing order 26 in the operation of the estimates committees').

⁸⁶ Senate Procedure Committee. Parliament of Australia, *Restructuring the Committee System* (2006) 1-2.

⁹¹ Officers may not be asked to give opinions on matters of policy, other than (with the Minister's consent) to explain its background. Department of Prime Minister and Cabinet, *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters – November 1989*, available at <<http://www.pmc.gov.au/pdfs/OfficialWitness.pdf>> at 19 August 2004.

⁹² Select Committee on a Certain Maritime Incident, Senate, *A Certain Maritime Incident* (Commonwealth of Australia, 2002) ('CMI Report'), 180-181.

⁹³ CMI Report, n. 92 above, 180-181.

⁹⁴ Noted in Department of the Senate, *Procedural Information Bulletin No 199 for the Sitting Period 27 February 2006 – 2 March 2006* (3 March 2006), 2.

⁹⁵ Eg CMI Report, n. 92 above, 193.

is willing to confront the executive directly and impose its blunt powers to hold officers in contempt,⁹⁶ its enquires may be thwarted or rendered politically irrelevant.⁹⁷ Moreover, once a Committee has reported, there is no obligation on the government to comply with any recommendations or even to respond to those recommendations. Governments regularly delay providing responses for a year or more.⁹⁸ They even delay their responses to the President's report on the reports awaiting government responses.⁹⁹ These weaknesses are accentuated now that government controls the Senate.

⁹⁶ Ibid, 181-182.

⁹⁷ When the government attempted to direct the public servants and statutory authorities not to answer questions relating to Australian wheat exports to Iraq while a Commission of Enquiry was underway, the Clerk of the Senate advised:

The Senate, like comparable legislatures, has never conceded that, with or without any kind of statutory provision, a minister has any power to direct any person not to give evidence to a parliamentary committee. That is a question of constitutional/ parliamentary law which has never been adjudicated, except by the Senate itself, not a question of statutory interpretation, and a statutory provision of the kind referred to is not sufficient to override the constitutional/ parliamentary law involved. (Department of the Senate, *Procedural Information Bulletin No 198 for the sitting period 7—9 February 2006 estimates hearings 13—17 February 2006* (20 February 2006) 5.)

⁹⁸ Two examples are noted in Department of the Senate, *Procedural Information Bulletin No 199 for the Sitting Period 27 February 2006 – 2 March 2006*, (3 March 2006) 2 and Department of the Senate, *Procedural Information Bulletin No 200 for the Sitting Period 27 March 2006 – 30 March 2006*, (31 March 2006) 1.

⁹⁹ The Government's response to the President's Report of 8 December 2005 was tabled on 22 June 2006, the same day as the President's next report. Many responses remained outstanding. See Commonwealth of Australia, Parliamentary Debates (Hansard), Senate, 22 June 2006, 83-95 (proof pagination).

V HUMAN RIGHTS AND THE SENATE

One of the most distinctive aspects of Australia's constitutional arrangements is its lack of a national bill of rights or human rights act. Until recently, there were no comprehensive State or Territory rights instruments either.¹⁰² It is not surprising to find other political institutions and actors moving to fill the vacuum. The High Court of Australia's discovery of an implied constitutional freedom of political communication is well-known.¹⁰³ Although human rights issues have not dominated the Senate, they have infused many aspects of its work.¹⁰⁴

The Senate Regulations and Ordinances Committee was formed in the early 1930s in an attempt to address concerns about the growth of the regulatory state. Its principal term of reference requires it to consider and report on whether delegated legislation trespasses unduly on personal rights and liberties. The Committee's origins clearly precede the birth of modern human rights discourse and it is not surprising that its focus has been on civil liberties and parliamentary control of administration rather than on human rights.¹⁰⁵ However, the broad language of the 'personal rights and liberties' term of reference allows it to consider personal liberty rights, criminal procedure rights and privacy rights among others.¹⁰⁶

When the Senate Scrutiny of Bills Committee was formed forty years after the Regulations and Ordinances Committee, an attempt was made to give it terms of reference that specifically identified some core civil and political rights.¹⁰⁷ That attempt was unsuccessful and its principal term of reference requires it to consider whether primary legislation trespasses unduly on personal rights and liberties, just as its predecessor committee reports on delegated legislation. Both committees avoid commenting on the policy aspects of primary and delegated

¹⁰² See now the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities 2006* (Vic). For discussion of the Victorian Act, see Simon Evans and Carolyn Evans, 'Legal Redress under the Victorian Charter of Rights and Responsibilities' (2006) 17 *Public Law Review* (forthcoming).

¹⁰³ See *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106; 11. For a brief survey of the most recent case, see Adrienne Stone and Simon Evans, 'Freedom of Speech and Insult in the High Court of Australia: *Coleman v. Power*' (2006) *International Journal of Constitutional Law* 677.

¹⁰⁴ This is not to underestimate the role of the whole Parliament in protecting rights, especially through anti-discrimination legislation. See, eg, Chris Ronalds and Rachel Pepper, *Discrimination Law and Practice* (2nd ed., 2004). For a survey of the attempts to adopt more comprehensive rights protections see, eg, George Williams, 'Federal Parliament and the Protection of Human Rights', Parliament of Australia Parliamentary Research Paper 20 1998-99 (available at <<http://www.aph.gov.au/LIBRARY/Pubs/rp/1998-99/99rp20.htm>>).

¹⁰⁵ See generally, Evans and Evans, above n 68.

¹⁰⁶ See, eg, Senate Regulations and Ordinances Committee. Parliament of Australia, *40th Parliament Report*, 112th Report (2005) Ch 4.

¹⁰⁷ Again, see generally, Evans and Evans, above n 68.

legislation. They aspire to a bipartisan and technical approach – this may be inevitable given the absence of any agreed or external human rights standard in Australia. However, the Scrutiny of Bills Committee in particular has applied its terms of reference to advance what may be identified as human rights concerns. For example, its report on entry and search provisions in Commonwealth legislation identified a set of principles that substantially overlap with human rights jurisprudence, although the language of human rights is entirely absent from the report. The principles begin:

- people have a fundamental right to their dignity, to their privacy, to the integrity of their person, to their reputation, to the security of their residence and any other premises, and to respect as a member of a civil society;
- no person, group or body should intrude on these rights without good cause;
- such intrusion is warranted only in specific circumstances where the public interest is objectively served and, even where warranted, no intrusion should take place without due process.¹⁰⁸

The principles that came out of its inquiry into strict and absolute liability offences similarly track human rights principles.¹⁰⁹ It applies both sets of principles regularly when reporting on the Bills that come before it.

Legislation Committees, particularly the Legal and Constitutional Committee, regularly report on human rights implications of legislation. They do not aspire to the same bipartisan or technical character as the two committees discussed above, and, therefore, sometimes engage in robust human rights analysis. The Senate Legal and Constitutional Legislation Committee's 2005 report on the *Provisions of the Anti-Terrorism Bill (No. 2) 2005* provides a useful illustration of this Committee's willingness to engage with human rights.¹¹⁰ Many of the submissions received by the Committee highlighted the threat that the Bill posed to human rights. The Committee elaborates on the bases of these various rights-concerns, and discusses in particular international human rights treaties and constitutional and statutory rights.¹¹¹ It deals specifically, for example, with concerns that the bill does not provide persons affected by the bill with adequate access to the courts,¹¹² reasons for their detention or for other orders made against them¹¹³ or a fair hearing,¹¹⁴ identifying the basis in the ICCPR for these concerns. The Committee also discusses the likely impact of the Bill on human rights in light of Australia's lack of a national Bill of Rights.¹¹⁵ Most of its recommended amendments to the Bill are directed at improving human rights

¹⁰⁸ Senate Standing Committee for the Scrutiny Of Bills, *Entry and Search Provisions in Commonwealth Legislation*, Fourth Report of 1999 (April 2000), 49.

¹⁰⁹ Senate Standing Committee for the Scrutiny Of Bills, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, Sixth Report of 2002 (2002), 283-289.

¹¹⁰ Legal and Constitutional Legislation Committee, Senate, Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2)* (November 2005).

¹¹¹ *Ibid* [2.25]-[2.31].

¹¹² *Ibid* [3.32].

¹¹³ *Ibid*.

¹¹⁴ *Ibid* [4.18].

¹¹⁵ *Ibid* [2.32].

compliance; however, in making those recommendations it does not use international human rights treaties or treaty jurisprudence as the standard against which the Bill is to be measured. A separate report by Australian Democrats Senator Natasha Stott Despoja agrees generally with the rights-analysis in the Committee's principal report but argues that the rights-analysis should have been more broadly based.¹¹⁶ By contrast, the dissenting separate report of Green Senators Bob Brown and Kerry Nettle, although robust in its criticism of the Bill, deals with the rights issues in much less detail.¹¹⁷

Even in discharging their estimates scrutiny function, Committees engage with human rights. Most commonly, as in Question Time,¹¹⁸ the issues relate to human rights in other jurisdictions.¹¹⁹ But occasionally, domestic human rights issues are pursued in estimates hearings. For example, a member of the Legal and Constitutional Affairs Committee recently asked representatives of the Attorney-General's Department whether it had advised on whether amendments to Australian migration legislation were consistent with international human rights law and whether any United Nations bodies had been consulted about its analysis.¹²⁰ Departmental officers asserted that while they had not consulted any United Nations bodies, the legislation was consistent with Australia's international obligations.¹²¹ And of course, human rights are central to the estimates hearings at which officers of the Human Rights and Equal Opportunity Commission appear.¹²²

Human rights form just one strand in the Senate's legislative scrutiny and accountability work. Neither the Regulations and Ordinances Committee nor the Scrutiny of Bills Committee has pursued its terms of reference as far as they might be pursued in the service of human rights. The institutional pressures on those Committees – to preserve their reputation for discharging a technical function – require a bipartisan approach that avoids the controversies that human rights analysis presents. Therefore, the Scrutiny Committee's impact on human rights has been indirect. It has improved the drafting practices of parliamentary counsel (for example, to avoid overreaching in search and entry powers and in strict liability offences) rather than having a direct and immediate effect on the Bill under scrutiny. It is the Legal and Constitutional Legislation Committee that

¹¹⁶ Ibid [1.8]-[1.9].

¹¹⁷ Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) (2005): Dissenting Report* by Greens Senators Bob Brown and Kerry Nettle.

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¹¹⁹ See eg Commonwealth of Australia, Official Committee Hansard, Senate Foreign Affairs, Defence and Trade Legislation Committee, Estimates (Budget Estimates) 24 May 2006, Canberra, 86, 91-97, 111-114.

¹²⁰ Commonwealth of Australia, Official Committee Hansard, Senate Legal and Constitutional Legislation Committee, Estimates (Budget Estimates) 24 May 2006, Canberra, 123 (Senator Ludwig) (hearing on the budget output relating to 'legal services and advice on international law and human rights').

¹²¹ Commonwealth of Australia, Official Committee Hansard, Senate Legal and Constitutional Legislation Committee, Estimates (Budget Estimates) 24 May 2006, Canberra, 123 (Mr Bill Campbell).

¹²² See eg Commonwealth of Australia, Official Committee Hansard, Senate Legal and Constitutional Legislation Committee, Estimates (Additional Estimates) 14 February 2006, Canberra, 114-117.

has most directly engaged with human rights. But even there, the absence of agreement in Australia about human rights standards means that it has avoided couching its analysis and recommendations in terms of human rights. That has allowed it to preserve some bipartisanship in its reports, even on highly controversial legislation such as the 2005 antiterrorism Bill. One of the factors at work here is the same one as identified at the outset of this Chapter: the tension between, on the one hand, responsible government as a paradigm of government that values efficient government and centralises power in the hands of the executive and lower chamber of parliament and, on the other hand, paradigms of government that emphasise checks on the exercise of government power. The Senate is partly structured around the federalist version of the latter paradigm. Some of its modern functions emphasise the human rights version of that paradigm. But it operates in a larger parliamentary and political setting that emphasises the centralising tendencies of responsible government. Without broad agreement on an Australia human rights framework it lacks the resources to challenge government robustly and consistently on human rights issues.

VI CONCLUSIONS

The Senate is plainly not a State's house, whatever that might mean. It is equally not a house of review, a phrase which has proved equally incapable of definition.¹²³ It is capable of checking the government's legislative programme and of exacting some measure of accountability from the government for its conduct.¹²⁴ This fragmentation of power is consistent with the federal instinct to divide and limit power. Harry Evans argues for a further (and familiar)¹²⁵ federal element: the Senate effects a dispersal of power so that legislative proposals require a *geographically* distributed majority to become law.¹²⁶ The government cannot legislate unless its programme has some measure of support throughout Australia, beyond the two largest states that dominate the House of Representatives.¹²⁷ However, the strength of party discipline, quasi-presidential election campaigns and above the line list voting in the Senate rather attenuate the sense in which these legislative majorities reflect popular majorities.

The relative rarity of government control of the Senate since 1949 has led to some complacency about the Senate's scrutiny and accountability role. Its finely developed set of institutional arrangements have depended on non-government control of the Chamber to be effective. In the immediate future, they may depend rather more on dissident government party members.

¹²³ Bach criticizes this descriptor as amorphous and imprecise: Bach, above n 27, 148-156. What exactly is the Senate supposed to review? And for what purpose? Is it legitimate for the Senate to review government policy, or is it limited to tinkering with the details of legislation? Does 'review' encompass rejection of legislation proposed by the government? Should the Senate oversee executive as well as legislative action?

¹²⁴ This view reflects the view of most modern commentators.

¹²⁵ Familiar, that is, to those not beguiled by the unsustainable commonplaces that the Senate is either a House of Review or a States' House.

¹²⁶ Harry Evans, 'The Senate Today', in *Upholding the Australian Constitution* (volume 13), (Proceedings of the Thirteenth Conference of The Samuel Griffith Society) 2001.

¹²⁷ NSW and Victoria have 87 of the 149 electoral divisions in the House of Representatives.

