The Australian Senate

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Like all institutions, the Australian Senate is a product of its history. It was born in 1901 as a result of the federation of six sovereign, independent Australian colonies – wildly unequal in physical size, population and wealth. Unremarkably, Australia’s federal fathers, there were no mothers, chose to have a lower house, the House of Representatives, as a people’s house, with single-member electorates and a democratic franchise, striving there to replicate the House of Commons and the practice of responsible government. But they chose for their upper house one radically different from the House of Lords, more akin to the United States Senate, though also \textit{sui generis}, designed to fit Australia’s peculiar circumstances. One American commentator rather unflatteringly calls Australia’s Senate a ‘platypus’, neither flesh nor fowl, neither properly democratic nor responsible, but having its own unique qualities and existence.\footnote{Stanley Bach, \textit{Playtpus and Parliament} (Canberra, 2003).} The two Houses and High Court together are also sometimes, interestingly, and more accurately, referred to as Australia’s ‘Washminster’ system.\footnote{Elaine Thompson, ‘The “Washminster” Mutation’, in Patrick Weller and Dean Jaensch (eds), \textit{Responsible Government in Australia} (Richmond, Vic., 1980), pp. 32–40. See also, David Butler \textit{The Canberra Model} (Melbourne, 1973) and Meg Russell, \textit{Reforming the House of Lords: Lessons from Overseas} (London, 2000).} Like the United States, Australia has a written constitution, a High Court to interpret it, and a strong Senate to help police it; like Westminster it has responsible government, an apolitical civil service, and a relatively benign, but constitutionally essential, head of state.
What are the main features of the Australian Senate?

To solve their problem of representing states (as the colonies became) as well as representing people, Australia’s federal constitution-makers elected, along US lines, to give each state equal representation in a Senate – initially six Senators, now twelve, plus two from each of the territories, making 76 in all. The Senators would be directly elected by the states each voting as one electorate (by Proportional Representation since 1949) so that, as one of the founding fathers remarked, the upper house ‘had the sweet sap of popular election in its veins’, thereby giving it a mandate and enhanced legitimacy. The constitution-makers also chose to give each chamber co-ordinate powers over all bills save money bills. In the case of money bills the Senate can reject but not introduce or amend them. And to give the Senate more stability they decided to make it a ‘semi-continuous’ house, half of its members being replaced (or rotated) every three years, usually in step with the lower house electoral cycle, though not taking their seats until the next 30 June. To keep the two houses in proportion, a ‘nexus’ was instituted, whereby the Senate would always be at least half the size of the lower house. The Senate has a quorum of a third of members and elects its own President who can speak and vote in debates but does not have a casting vote.

To resolve deadlocks a two-staged procedure was set out. First, instead of the standard ‘half-Senate election’ a full Double Dissolution would be granted by the Governor-General, at the Prime Minister’s request. The

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3 Unless otherwise indicated this paper draws on the Senate bible, Odgers’ Australian Senate Practice (12th edition) for matters of fact. (Available at www.aph.gov.au/pubs/odgers). The numbers were increased to 12 in 1984. The territory Senators were introduced in 1974.

subsequent Double Dissolution election would see all Senators as well as the members of the Lower House newly endorsed and it was expected that then the disputed bill or bills might be passed. If it or they were not passed, provision was made for a second stage which would see a joint sitting of both Houses wherein a simple majority would prevail and with it the popular will. This might seem cumbersome, and it is, but it works.

It was expected that apart from its being a ‘States House’ the Senate would also function as a ‘House of Review’. To do this more efficiently, from 1970 the Senate initiated a set of standing committees to review legislation in detail and also to check the estimates of the federal government departments twice each year. The Senate, therefore, acts as a safeguard on hasty legislation and as a powerful watchdog over expenditure and civil liberties.

_Criticisms and Fears_

From the start there were fears that, in the words of John Winthrop Hackett, a Western Australian politician, 'either responsible government will kill federation, or federation … will kill responsible government'.

And Alfred Deakin, an early Prime Minister, predicted that the states would find they were ‘bound to the chariot wheels of the [Australian] Commonwealth’ parliament with scant protection from the Senate. As it has turned out, however, a _modus vivendi_ has been successfully worked out. In over a century of federal parliaments, there have only been six Double Dissolutions and only one joint sitting (in 1974). All bar one of

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7 _The Times_, 1 April 1902. Though the Federal parliament certainly became more significant financially than the state parliaments with the passing of the decades.

these ultimately resulted in the disputed legislation being passed, and in
the remaining case, in 1987, the bill was declared unconstitutional by the
High Court.

In 1975, when the Governor-General (Sir John Kerr) dismissed Gough
Whitlam’s Labor Government after its repeated failure to obtain supply
from a hostile Senate, and forced a Double Dissolution election, Labor
cried foul. This was in part because Kerr had appointed Malcolm Fraser,
the leader of the Liberal Opposition, caretaker Prime Minister, and
perhaps more so because two non-Labor state governments, sailing very
close to the wind in terms of constitutional convention, had appointed
maverick Senators to casual Labor Senate vacancies, by which means
Fraser was guaranteed his Senate majority.\textsuperscript{9} Be all this as it may, when
the people pronounced at the polls a month later Kerr was vindicated as
Fraser’s Liberals were easily confirmed in office. The loophole which
enabled the maverick appointments was subsequently closed after a
referendum in 1977.

Paul Keating, the Labor Prime Minister in the 1990s, infamously
described the Senate as ‘unrepresentative swill’\textsuperscript{10} and his party on
occasion has called for reform or even abolition. He had a point in that, to
take the extreme case, a New South Wales Senator has to win a quota of
fourteen times as many votes as has a Tasmanian Senator. To remedy
this, some have called for a threshold to be introduced, as prevails for
example in Germany.\textsuperscript{11}

\textsuperscript{9} A good summary account is Gavin Souter, \emph{Acts of Parliament} (Melbourne, 1988), ch. 17.
Is the Senate, however, really unrepresentative? Derived from John Stuart Mill, there is an argument that remote areas and minority views need to be compensated for in a mature democracy. There is also the fact that the Senate vote much more accurately reflects the balance of electoral opinion in the proportion of votes and seats won that does the preferential vote in the lower house, where occasionally government is won by a party with a minority of the votes cast. That under Proportional Representation it is rare for the Government to have a majority in the Senate, and to pass legislation it is usually necessary to win over the minority parties’ Senators, such as the those for the Greens and Australian Democrats, and a sprinkling of Independents, is seen by many as a positive good.¹²

Conclusion
There is no doubt that Australian Prime Ministers of all stripes find the Senate burdensome, but the fact is that, time and again, the electorate has rejected plans to draw the Senate’s teeth. Australians like the idea of having a Senate to act as a check on what they see as the excesses of the Lower House, to ensure proper scrutiny and better laws, and they also know that the Double Dissolution and Joint Sitting mechanism means that ultimately their democratic will will prevail. Long live the platypus.

¹² At the moment 9 Greens, 1 Independent and 1 Democratic Labor Party Senator hold the balance of power in the House.