

The Australian Senate

**Professor John Uhr
Australian National University**

Paper presented for roundtable

“Senate Reform: Options and Comparative Perspectives”

Sponsored by the Institute for Research on Public Policy
and the Forum of Federations

November 18, 2008
Sheraton Ottawa Hotel
Ottawa, Ontario

This document is a preliminary draft.
**PLEASE DO NOT QUOTE OR REPRODUCE IN WHOLE
OR IN PART WITHOUT PERMISSION FROM THE AUTHOR.**

1. Introduction

1.1 The Australian Senate with 76 elected members is one of two houses of the Parliament of the Commonwealth of Australia. The other elected house is the 150 member House of Representatives. The Australian 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. Members of both houses are elected on the same franchise and are subject to the same qualifications of office. Australian electoral practice is historically distinctive: voters have long operated under a system of compulsory voting, with a range of voter-friendly measures (in reality: 'party-friendly' measures) implementing 'preferential' voting (often called 'the alternative vote' outside Australia) for both houses, and a 'proportional representation' (effectively, a list system using the 'single transferable vote' method) for Senate elections.

1.2 The Australian Constitution sets out the powers of the two houses. 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'. Another set of terms has the House called 'the house of the people' and the Senate 'the house of the States'. The prime minister and most of the ministry have historically been drawn from the House of Representatives.

1.3 The Parliament itself has legislated to 'fill out' many of the constitutional provisions, notably in relation to the system of electoral representation used by each house. For example, the number of

senators for each state has been expanded from the original six to the current twelve, and two senators have been allowed to be elected for each of two mainland Territories: the Australian Capital Territory and the Northern Territory. The Senate system of proportional representation introduced by ordinary statute for the 1949 elections has broadened the range of political parties and independents represented in the Senate. The constitutional provisions relating to Parliament may only be altered through referendum: from time to time, governments attempt to use referenda to curb the powers of the Senate but historically only eight of 44 referenda proposals have been successful, with some impact on Senate operations but no real diminution of the Senate's powers.

2. Aim and Scope

2.1 This paper is a report on 'the Australian Model' of a Senate. The aim of the report is to clarify the nature of the Australian Senate for a Canadian audience curious about lessons that 'the Australian Model' might have for Canadian discussion of reform of the Canadian second chamber.

2.2 Given that the report is designed for oral delivery to a non-specialist audience, I have tried to keep the text relatively uncluttered with historical or statistical data, preferring instead to provide a snapshot of current operations of the Australian Senate. Wherever possible, I use examples to illustrate general trends, suggesting where readers find more comprehensive data which helps explain how these trends have arisen. I use selected averages rather than provide historical runs of data, hoping to give a flavour of 'the Australian Model' without trying to explain institutional history or the Senate's many interesting variations year by year.

2.3 My basic aim has been to provide a Canadian audience with a picture of how the Australian Senate impacts on Australian national politics. My focus is on the institutional qualities that the Australian Senate brings to Australian national politics, so that readers can get a reliable first sense of what sort of impact 'the Australian Model' of a Senate makes to parliamentary politics as practiced in Australia. As I note in the next section, we can not assume that 'the Australian Model' would have similar impacts if adopted elsewhere.

3. Three Qualifications

3.1 A number of qualifications should be mentioned at the outset. First, this is a personal report by an academic analyst and not an authorized statement by an official spokesperson reflecting the institutional interests of the Australian Senate. The Australian Senate does have something of an authorized version defending its contribution to Australian parliamentary democracy: *Odggers' Australian Senate Practice*, which is a large manual of parliamentary practice now in its 12th edition, providing readers with unrivalled knowledge about Senate history, procedure and practice.¹ Although I write as an admirer of the Australian Senate, this report is an exercise in advice rather than advocacy: advice about how the Australian Senate impacts on Australian politics, rather than advocacy about the export potential of 'the Australian Model'.

3.2 Second, and building on this first qualification, I note that '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 power with opposition parties suggests the limits of the 'Westminster' analogy for Australian politics. Bicameralism has many virtues; so too, bicameralism has many varieties, allowing Canadian and Australian students of parliamentary democracy to learn from the experiences of each other. Both are capable of adapting and innovating in ways that overcome many of the deficiencies of grafting alien institutions on native stock.

3.3 Third, 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 changed. 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.

3.4 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.² 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.

3.5 Why labour these qualifications? The answer is that ‘the Australian Model’ is a work in progress. This report tries to convey an accurate picture of current operations. Canadian audiences requesting similar reports in earlier decades would have received very different reports, depending on which wave of institutional change was occurring at the time of the report’s preparation. Thus readers of this report should bear in mind that ‘the Australian Model’ being discussed is in reality the current version of a model that has been developing for over a century. Further, many of the current features reflect often-forgotten decisions by earlier generations of political innovators or reformers. In other cases, current features derive from attempts to respond to problems deriving from earlier generations of institutional innovators and reformers. Thus ‘the Australian Model’ is far from being a kit of deliberately crafted components that one can, after importing and assembling, expect to operate in Canadian circumstances exactly as it does in Australian circumstances.

4. Canada and Australia

4.1 Canada and Australia deserve the close comparison they receive. Canada and Australia share many aspects of the larger heritage of parliamentary government. 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 of Nations. 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.

4.2 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.

4.3 The relevance is that the Australian Senate, unlike the Canadian Senate, is nested in a framework of bicameral Australian parliaments. 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. I know of no evidence of popular interest in reform of the Australian Senate, certainly not in repeal of the Senate or State second chambers, although there is evidence of popular suspicion of sustained government interest in reform of the Australian Senate. I will say more about this in the Conclusion.

5. A States House?

5.1 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 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.

5.2 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.

5.3 The Constitution was written by serving politicians who fully appreciated the rising power of party and of the normality of party competition in a 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.³

5.4 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.

5.5 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 of 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 (or what factional representative) gets to stand for Senate election.

6. A Current Snapshot

6.1 I want to turn now from what the Senate is to what the Senate does. I think it might be useful to use current examples to convey the 'feel' and 'presence' of the Australian Senate and the 'spirit' of its approach to parliamentary politics.

6.2 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 (2004-2007), 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.

6.3 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.

6.4 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.

7. Budget Blues

7.1 Time now for some recent examples of the Senate's impact on Australian national politics. I will highlight examples of the Senate's response to the Rudd government's first budget. This story tells a larger tale about the Senate's impact on government law and policy.

7.2 The parliamentary side of the Australian 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, including government budgets. 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 (particularly the 40 year-old practice of Senate estimates committee hearings) as their primary opportunity to hold the party in government to account.

7.3 What goes around, comes around; and both major party blocs have learnt to use this power of delay in ways that generally fall short of what public opinion might see as willful and irresponsible obstruction. The line between open accountability and willful obstruction is, of course, a matter of political convention rather than black-letter constitutionality. In the history of the Australian Senate, the year 1975 stands out as the year constitutionality trumped convention when the Senate delayed considering the government's budget 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.⁴ 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 now proceed to give a few examples of the typical forms that Senate impact takes, drawing on examples from the last few months.

7.4 The simple version of the current Senate story is that the Senate continues to have a significant impact on government legislation. By 'significant', I mean that 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.⁵ 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 2008. 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. Bills were 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.⁶

7.5 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 in its rights to 'request' that the House of Representatives amend such bills. And so the Senate does.

7.6 But a more radical challenge to conventional interpretations of s53, and to the Rudd government's budget, came when the non-government parties in the Senate 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 (or 'special appropriations') 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.⁷

7.7 Beneath the surface of partisan dispute over the government's parliamentary tactics lurked a deeper dispute over the clashing opinions of the two parliamentary Clerks, with each bringing forward evidence to support the constitutional claims of their own house. A careful reading of the Clerks's opinions would show just how difficult it is to eliminate administrative no less than policy disagreement from bicameral parliamentary arrangements.⁸

8. Impact on Legislation

8.1 I turn now to a more general review of the impact of the Senate on Australian parliamentary politics. The first and in many ways most characteristic impact is on the legislative process, particularly on the fate of government legislation. After briefly dealing with the Senate's legislative impact, I shall look even more briefly at two related areas of Senate impact: on government accountability; and on parliamentary representation. These three areas of legislation, accountability and representation are three central testing-grounds for evaluating the effectiveness of any

parliamentary system. The comments here are only the modest first steps towards an evaluation of the institutional effectiveness of the Australian Senate.

8.2 When considering the Senate's impact on the legislative process, the starting point is to recognize that in most years the Senate passes around two-thirds of government bills without amendment. The Senate's impact on the content of 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'. Critics like to point out that approximately one-third of the government bills that are amended are altered through changes moved by the government itself. But who moved the hand that moved the amendment? As is well known, many government amendments take up issues originally raised by non-government interests and are to that extent involuntary or enforced actions. The conclusion is not black or white but grey. On the one hand, most of what governments want, governments get. On the other hand, much of importance to non-government parties is also secured through that very process of government adoption of non-government interests.

8.3 Remember that governments need Senate assent to all their legislative initiatives. Not surprisingly then, 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 one of the Senate's set of eight investigative committees for inquiry and report. These are inevitably the bills that go on to attract amendments, often although not always as consensus recommendations from the relevant committee.

8.4 Instead of providing comprehensive data on the Senate's record of impact on proposed legislation,⁹ I simply want to contrast two recent years in order to highlight the general story of Senate legislative activism. This year's legislative record is still incomplete. Last year was an

election year when the record is typically truncated because of a smaller number of sitting days. So 2006 self-selects as the most recent full year, except that it happens to be one of those rare years when the Howard government had a majority in the Senate, so we might expect evidence of a tame Senate. 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.

8.5 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, 75% of which were government bills. Around 45% of government bills were referred by the Senate to one of the eight 'standing' (or subject-matter) committees for inquiry. Around 80% of bills passed both houses, some in amended form. The Senate agreed to amendments in the case of around 15% of the bills under consideration: a relatively low figure but remember that this reflects the brief period of Howard government control of the Senate. Many legislative amendments originated as government proposals: in fact, around 92% of successful amendments were government amendments: non-government senators moved no more than 8% of committee stage amendments.

8.6 Contrast this story with the year 2003, a more typical year well before the Howard double majority. The overall pace of legislative work is about the same, with 215 bills passing both houses, compared to the 218 figure in 2006. But there are some interesting contrasts with 2006. For example, whereas 2006 had only one bill caught in fundamental disagreement between the two houses, in 2003 there were 25 such disagreed bills: that is, bills with no agreed resolution that year. That is a significant proportion of a government's legislative program. And instead of there being 15% successfully amended bills, in 2003 there were nearly 30% amended bills. And most interesting of all, the committee stage evidence shows a higher proportion of successful to unsuccessful amendments, with 55% of proposed amendments being successful. 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.

8.7 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? The fact that most amendments are moved by the government would suggest that the House would accept these amendments. True enough: in nearly 80% of the cases over the last decade, the House has accepted the Senate amendments.

8.8 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 puts the Senate's power into fresh perspective.¹⁰ 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 of the day) 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-proposes with alternative amendments, the Senate also typically yields. Generally, the Senate either does not contest when a government overrides Senate amendments.

8.9 This situation is a classic case of the glass being half full or half empty. 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, which Bach brings to the Australian scene, one wonders why the Senate does not hold its nerve for the other 20% of the time. From Bach's perspective, one finds 'evidence of regrettable institutional reticence'. As Bach writes: '...the pattern of Senate acquiescence...also may reflect persistent doubts among many Australians, and perhaps some Senators, about the constitutional propriety of the Senate's determined exercise of its constitutional powers to legislate, especially in ways that challenge the government's legislative agenda...Some Senators may have believed, and may continue to believe, that mounting regular and determined challenges to government legislation

might produce public anger and could even violate their own sense of the what the Senate's appropriate role in the legislative process should be'.¹¹

9. Impact on Accountability

9.1 We turn now to the second arena of Senate impact, which is impact on government accountability. Again, I begin with a current example. One of the most heated topics in recent Australian debates over government accountability has been the unaccountable power of the private office employed by government ministers. Australia has seen extraordinary growth in the numbers of staff working directly for government ministers. The unaccountable power of ministerial staff became an election issue in the last few national elections. Labor in opposition promised to rein in the power of ministerial staff, based largely on the evidence of unaccountable power unearthed by Senate committees of inquiry. Labor in the Senate made the running on this issue, so it comes as now surprise that Labor senators in government have been at the forefront of regulating the conduct of ministerial offices. The Rudd government introduced a new code of conduct for ministerial staff on 26 June 2008.¹² The fact that this initiative was promoted by a senior government Senate minister is telling. Senator Faulkner is a former Leader of the Opposition in the Senate and enjoyed high public prominence as a critic of the former Howard government's misuse of ministerial staff. When in opposition, Labor promised to bring greater public accountability to ministerial staff, and the new code of conduct delivered on that promise.

9.2 How can we gauge the impact of the Senate on government accountability? One simple but useful way is to track the record of Estimates hearings by the Senate's eight 'standing' committees responsible for holding hearings on the 'estimates' included in the government's annual budget.¹³ These estimates hearings occur twice-yearly and allow non-government senators a welcome opportunity to ask for whatever evidence from the heads of the public service they or their committees consider necessary for them to make an informed decision about whether to support the government's proposed budget. The interesting dimension is that Senate estimates have extracted commitments from ministers that senior public servants (but not ministerial staff employed in the private office of government ministers) are expected to appear as witnesses. Given the Senate situation, many of these witnesses will appear in the absence of their

departmental minister, who might well be a member of the other parliamentary house. After all, two-thirds of the ministry are located in the House of Representatives. Hence, many public servants appear alongside a duty minister from the ranks of the Senate ministry: such ministers might or might not be across the policy issues facing the departmental witnesses.

9.3 Perhaps none of this really matters in strict legislative terms: the rude fact is that, to my knowledge, no estimates hearing has ever generated a determination by an Estimates committee that a government's budget legislation should be amended. The political purpose of the estimates exercise is not so much to examine the proposed budget as to use the formal legislative authority of the Senate to hold governments accountable for alleged policy and administrative deficiencies, independently of the merits (or otherwise) of the proposed budget. So what do Senate estimates committees focus on when exercising their accountability functions? Perhaps surprisingly, they focus on many matters that go very close to the heart of the norms of responsible parliamentary government. A good example is the provision of policy advice to the political executive, which might be thought to be an area out of bounds for parliamentary committees when examining the public service.

9.4 Observers of Estimates hearings note that across the eight committees which share responsibility for this core business, one common theme is the reluctance of government witnesses (ministers as well as officials) to report openly on the nature of public service to government.¹⁴ One particular committee, the Senate Legal and Constitutional Committee, tracks this issue with regular reports on the stand-off between the government and the Senate over policy advice given by the public service to government ministers. Earlier this year the public service secretary to the Attorney-General's Department tabled advice from the head of the Department of Prime Minister and Cabinet to the effect that public service advice was confidential except when ministers might decide to reveal it.¹⁵ The Senate regularly acknowledges that in many if not most cases, public service advice will indeed be protected by public interest immunity; but the Senate's point has been that the mere claim to a general public interest immunity is hardly persuasive evidence of the merits of a specific claim.

9.5 But there is a deeper underlying trend towards direct parliamentary accountability of senior public servants. Over more than 40 years, the Estimates hearings have reframed accountability relationships between administrative officials and Parliament. In tension with the reluctance of ministers to table public service policy advice is the increasing openness of public servants to speak their own minds on matters of public service professionalism that are not confidential to the inner workings of government. Observers note the rise of public service forthrightness in Estimates hearings, where chief executive officers are displaying increasing boldness in revealing and indeed explaining their own professional opinions. As a Senate procedural digest reports after a recent round of Estimates hearings: 'A notable feature of the hearings was the outspokenness of several senior officers and their defence of their roles: the Secretary of the Treasury vigorously defended his right to speak on economic issues; the Auditor-general spoke very frankly about the effect of budget constraints on the ability of the Audit Office to perform its essential tasks...the Chief of the Defence Force was as frank as ever, stating that foreign forces would be required in Afghanistan for ten years'.¹⁶

9.6 A prominent recent example of how the Senate Estimates hearings can impact on the accountability of government officials occurred last month, when the public service head of the Treasury made one of his regular twice-yearly appearances before the relevant Senate committee investigating his department's budget estimates. The hearings are free to canvass any matters that the Senate considers relevant to making decisions about the government's expenditure plans on the basis of informed consent rather than blind judgment. Over time, the Senate has made clear its own expectations that public service heads should appear, to provide what has come to be called 'the factual and technical background' to government policy and practice. Provision of this type of policy information can and should be distinguished from defence and justification of government policy and practice, which is a task more properly expected of government ministers. Needless to say, questions and answers about government practice can have very large policy ramifications. The degree of difficulty is substantially increased when, as in this case, administrative officials appear alongside a duty minister drawn from the ranks of the government's crew of Senate ministers, as distinct from the officials' own departmental minister. The Treasury minister is by long convention a very senior member of the House of Representatives, so that in this case, the public service head of the Treasury was appearing alongside a non-Treasury minister who was at the

table providing a ministerial presence for a range of public agencies that were not part of his official duties.

9.7 To cut to the chase, the head of Treasury spent 8 hours on 22 October in one long day appearing before the Senate estimates committee.¹⁷ The big issue had little or nothing to do with specifics provisions of the appropriation bills formally under examination. The issue of concern to non-government senators who dominated the hearings was the Rudd government's just-announced relief package in response to the international credit crisis, and in particular the roles of the Treasury bureaucrats and appointed heads of the central bank in advising the Rudd government on policy options. Fuelling the hearing was the media, which strengthened opposition doubts about 'ministerial misspeak': leaks published in the daily press suggested discrepancies between what that the Rudd government was saying about acting on public service advice and what unauthorized disclosures revealed about the rather different state of public service advice. The Treasury head was caught between explicit claims by the Treasury minister and implicit claims attributed in particular to the central bank, whose head was quoted in ways conveying a picture of scepticism of the Rudd government strategy.

9.8 One final area of Senate impact on government accountability relates to the Constitution itself. One could argue that the Constitution is the anchor of accountability for all government operations. But what role does or should the Senate have in holding governments firm in their compliance with the Constitution? Section 53 includes the provision that the Senate may not amend bills appropriating money for 'the ordinary annual services of the government' (that is, core 'supply'). It is not hard to imagine governments being tempted to tack other budget provisions onto an ordinary annual services bill in order to avoid Senate amendment. Certainly, there is evidence that Senate Estimates committees often suspect that matters classified by government as part of the ordinary annual services are misclassified in ways that are designed to deflect Senate scrutiny, especially scrutiny of new policy proposals that are, strictly speaking, 'extra-ordinary' and ought therefore be open to Senate scrutiny.

9.9 For example, early in the life of the Rudd government, the government introduced bills appropriating monies to deal with an outbreak of equine influenza, claiming that these bills were for

'ordinary annual services' and therefore not amendable by the Senate. This claim attracted Senate attention and was openly rejected by the relevant Senate Estimates committee as an unwarranted use of the constitutional language of 'ordinary annual services'.¹⁸ The Senate Finance and Public Administration Committee tracks this issue and reports regularly on differences in interpretation between the government and the Senate over this core constitutional concept. In a report tabled on 20 March 2008, this committee repeated the traditional Senate claim that 'ordinary annual services' does not include new policies and new projects. The government seemed sufficiently worried by the entrenched nature of the Senate's claims that it has taken on a retiring senator (former senator Andrew Murray) as an adviser on this contentious constitutional issue.¹⁹

10. Impact on Representation

10.1 Third in this brief trilogy is a comment on the impact of the Senate on parliamentary representation. Linking with the comments above on government accountability, I should begin by noting the substantial representation of the government frontbench in the Senate. Labels like 'house of review' can mislead with pictures of non-government reviewers independently going about their work of policy scrutiny and administrative oversight. Over the years, there have been reform calls to free the Senate of government ministers but the governing parties have shown no interest in denying their senators the chance of ministerial office. 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.

10.2 The figures for the current 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 the 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'. This itself has a very real impact on Senate effectiveness, as two-thirds of the relatively small parliamentary house of 76 members are then expected to do the lion's share of work on Senate committees.

10.3 Obviously, the Senate impacts very directly by increasing the representation of the smaller States in the Commonwealth Parliament. So too, the Senate's inclusion since 1975 of two senators from the two mainland Territories increases the representation of those regions. Traditionally, the Senate has better represented women than has the House of Representatives, as one would expect from a system of proportional representation which allows the party hierarchy to promote female candidates with less risk of negative voter reaction than with local contests. Currently, around 35% of senators are female and around 27% of House members are female: the patterns are slowly converging but the historic leader has been the Senate in the years since the adoption of proportional representation. Neither house has special provisions for indigenous representation. The Senate has however had a number of indigenous representatives as members of political parties with Senate seats.

11. How so much comes from so little

11.1 The real puzzle about the Australian Senate is how such a small house can try to do so much and so often achieve so much. The answer is that the basis of the Senate's functionality is its public legitimacy. The Canadian and Australian Senates do not differ all that much in terms of their formal constitutional powers. What is clearly distinctive about the Australian Senate is not so much its busy involvement in the three domains of law-making, accountability and representation as the high public expectations that the Senate provide the checks and balances otherwise missing in Australian parliamentary government. To exaggerate for effect: senators know that they occupy valued and highly-honoured public offices, that they are elected to perform as agents of open

government and public accountability, and that they are important bridges facilitating open traffic between executive government and wider community interests. This fascinating situation came about because of a century-long convergence of expectations inside and outside of the Senate: institutional leadership from within by activist politicians got the Senate involved in legislative and policy scrutiny; and demands by outside interests for rights of parliamentary access widen the public legitimacy of the Senate's step-by-step pursuit of open government and public accountability.

11.2 One can read this story in many places, but the one that I will mention here is the Labor narrative of its love/hate relationship with the Senate. Labor at Federation was suspicious of, if not hostile to, the prospect of a Senate which seemed designed as a brake on democracy. Labor early adopted a Senate-abolition plank in its party platform. And for good reason: Labor was the first party in government to be frustrated to the point of electoral defeat after suffering at the hands of an obstructive Senate, during the brief but inglorious years of the Scullin government (1929-1931). Not surprisingly, Labor took the initiative to deliver on the Federation promise of proportional representation for the Senate as a safe and sensible way of giving the second chamber a distinctive character in the Australian parliamentary system. Yet Labor was also the party, interestingly when in opposition in the late 1960s, that moved to establish a Senate committee system and to accept Estimates committees as the conservative parties adjunct to that reform. Even more pointedly, Labor was the party that rescinded its Senate-abolition plank in 1979: four years *after* the 1975 Dismissal, which one might have thought would have confirmed all its worst fears about the Senate. Why the historic about-turn on the Senate? The short answer is that public legitimacy had attached to the Senate, not so much because of its rare capacity for deadlock and obstruction but because of its increasingly normal capacity for slow drilling of the hard boards of open government and public accountability.

11.3 A proper explanation of this institutional history of deepening public legitimacy is beyond us here and now. Not everything done by the Senate or by senators has been of high public value. But if a social-democratic political party like the Australian Labor Party has made its peace with the Senate, then we are safe to assume that the Senate has done enough to earn its place in terms of public legitimacy. Between most elections, there is usually a crisis facing the party in government

that attracts the attention of enough non-government senators that one of the many committee structures emerges as the primary accountability arena for public investigation of that current crisis. The value of the Senate is unrelated to any capacity it might have to resolve this or any other crisis: the Senate is not a court of law. Instead, the Senate's real value is that it can find a forum for the public investigation of misgovernment, using its power of publicity to bridge the gap between government secrecy and open government, and to use its power to frustrate government to bridge a related gap between government decision-making and accountable government. When push comes to shove, the Senate's vast constitutional powers certainly get the attention of government focused on what senators want government to focus on; but the Senate's sustained public legitimacy derives more from the prudent political management of its various arenas of public accountability. The Senate rarely 'solves' government problems: exercises by Senate committees in these accountability arenas inevitably give rise to more questions than answers, but that itself is an important contribution to the cause of open government.

11.4 There are only 76 senators, after all. They might have the backing of the Constitution. They might also have the backing of a well-developed committee system, currently including eight 'standing' or portfolio committees which also take responsibility for Estimates hearings, four 'select' or temporary committees, two legislative scrutiny committees, participation on an expanding number of 'joint' committees with membership from both houses, and a number of 'house' committees of which the most significant is the Senate Privileges Committee which manages the increasing case load of friction between the Senate and government officials. Perhaps the very smallness of the number of available senators to serve on these committees means that the committees tend only to investigate matters of genuine public importance.

12. Conclusion

12.1 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 looking at the Australian Senate.²⁰ Prime minister Harper told his Australian audience that: 'Australia's Senate shows how a reformed upper house can function in our parliamentary system'. I have reason to think that prime minister's Harper's 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.

12.2 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.

12.3 But, as said earlier what goes around, come around. 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 just last month.²¹ 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. But the praise was grudging at best: in senator Faulkner's view, 'The Senate does not reflect that fundamental, democratic, Chartist principle of one vote, one value'. Senator Faulkner conceded that the same complaint could be made of the US Senate, and he also conceded that the US Senate had no outstanding problem with public legitimacy.

12.4 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, in order to eliminate the 1975 option. Second, substituting fixed four 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. There is nothing more concrete on offer as yet but this recent ministerial speech indicates where government thinking is heading. Senate reform has been a staple theme of Australian politics and it is only fair to end by reminding readers that the current Senate is the product of substantial reforms over many generations. All the reforms are consistent with the original if quite permissive words of the Constitution which remain the final authority on the power of the Australian Senate.²²

ENDNOTES

¹ Full text available at: www.aph.gov.au/Senate/pubs/odgers/index.htm

² J Uhr. 'Why we chose proportional representation', chapter 2 in Marian Sawer and Sarah Eds, *Representation and Institutional Change: 50 Years of Proportional Representation in the Senate*. Canberra 1999. available at: www.aph.gov.au/Senate/pubs/odgers/index.htm

³ J Uhr, 'Proportional Representation in the Senate: Recovering the Rationale', *Australian Journal of Political Science*, v30, 1995, 127-141.

⁴ *Odgers' Australian Senate Practice*, pp564-573

⁵ *Senate Procedural Information Bulletin*, no. 222, 27 June 2008, p2, available at: http://www.aph.gov.au/Senate/pubs/proc_bul/index.htm

⁶ *Senate Procedural Information Bulletin*, no. 225, 27 October, p2, available at: http://www.aph.gov.au/Senate/pubs/proc_bul/index.htm

⁷ *House of Representatives Hansard*, 23 September 2008, pp8274-8281, available at: <http://www.aph.gov.au/hansard/hansreps.htm>

⁸ *Senate Procedural Information Bulletin*, no. 224, 26 September 2008, pp5-7, available at: http://www.aph.gov.au/Senate/pubs/proc_bul/index.htm

⁹ Full statistics are available at: <http://www.aph.gov.au/Senate/work/statistics/index.htm>

¹⁰ Stanley Bach, 'Senate Amendments and Legislative Outcomes in Australia, 1996-2007', *Australian Journal of Political Science*, 43/3, September 2008, 395-423.

¹¹ Bach, 'Senate Amendments', at 418.

¹² Senator John Faulkner, Special Minister of State, *Code of Conduct for Ministerial Staff*, available at: http://www.smos.gov.au/media/code_of_conduct.html

¹³ *Odgers' Australian Senate Practice*, pp366-371

¹⁴ *Senate Procedural Information Bulletins*, no. 218, 25 February 2005, p4; no. 219, 25 March 2008, p2; no. 222, 27 June 2008, p3; and no. 225, 27 October 2008, p3 available at: http://www.aph.gov.au/Senate/pubs/proc_bul/index.htm

¹⁵ *Senate Procedural Information Bulletin*, no. 221, 6 June 2008, p1, available at: http://www.aph.gov.au/Senate/pubs/proc_bul/index.htm

¹⁶ *Senate Procedural Information Bulletin*, no. 221, 6 June 2008, p3, available at: http://www.aph.gov.au/Senate/pubs/proc_bul/index.htm

¹⁷ Full coverage in *The Australian*, 23 October 2008, available at: <http://www.theaustralian.news.com.au/>.

¹⁸ *Senate Procedural Information Bulletins*, no 218, 25 February 2008, p3, no. 219, 25 March 2008, p2, available at: http://www.aph.gov.au/Senate/pubs/proc_bul/index.htm

¹⁹ *Senate Procedural Information Bulletins*, no 219, 25 March 2008, p3, no. 222, 27 June 2008, p3, available at: http://www.aph.gov.au/Senate/pubs/proc_bul/index.htm

²⁰ *House of Representatives Hansard*, 11 September 2007, p4, available at: <http://www.aph.gov.au/hansard/hansreps.htm>

²¹ Senator John Faulkner, Special Minister of State, *The Senate: Blessing or Bane?*, 9 October 2008, available at: http://www.smos.gov.au/speeches/2008/sp_20081009.html

²² The full text is available at: <http://www.aph.gov.au/Senate/general/Constitution/index.htm>

Additional References

Bach, Stanley 2003, *Platypus and Parliament: the Australian Senate in Theory and Practice*.

Canberra: Department of the Senate, extracts available at:

<http://www.aph.gov.au/Senate/pubs/platparl/index.htm>.

Castles F G and Uhr, J 2007, 'The Australian Welfare State: Has Federalism Made a Difference?', *Australian Journal of Politics and History*, 53/1, 96-117

Uhr, John 1989, 'The Canadian and Australian Senates: Comparing Federal Political Institutions', chapter 5 in , B W Hodgins et al, Eds, *Federalism in Canada and Australia: Historical Perspectives 1920-1988*. Peterborough: Frost Centre for Canadian Heritage and Development Studies, 130-146

Uhr, J 1995 'Proportional Representation in the Australian Senate: Recovering the Rationale', *Australian Journal of Political Science*, 1995 special issue on party systems, vol 30, pp127-141.

Uhr, John 1998 *Deliberative Democracy in Australia: the changing place of parliament*. Cambridge University Press.

Uhr, J 1998 'Generating Divided Government: The Australian Senate', ch 4 in *Senates: Bicameralism in the Contemporary World* eds S C Patterson and A Mugan. Ohio University Press.

Uhr, J 2001 'Rules for Representation: Parliament and the Design of the Australian Electoral System', chapter in Geoffrey Lindell and Robert Bennett eds *Parliament: The Vision in Hindsight*. The Federation Press, 249-290.

Uhr, J 2002 'What's so responsible about responsible government?', in D Burchell and A Leigh eds, *The Prince's New Clothes: why do Australians dislike their politicians?*. University of New South Wales Press, 155-166.

Uhr, J 2002 'Explicating the Australian Senate', *Journal of Legislative Studies*, 8/3, Autumn, 3-26

Uhr, J 2004 'Parliament and the Executive', *Adelaide Law Review*, University of Adelaide, 25/1, 51-65.

Uhr, J 2005 'Rethinking legislative powers' chapter in H Charlesworth, M Chiam, D Hovell and G Williams eds, *The Fluid State: international law and national legal systems*. The Federation Press, 18-33.

Uhr, John 2006 'Bicameralism', ch 24 in R A Rhodes, S A binder and B A Rockman, Eds, *The Oxford Handbook of Political Institutions*. Oxford University Press 2006, 474-494

Uhr, J 2006 'Appropriations and the Legislative Process', 17 *Public Law Review* 2006, 173-177.

Uhr, J 2006 'Constitutions and Rights', chapter 9 in B G Peters and J Pierre eds, *Handbook on Public Policy*. Sage.

Uhr, J 2006 'The Performance of Australian Legislatures in Protecting Rights', in T Campbell, J Goldsworthy, and A Stone eds, *Protecting Rights without a Bill of Rights..* Ashgate, 41-59.