

A Case for the Upper House: The Role of the Senate in Improving Legislation and Government Performance

The two most often quoted purposes of the Senate have been that it acts as a house of review, and that it should act as a states' house. Such purposes were clearly envisaged in the writing of the Constitution: The Senate was given equal power over all legislation, with the exception that it was prohibited from introducing financial legislation (Section 53), and the requirement that each state elect the same number of Senators, regardless of its population (Section 7) should, in theory at least have protected the smaller states from domination by the larger ones that, by dint of their greater population, hold the numbers in the House of Representatives.

Early developments in the political system put paid to the latter idea: the Senate quickly developed into a party house just as much as the House of Representatives had. The requirement that all Labor members vote with the majority decision of their caucus meant it was impossible for them to vote against a measure that might have harmed their state. There was more potential for senators from the conservative parties to take a state party position against a national party line, but there have been very few examples of this happening.

The party-based nature of the Senate, together with the electoral system used to elect Senators in the early days (the preferential block majority system) meant that the Senate very rarely acted as a house of review. For the first ten years of federation, an uneasy three-way tussle took place in which none of the three largest parties (Protectionist, Free Trade and Labor) had a majority in either house, so negotiation was the order of the day in both chambers. The formation of a united Liberal Party for the 1910 election changed this: from then until 1949 there were only three occasions where the government of the day did not have a majority in the Senate.¹ Two of these (the 1929-31 and 1941-43 periods) occurred when government changed without a Senate election: the other (1913-14) occurred when Joseph Cook was elected Prime Minister with a one-seat majority of one in the House of Representatives, but a deficit of 22 in the Senate. He therefore quickly engineered Australia's first double dissolution, but lost the election. Ironically, the bill chosen by Cook as the trigger was a bill designed to prohibit preference being given to union members in public sector employment.² In light of this result, it is not surprising that it was another 37 years before another double dissolution was called.

A crucial change to the electoral system in 1948, namely the introduction of proportional representation, decisively changed the nature of the Senate forever. It ensured that not only would the two major parties have relatively evenly matched numbers, but also the use of quota preferences gave minor parties a chance of being elected. It did not take long for a minor party to emerge; when the Labor Party split in 1955, the Democratic Labor Party was formed, and it won two Senate seats in the 1955 election.

¹ Resolving Deadlocks: A discussion Paper on Section 57 of the Australian Constitution, Commonwealth of Australia, 2003, PP. 53-4.

² Carroll, Brian, From Barton to Fraser: Every Australian Prime Minister, Melbourne, Castella Australia, 1978, p. 51.

This event took place during the long Prime Ministership of Bob (later Sir Robert) Menzies. In 1951 Menzies became the second Prime Minister to call a double dissolution after the Senate had twice rejected his Commonwealth Bank Bill, but for most of his time as Prime Minister he either had a majority in the Senate, or he happily negotiated his policies through a minority but relatively friendly Senate.

The main reason for this was the presence of the Democratic Labor Party, which held the balance of power for most of Menzies' later years, and up until the 1974 double dissolution election saw all its senators defeated. The DLP had a justified reputation for being violently anti-Labor: many of the marginal seats that kept the Liberal-Country Party in office in 1961 and 1969 had been won on a huge (over 80% in many cases) share of DLP preferences. Yet its former leader Frank McManus was anxious to put a positive interpretation on the party's performance in the Senate. In his memoirs he claimed that the DLP used its balance of power responsibly, voting for or against legislation on its own merits, and improving the work of committees. He also claimed that, contrary to popular belief, it had voted with the Labor Party around 36% of the time, compared to around 48% with the Liberal-Country coalition.³ Unfortunately McManus gives no details, so it is difficult to test the veracity of his claim.

Fred Daly, a stalwart Labor MP during the same time, was not nearly so praiseworthy of the Senate's role. He viewed the Senate as being designed to frustrate the reform programs of Labor governments, and was highly critical of then Labor Senate leader Lionel Murphy's move to set up Estimates Committees and the like. He called the Senate a 'relic of Tory power.'⁴

As a one of the minister in the dismissed Whitlam Government, it is understandable why Daly would hold this view. He died in 1995, so it is not possible to ask him whether he is still of the same opinion. What is argued here is that in more recent times the Senate has far more positive uses than the destructive way in which the conservative opposition used it between 1972 and 1975.

The backlash against the Whitlam Government was so great that the incoming Fraser government held a comfortably majority in the Senate, which they held until the 1980 election. The new Senators did not take their seats until July 1981, but from that point on, the Democrats had held the balance of power. They were willing to flex their muscle: 13 bills introduced by the Fraser Government were blocked twice. According to Jim (later Sir James) Killen, a minister in Fraser's government, all proposed to impose charges or restrict access to benefits.⁵

The Democrats also held the balance of power after the Hawke Labor government came to power, and continued to do so for the entire life of the Hawke and Keating governments. However most of the government's legislation passed through the Senate, possibly because the Liberal opposition agreed with most of the government's policies. A double dissolution was called in 1987 after a proposed national identity card scheme was rejected, but after winning the election the government abandoned the plan in favour of a tax file number scheme.

³ McManus, Frank, *The Tumult & the Shouting*, Melbourne, Rigby, 1977, p. 153.

⁴ Daly, Fred, *From Curtin to Kerr*, Melbourne, Sun Books, 1977, p. 201.

⁵ Killen, Sir James. *Killen: Inside Australian Politics*, Melbourne, Methuen Hayes, 1985, p. 113.

When the Howard government came to power, the Democrats were briefly lose the balance of power, as the defection of former Labor Senator Mal Colston meant the government could pass bills with his and Brian Harradine's support. The Democrats were back in a pivotal position after the 1998 election. It is this period that takes u the bulk of my attention.

The views of (now ex) Democrat Senators

All three retiring Democrat Senators interviewed – Andrew Bartlett, Andrew Murray and Natasha Stott Despoja – emphasised their role in improving legislation during their time in the Senate.

Natasha Stott Despoja emphasised improvements to the final GST legislation in the 1999-2000 period, and to the Howard Government's border protection legislation just before the 2001 election. I reminded her of modifications to legislation relating to nursing homes during the Howard years, and reductions in excise on leaded petrol during the Hawke-Keating years that the Democrats helped to influence, and she agreed that these were important and valuable contributions. In a similar vein, the Democrats opposed the Keating Government's attempt to impose a levy on blended fuel, and eventually the government dropped the legislation.

Andrew Murray stressed his role in negotiating the Workplace Relations Act in 1996, the most important amendment forced on the government being the inclusion of a no disadvantage test. (Then Democrat leader Cheryl Kernot received most of the media credit for the negotiation.) He did stress, however, that the procedures did not work nearly as well after the Howard Government gained a Senate majority in 2005. Attempts to get the government to modify its proposed IR reforms, which later became the Workplace Relations Amendment (Work Choices) Act 2005, fell on deaf ears. Murray did emphasise that in the early years of his government, Howard was sensitive and careful about the legislation he pushed through.

Murray was also keen to emphasise his role in GST negotiations, and particularly the fact that in the end, the GST was not applied to food. However Andrew Bartlett argued that the Democrats made too many concessions on the GST, and believed that the Howard government would have lost any election fought on the GST in 1999 or 2000.

Murray also emphasised that even after the Howard Government gained a Senate majority, the minor party senators continued to do valued committee work. And the Democrats negotiated with the Australian Taxation Office to assist people hurt by managed investment schemes.

Bartlett was firmly of the view that the Howard's 2006 IR changes were an extreme piece of legislation, and that Senator Barnaby Joyce's efforts brought only minor improvements, such as a greater protection of public holiday rates.

The views of other minor party Senators

Senators Bob Brown and Nick Xenophon were interviewed on ABC Radio's flagship 'AM' on 19 August 2008. Both emphasised that the government should respect the Senate and the role that senators had been elected to perform. The two saw their roles slightly differently, with Brown stressing his major objective was to advance the cause of improving responses to climate change, while Xenophon emphasised his desire to protect and improve South Australia's access to water in the Murray-Darling Basin.

Xenophon again appeared on ABC Radio a week later, this time on the Matthew Abraham-David Bevan hosted morning show, with Senator Nick Minchin as his companion. Xenophon made similar points to those he made a week earlier, while Minchin said that while he had been elected as a representative of South Australia, he saw his main role as that of an opposition senator whose primary role was to keep the government accountable.

I have not heard many comments from Senator Stephen Fielding, but it is clear that he takes his duties as a legislator seriously. During the last term of the Howard government, he opposed the government's industrial relations 'reforms' on the basis that they were family unfriendly. Because Barnaby Joyce decided to support the bulk of the changes, it made little difference. On the other side of the coin, Fielding's decision to support Voluntary Student Unionism legislation meant that Barnaby Joyce's opposition to the legislation also meant nothing. This is an example where the presence of a government Senate majority meant that amendments that would have improved legislation were not made.

Since the Rudd government came to power, Fielding has been willing to vote against legislation he saw as flawed, such as the tax increase on pre-mixed spirits and the luxury car tax. My personal view is that he improved the final legislation in the latter case, but that the alcopops tax increase has merit and should be passed. This to some degree illustrates the point that use of Senate powers is an area on which people will disagree.

The Views of other players and commentators

Not all political players viewed the performance of the Senate with such admiration. Former Prime Minister John Howard was highly critical of the Senate's performance during his time as Prime Minister. In a newspaper interview conducted in late 2005, Howard saw the actions opposition and minor party senators as "those who would frustrate the will of the people."⁶

Whether you accept this as a valid criticism will depend on whether you see the 'will of the people' as the stated policies of the elected government, or in a case where opinion polls clearly show the people are opposed to a particular government policy, for example the privatisation of Telstra, the blocking Senate more truly represents the will of the people. I must admit I lean towards the latter view in this case.

⁶ Quoted by Mackerras, Malcolm, 'Howard's Strategy for Senate Control', Paper prepared for conference titled "John Howard's decade", held at Australian National University, Canberra, 3-4 March 2006, p. 34.

One claim commonly made by Howard in radio and television interviews that can be dismissed is his claim that the Senate he had to deal with was particularly obstructionist. Figures provided by Mackerras in the previously quoted paper suggest that during the first three years of Howard's government, a total of twelve bills were twice rejected by the Senate, an average of three. This is more obstructive than the Senate was during the five terms of the Hawke-Keating government (an overall total of just three), but in overall historical terms it comes a very poor fourth.

The Senate was at its most obstructionist during the two terms of the Whitlam Government, with a total of 27 bills blocked twice. 21c of these occurred during the second term of that government, which co-incidentally was John Howard's first parliamentary term. During Malcolm Fraser's last term (the only one in which he did not have a Senate majority) a total of thirteen bills were blocked twice, and in the 1955-58 term of Bob Menzies' government, a total of fourteen bills were blocked twice.⁷

The 1972-75 opposition did of course argue that much of the Whitlam Government's legislation did not have the support of the people, or that it deserved to be blocked simply because it was bad legislation. And since the Rudd government came to office, the opposition has been willing to flex its muscle, claiming, with some justification, that the government does not have a mandate for policies such as the proposed tax increase on luxury cars. All this seems to prove is that a political party's attitude to Senate power depends very much on whether it is in government or not.

Conclusion

The story presented in this paper is that of a generally positive role for the Senate in improving government legislation and keeping governments accountable. There have been far more cases of legislation having been improved than there are of it having been made worse. There will be some who would argue that the GST negotiations made the final package more complicated, but its equity was improved.

I finish with a final thought that many Liberal and National MPs might like to ponder. Did the Senate actually help the Howard Government by protecting it from its own ideological extremism? Post-election polls suggest that Work Choices cost the Coalition around 2% of the vote, which is roughly the government's winning margin in the key marginal seats. I strongly lean towards the view that the 2004-07 Coalition Senate majority was the rope with which John Howard chose to hang himself.

⁷ Mackerras, Howard's..., p. 25.