
The Australian Model Senate

by John Uhr

This article describes the Australian Model of a Senate and looks at what lessons it might have for discussion of Second Chamber reform in Canada.

Canada and Australia deserve the close comparison they receive. Both were British colonies attracted to the promise of responsible parliamentary government around the mid-19th century. Both are federations. Both are members of the Commonwealth. Both are constitutional monarchies. And both have had to struggle for many of the rights of self-government.

Canada as the older British colony was something of an inspiration to 19th century Australian colonists: 'Canada Bay' in Sydney is named in honour of the Canadian colonists who took temporary refuge in Sydney after the initial failure of the Upper Canada struggles for self-government. Both countries have a long history of stable parliamentary government at both national and provincial/state levels, including early reliance of second chambers at provincial/state level.

But the historical developments diverged at some point, with the Australian colonies/states showing greater interest in modernizing and democratizing their second chambers. By contrast, Canadian provincial second chambers were discarded: a process that only one Australian state (Queensland) has followed.

Over recent decades, many of the Australian state second chambers have been further reformed to resemble 'the Australian Model' pioneered by the Australian Senate. Thus the Australian Senate should

be understood as part of a larger package of bicameral arrangements in the Australian federation. Australian political parties have learnt to use bicameralism for their own purposes: the existence of second chambers is accepted a part of the institutional environment of parliamentary politics and is presumably welcomed by parties, particularly as it increases opportunities for paid public office open to political activists.

A Few Qualifications

A number of qualifications should be mentioned at the outset. 'The Australian Model' is an Australian response to Australian problems, with possible lessons for other countries but probably very few easy or non-controversial applications to non-Australian circumstances. Put simply: 'the Australian Model' is not designed along the lines of any other model, and it is unlikely to perform well as a model for other countries, even so-called Westminster countries, to try to replicate.

Australian parliamentary commentators have increasingly rejected the terms and categories of 'the Westminster system' because Australian political practices do not really resemble those of classic Westminster. The presence of an elected Senate in a constitutionally-entrenched federal parliament is far from classic 'Westminster'. True enough, many governments of the day appeal to Westminster norms when trying to justify the prevailing power of the political executive in what is loosely called a regime of 'responsible government'. Also true is that opposition parties often appeal to 'Westminster' norms to justify an increased share of parliamentary power by non-government parties. The fact that Australian governments so rarely share significant parliamentary

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power with opposition parties suggests the limits of the 'Westminster' analogy for Australian politics.

The current characteristics 'the Australian Model' have developed or grown up in the 107 years since Australian Federation in 1901, reflecting the work of many generations of parliamentary actors. These actors built on the constitutional foundations spelt out in the 1901 Constitution for the Commonwealth of Australia but often in ways not necessarily anticipated by the constitutional framers. Although the black-letter provisions of the Australian Constitution might not have changed all that much since 1901, the practical operations of the Australian Senate most certainly have. These institutional changes have been driven partly by changes in parliamentary law on such core operational issues as electoral mechanisms and driven partly by changes in the parliamentary ambition of the political parties competing for place and power in Australian politics.

History certainly matters; but accidents of history probably also matter. It is possible that elements of 'the Australian Model' rest on accidental developments or, more likely, unintended consequences of almost forgotten developments. Even the Australian embrace of proportional representation is something of a happy accident, with its Labor initiators in the late 1940s unaware of many of its potential effects. The practical implication of this historical blend of intention and accident is that the current version of 'the Australian Model' is such an amalgam of law and politics that observers are uncertain how particular elements of the model (eg, Senate Estimates hearings) might operate as stand-alone features taken out of their historical context.

The Constitutional and Political Context

Before trying to unpack 'the Australian Model', it might be useful to briefly outline the formal constitutional provisions and also to convey something of the 'feel' and 'presence' of the Australian Senate in the current political context.

The Senate with 76 elected members is one of two houses. The other elected house is the 150 member House of Representatives. The Constitution establishes the Commonwealth of Australia as a federation of six States, with the Senate composed of an equal number of senators from each State. Each State forms one multi-member constituency, with senators serving for fixed six year terms. House members represent single-member seats distributed nationally according

to population, and serve three year terms, subject to early dissolution by the prime minister.

The two houses share 'legislative power', with the Senate having virtually equal legislative powers with the House of Representatives. Although there are restrictions on what types of laws the Senate may introduce (eg, appropriation or taxation bills) or amend (eg, appropriation for the 'ordinary annual services' of government), there are no restrictions on the power of the Senate to reject bills. The Constitution contains deadlock-resolving provisions involving a 'double dissolution' (ie, a dissolution of all members of both houses) with the prospect of a subsequent 'joint sitting' of all members to determine the fate of disputed measures. By convention, the House of Representatives is often referred to as 'the house of government' and the Senate as the 'the house of review'.

The current Rudd Labor Government was elected in November 2007 when it defeated the conservative Howard Government, which had won a rare double majority in both parliamentary houses at the previous 2004 election. Apart from the Howard Government in its fourth and last term in office, no Australian government in the last 30 years has enjoyed a Senate majority. The distinctive Senate electoral system of proportional representation has the effect of denying either of the two major party blocs (Australian Labor Party; the Liberal-National coalition parties) a Senate majority. Typically, governments do not have a majority of Senate seats to guarantee passage of their own initiatives; equally, the official opposition does not have a majority of votes to get its own way. With neither of the two major party blocs enjoying majority power, the 'balance of power' typically falls to the third parties: the so-called 'cross benches' comprising the minor parties and independents who manage to win Senate seats through the remarkable fairness of proportional representation which allocates seats proportional to the share of votes.

The 2007 election of the Rudd Government restored the Senate to its usual non-government majority. Remember that this situation rarely if ever means a Senate majority for the official opposition. The 76-member Senate currently comprises: 32 government senators; 37 opposition senators; and 7 cross-bench senators (5 Greens; two independents). Unlike the lower house Speaker, the Senate President (by convention, a government senator) has no casting vote, consistent with the strict reading of federalism as meaning equal voting power of each state. Half of the total Senate 76 votes (ie, 38 votes) is sufficient to block a measure. Any party wanting to secure passage of its

initiatives requires one more than half of the Senate votes: 39 votes.

To wield a bare winning majority of 39 votes, the current Rudd Government needs all seven cross-bench votes. The current opposition can block government initiatives by gaining one additional vote (38 votes) but it needs yet another vote to get a majority of 39 votes for passage of its own initiatives. The situation of dispersed power is equally demanding for the minor parties. The Greens are the largest of the cross-bench forces and they need two more votes than the 'green-friendly' government can provide in order to get a Senate majority in favour of Greens' initiatives. The Greens could secure a majority with the support of the official opposition, but this would involve an unusual blending of right and left political orientations: not impossible but not what either orientation would initially favour. And then there are the two independents: either of the two independents can join forces with the opposition to secure 38 votes to block government initiatives; both can join forces and provide the official opposition with the required 39 votes for Senate passage of opposition initiatives.

Senate's Impact on Australian National Politics

The Senate's response to the Rudd Government's first budget tells a larger tale about the Senate's impact on government law and policy.

The parliamentary side of the budget process begins with the Treasurer's budget speech in early May, in anticipation that Parliament will pass the budget as soon as possible in the new financial year which begins on 1st of July. Passage through the House of Representatives is generally smooth because the government of the day holds office by virtue of its House majority, which Australian governments are not shy to use. The trick is getting the budget smoothly through the Senate, which under the Constitution has no time limit within which to pass legislation. Governments have learnt to tolerate a fair degree of delay in the Senate, because they know that both major party blocs use their time in opposition to use the budget process as their primary opportunity to hold the party in government to account.

Both major party blocs have learned to use this power of delay in ways that generally fall short of what public opinion might see as willful and irresponsible obstruction. In the history of the Australian Senate, the year 1975 stands out as the year constitutionality trumped convention when the Senate delayed to the point of deadlock, triggering the Governor-General's intervention to dismiss the Whitlam Labor government on the basis that it lacked parliamentary confidence.

The opposition took office as caretaker government and resoundingly won the subsequent election demanded by the Governor General. 'The Dismissal' of 1975 is an atypical example of the Senate's impact on Australian politics. Let me give a few examples of the typical forms that Senate impact takes, drawing on examples from the last few months.

The Senate has recently made repeated amendments to the Rudd Government's package of budget bills: not 'money bills' or supply as such, but budget measures introduced as part of the government's overall budget package. This tendency towards challenging or even amending budget measures was initially pursued by opposition senators whose unusual period of Senate mastery did not come to an end until the newly-elected senators took up office from July 2007. But the tendency was reinforced by 'the new Senate' where the balance of power was held by the Greens and two independents. With the budget still under legislative consideration by the Senate, a number of prominent budget measures suffered at the hands of the non-government forces, often defeated at second reading; for instance, a national health taxation measure was defeated on 28 August; a package of bills to increase taxation on luxury cars was also defeated on 4 September (later passed with amendments on 17 September); a medicare levy surcharge bill was also defeated on 24 September, although later passed on 16 October following cross-party agreement on a compromise package of amendments.

Other budget measures were passed but only after amendment, including amendments that take the form of 'requests' to the House of Representatives in those cases where the Constitution places limitations on the Senate's capacity to amend directly: eg, the government's budget measure to remove excise exemptions for a range of fuel condensates. This constitutional limitation on the Senate's power to amend taxation bills is contained in s53 of the Constitution. The cryptic words of the Constitution have provided hours of enjoyment (and years of employment) for constitutional lawyers. Government lawyers usually take the strict interpretation that any bill relating to taxation may not be amended by the Senate, although the Senate is within its rights to 'request' that the House of Representatives amend such bills. And so the Senate does.

But a more radical challenge to conventional interpretations of s53, and to the Rudd Government's budget, came from non-government parties in the Senate when they engaged in their own budget-making exercise by passing legislation to increase the age

pension. Section 53 states in part that appropriation or taxation legislation 'shall not originate in the Senate'. The Senate passed this non-government pension bill on 22 September 2008, with its supporters claiming that the bill itself did not appropriate money but simply increased the rate of age pensions which were formally appropriated under standing provisions in existing social security legislation. The Rudd Government argued that the House of Representatives was under no obligation to consider the Senate bill because it was 'unconstitutional'. The Speaker of the House of Representatives tabled advice from the Clerk of the House of Representatives supporting the government's contention that the House was under no obligation to consider the Senate bill because it was 'not in accordance with the constitutional provisions' of s53. The opposition in the House of Representatives has little if any opportunity to debate the Speaker's ruling as the government used its numbers to close debate, which had the effect of dividing the House on the Speaker's ruling, to the convenience of the government.

States House?

One of the major misconceptions relating to the Australian Senate is the contention that the Senate has somehow failed to live up to supposedly-original intention of acting as a 'States' House'. The claim is that the primary purpose of the Senate was to inject State-wide blocs of State representatives into the national Parliament and that these State-wide blocs would be expected to protect their respective States' interests by voting en bloc as State delegates. While it is true that the Senate has never (or very rarely) voted along State lines, and while it is true that party divisions quickly arose as the predictable sources of division within the Senate, it does not necessarily follow that the Senate has 'failed' as a States House.

First, the Senate does provide for equal representation of each State and this constitutional equality strengthens the political representation of the smaller and hence more vulnerable States. These smaller States receive a greater number of parliamentary representatives than they would deserve solely on the basis of representation by population. Second, each of the major parties of government draws into its federal party caucus a greater number of representatives from the smaller States than they otherwise would without a Senate. Thus the Senate broadens the State representation of the major political parties. Third, the standard misconception gets the original intention wrong. The original intention was to have the Senate promote States interests not through uniformity of voting but through diversity of views

represented within each State body of senators. The Constitution was written by serving politicians who fully appreciated the rising power of party and of the normality of party competition in an emerging system of party government. But they also appreciated the facts of political geography and knew that the national Parliament needed to know the diversity of views within each State if the Parliament was to contribute to the new federal Commonwealth. Fourth, the very idea of a Senate was favoured by many early federalists on the assumption that proportional representation would make the second chamber a distinctive house of minorities. Just as the equal representation of each State in the Senate would protect the minor States, so too proportional representation would protect minorities within each State body of senators. This frequently-forgotten version of the Senate as a States house is in many ways the basis of its greatest enduring public legitimacy.

Arguments over the Senate as a States House eventually come face to face with the fact that the Senate has developed very much as a party house, and more particularly as a State party house. That is, State party officials tend to dominate who gets elected to the Senate. They exercise this power through their selection of who gets nominated on the State party list. Current electoral arrangements allow, indeed encourage, voters to elect senators by endorsing the party-ticket of their preferred party, right down to that party's often-undisclosed order of 'preferences' as required under the Australian system of preferential voting. Voters have the option of ranking their candidates according to whatever merit ranking the voter favours. But the political parties do all that they can to encourage voters to limit their involvement to authorizing their favoured party's internal rank order of candidates.

One important consequence of this party-list development is that the Senate can be seen from the perspective of political parties as something of a nominee house: voters get to authorise those on their favoured party list, even though they might never hear of many beyond those near the very top if the ticket. Of course, similar observations could be made about House of Representatives elections, to the extent that voters tend to vote for party labels rather than known candidates and so simply authorize choices made by party officials. But in lower house elections, voters tend to see more of the small number of candidates competing in their riding (or 'division' in Australian language) and are better placed to form their own view of the who is the one candidate best qualified to be their representative. Such calculations are considerably more difficult to do on the basis of reliable knowledge

in Senate elections when voters are typically electing not a single representative but six representatives. Thus it is easier for many voters simply to take on trust the rank ordering determined by their preferred party, which illustrates the considerable power of the State party officials who determine who gets to stand for Senate election.

Ministers in the Senate

The current Rudd Government is typical in drawing a third of its cabinet ministers from the Senate. These are not junior ministries but include (using their short titles) the cabinet secretary, the minister for climate change, the minister for immigration, the minister for communications, the minister for industry, and the minister for human services.

Of course, the House can claim that it has twice as many cabinet ministers as the Senate. Interestingly, this relationship of two to one reflects the constitutional 'nexus' provision which holds that the House of Representatives should have twice the membership of the Senate. But senators can put this in more positive terms by stating that the Senate contains half the number of ministers as the House.

The figures for the Opposition are almost identical. In addition, one-sixth of the government's parliamentary secretaries (junior ministers) come from the Senate. Figures for the Opposition are even starker, with two-thirds of their parliamentary secretaries coming from the Senate. Put differently, slightly less than one third of the government's 32 senators hold executive office (9 of 32). Once again, figures for the Opposition are even more revealing, with slightly less than half of their Senate membership holding a position in the shadow executive (16 of 36). To drive home my point, I note that almost exactly one-third of senators serve in executive offices, defined as membership of either the political executive of the governing party or the shadow executive of 'the alternative government'.

Impact on Legislation

Instead of providing comprehensive data on the Senate's record of impact on proposed legislation, I simply want to contrast two recent years to highlight the general story of Senate legislative activism. We can compare 2006 with 2003, the last non-election year before the arrival of the rare Howard double majority. The two-year contrast is instructive.

The starting point is that in most years the Senate passes around two-thirds of government bills without amendment. The Senate's impact on these non-controversial bills might well be considerable, causing

governments to anticipate non-government interests and to modify their own initial drafting. That is, the very fact that Senate consent is required for legislation is itself sufficient for governments not to introduce bills or provisions in bills that have no prospect of 'getting through the Senate'. Approximately one-third of government bills that do attract amendments are changed more often as a result of government rather than non-government amendments. Again, many government amendments take up issues originally raised by non-government interests and are to that extent involuntary or enforced actions by governing parties. But the starting point is that most of what governments want, governments get; which is not deny that much of importance to non-government parties is also secured through that very process of government adoption of non-government interests.

Most of the formal time available to the Senate is spent in what is classified as 'government business': primarily the passage of government legislation. In the years since 2001, around 52% of the Senate's timetable has been devoted to 'government business'. This figure nicely illustrates one of the fundamental functions of the Senate, which is to process whatever the government wants processed, although not necessarily in ways or with results favoured by governments. The Senate has passed on average 165 bills each year, almost all being government bills. On average, 67 bills each year are referred to a Senate committee for inquiry and report. These are inevitably the bills that go on to attract amendments, often although not always as initial recommendations from the relevant committee.

The contrast between two sample years clarifies the situation. Sure enough, the 2006 record shows no success in relation to any of the 39 second reading or 'policy' amendments moved, mainly by the then-Labor opposition. But when we look at the subsequent 'committee of the whole' stage of the legislative process dealing with the details of proposed legislation, we find a different story with evidence of Senate capacity and will to amend many government bills. In 2006, the Senate dealt with 218 bills, 163 of which were government bills, 39 of which were introduced by the government in the Senate. 100 bills were referred by the Senate to one of the eight standing or subject-matter committees for inquiry. Around 172 bills passed both houses, two of which were non-government bills originating in the Senate. The Senate debated committee stage amendments in respect of 72 bills, and agreed to amendments in the case of 25 bills. Many legislative amendments originated as government proposals: 360 out of 390 successful amendments: non-government senators moved 30 of

the 390 committee stage amendments. Another 480 proposed amendments were defeated. Remarkably, few government amendments get defeated: by the time governments get round to proposing amendments, they have prepared the ground and taken on board many demands from non-government parties. It is surprising how rarely the Senate is required to conduct formal divisions with a recorded voting list.

In 2003 the pace of legislative work was about the same, with 215 bills passing both houses compared to the 218 figure in 2006. But there are some interesting contrasts. For example, whereas 2006 had only one bill caught in fundamental disagreement between the two houses, in 2003 there were 25 such disagreed bills. And instead of there being 25 successfully amended bills, in 2003 there were 62 amended bills. And most interesting of all, the committee stage evidence shows a higher proportion of successful to unsuccessful amendments, with 808 successful amendments out of 1484 proposed amendments. The contrast is highlighted when we notice that 2003 included 17 successful Senate 'requests' to those bills which the Constitution says the Senate may not amend. There were no requests, successful or unsuccessful, in 2006.

Of course, most Senate amendments are moved by the government, even though the government rarely enjoys a majority in the Senate. This tells us that governments can read the writing on the wall and do what they can to direct and steer the legislative momentum.

What happens to Senate amendments when they return to the House of Representatives? In nearly 80% of the cases, the House accepts the Senate amendments.

But what happens in the other 20% of cases when governments refuse to accept Senate amendments? Stanley Bach is the latest authority on this topic whose recent research put the Senate's power into fresh perspective. Reviewing the last decade or so of Senate amendments to government legislation, Bach contrasts the high rate of Senate amendments with the interesting pattern that emerges from the way the Senate reacts when the House (ie, the government) refuses to accept Senate amendments. In many such cases, governments simply stick to their guns and do not counter-propose alternative amendments; and in most such cases, the Senate yields. In other cases, where the government counter-propose with alternative amendments, the Senate also typically yields. Generally, the Senate either does not contest government overrides or does

not insist on its own amendments in over 90% of the time.

Looked at from a parliamentary perspective, one has to admire a second chamber that can secure the first chamber's support for 80% of its amendments. But looked at from a Washington perspective, as Dr Stanley Bach brings to the Australian scene, one wonders why the Senate does not hold its nerve for the other 20% of the time. He finds evidence of regrettable institutional reticence.

Conclusion

When Prime Minister Harper spoke to a joint meeting of Australian parliamentarians in September 2007, he confessed that he was one of those Canadians who suffer from 'Senate envy' when considering the Australian Senate.

Mr. Harper told his audience that; 'Australia's Senate shows how a reformed upper house can function in our parliamentary system'. I have reason to think that his praise of the Australian Senate was not shared by the Australian prime minister John Howard, who was then enjoying his remarkable double victory with a rare majority in both parliamentary houses. But the Howard Government went on to lose their power at the November 2007 election: they lost their Senate majority; more importantly, they lost government; more personally, John Howard lost his own parliamentary seat. Commentators believe that one reason for the Howard Government's defeat was, paradoxically, their remarkable double victory at the previous election in 2004.

First elected to government in 1996, the Howard Government suffered its own form of 'Senate envy' associated with their inability to steamroll legislation through the Senate. Many of the Howard Government's most prized policy initiatives, particularly workplace relations, were frustrated in the Senate. When the double victory did arrive, the Howard Government knew that such commanding parliamentary power would not come again and so they pushed through with more daring legislative proposals than would have been possible earlier. Opposition critics claimed that the government had no mandate for some of the more far-reaching proposals which has never been openly declared at election time. The community watched as the government seemed to be overplaying its hand with a legislative program reshaped along more fundamentalist lines than earlier programs. It is plausible that voters punished the Howard Government for, among other perceived mistakes, misusing its Senate power to ignore or at least marginalize the

rights of non-government parties to be treated with due parliamentary process.

The new Rudd Government has just announced its own Senate reform proposals. Senator John Faulkner, cabinet secretary and special minister of state, revealed the new vision at a conference on bicameralism on October 9, 2008. Faulkner admitted that the current legitimacy of the Senate reflects not so much the merits of the original Constitution as the period of Senate reform in the late 1940s that introduced proportional representation.

Reporting the views of former Labor prime minister Paul Keating about senators as 'unrepresentative swill', senator Faulkner contrasted his open admiration for 'democratic principles' with his unhidden dislike of

the Senate's power to frustrate democratically-elected governments, with the 1975 events front and centre in his picture of the Senate's 'constitutional restrictions'. What are the reform options? First, curbing the Senate's power to block supply, as happened in 1975. Second, substituting fixed four-year terms for both houses to 'make the Senate more reflective of the will of the electorate at the most recent election', in place of the current mixture of three years for the House and six years for the Senate.

In his view, 'The Senate does not reflect that fundamental, democratic, Chartist principle of one vote, one value'. Australian practices can and do change and although it may come as a surprise to Canadians, Senate reform is a perennial topic in Australia.