

THE CONSTITUTION AND THE AUSTRALIAN SYSTEM OF LIMITED GOVERNMENT, RESPONSIBLE GOVERNMENT AND REPRESENTATIVE DEMOCRACY: REVISITING THE WASHMINSTER MUTATION

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I INTRODUCTION

At Federation, Australia's 'federation fathers', reflecting their environment, created a unique set of political institutional arrangements. In the century that followed, the Australian system continued to develop as a unique system, especially with respect to the nature of Australia's representative democracy and in the ways the system embodies limited, responsible parliamentary government.

This article examines the nature of representative and responsible government in Australia, with particular emphasis on the role of the Senate. That body, while originally designed first and foremost as a States' house, quickly failed in that role and became a second party house. As a second chamber, the Senate has in the latter half of the 20th century developed as a house of review. As such, the Senate can be seen as enriching and enlarging the way the Australian system incorporates notions of limited parliamentary democracy.

II REPRESENTATIVE DEMOCRACY

When the *Australian Constitution* ('Constitution') is taken as the starting point for examining the Australian political system, there are good grounds for seeing that system as one which incorporates (among other things) ideas of dual representation, because, as well as giving extensive powers to both Houses of Parliament, the Constitution also specifies that both Houses are elected.

As Reid and Forrest noted in 1989:

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The founders of the Australian federation were united in their expectation that the Commonwealth Parliament would embrace the highest ideals of political representation ... they were unanimous that both houses should be elected and that commitment to representative government was embedded in the Constitution. The Constitution (ss 7 and 24) provides that both houses of the Federal Parliament are to be 'directly chosen by the people'. The Constitution also embraces the democratic commitment to 'one person, one vote', by providing in ss 8 and 30 that in choosing members of parliament 'each elector shall vote only once'.¹

Thus, despite the criticisms of the High Court of Australia ('High Court') during the 1990s when it argued in its decisions on political free speech² that the Constitution is underpinned by a presumption of representative democracy, Australia was nonetheless created as a representative democracy. Uniquely at the time of Federation, both Houses of the Commonwealth Parliament were elected by the people – originally by universal adult male suffrage, and within a couple of years by universal adult suffrage.³ And the Senate's role in the joint representation of the people was further embedded constitutionally in s 24, 'the nexus' guaranteeing that the membership of the House of Representatives shall be 'as nearly as practicable, twice the numbers of the senators'. That clause underlines the commitment of the founders to a dual system of representation of the people by ensuring that as the population expanded, so did both Houses of Parliament. In that way – through the continuing expansion of the Senate as the population grew – it could continue to function as a representative democratic chamber.

Of course the Australian system was, and is, a system of responsible government because governments are formed exclusively by the majority in the Lower House; but it was also designed as one of joint democratic representation.

III REPRESENTATION: COMPARING THE HOUSE AND THE SENATE

A Party Representation

Today, the Senate's assertion of its legislative powers is justified on the grounds that it is an elected house (ie, the constitutionally embedded provision) *and* that it is elected through proportional representation (a non-constitutionally embedded arrangement). Moreover, given that Australia's representative system is based around political parties, the Senate's claims to being a representative, democratic chamber are quite strong.

1 Gordon Reid and Martyn Forrest, *Australia's Commonwealth Parliament 1901-1988: Ten Perspectives* (1989) 85.

2 *Australian Capital Television Pty Ltd v Commonwealth* [No 2] (1992) 177 CLR 106 ('*Electoral Advertising Bans Case*'); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 ('*Industrial Relations Commission Case*').

3 While it is usual to refer to adult male suffrage, it is inaccurate in that it was only white adult male suffrage. Indeed, upon Federation, the Aboriginal people (both male and female) of South Australia lost their voting entitlement. When that colony gave its people universal suffrage there was no race-based exclusion.

Because representation in the House of Representatives is based around single-member, geographically determined electorates, elections regularly produce distorted results, in that governments are often elected with a majority of the seats, without having gained a majority of the vote. The chance for distortion in Australia is made greater by the requirement that electorates are drawn up within State boundaries. Even when governments achieve a majority of the vote, the percentage of seats gained frequently bears little resemblance to the percentage of the popular vote.

Campbell Sharman examined the vote in the 1998 election for each House.⁴ He found that the Coalition parties won just under 40 per cent of the vote for the House of Representatives, but gained over 54 per cent of the seats. The Senate, however, produced the result that the Coalition won 42.5 per cent of the seats with 37.7 per cent of the vote. Sharman stated that:

Even including those senators who began their terms in 1996 the composition of the new Senate gives the Coalition 46 per cent of the seats, a figure which is a much more accurate reflection of the party vote for the House of Representatives than the House of Representatives result itself ... It is the House of Representatives that is unrepresentative, not the Senate ... The Senate is certainly more than representative enough to have its actions underpinned by a powerful sense of popular legitimacy.⁵

If we turn from the major parties to the minor parties, the Senate's claim to fairer party representation is also demonstrable. For example, in the 1998 election, 25 per cent of voters voted away from the major parties in their first preference votes, bringing a net gain in minor party representation of two seats. The 1999 Senate gave to the minor parties and independents 12 of the 76 senators; or 16 per cent. The first preference vote for minor parties in the House of Representatives was around 20 per cent and yet only one representative was elected who was not from the major parties – an Independent in Calare (NSW).

On the other hand, and of profound importance, remains the fact that because the Constitution gives equal representation to the States, and because the Australian States have different population sizes, the Senate does not embody the notion of 'one vote, one value'. If that notion is seen as central to representative democracy, the Senate fails.

B Ethnicity and Representation

Neither House of Parliament can claim to be reasonably representative in terms of the ethnic and racial make-up of its parliamentarians. There is only one senator (new in 1999) of Asian background; only one Indigenous senator (again, new in 1999); and no more than six or seven senators who are from non-'Anglo-Australian' backgrounds. The vast majority of senators are Australian born and most of the senators who are born overseas are also from 'Anglo' or Irish backgrounds. There are seven senators born in the United Kingdom ('UK') (nine per cent), one from Eire, one from Zimbabwe, one from New Zealand and one

4 Campbell Sharman, 'The Senate and Good Government' (Papers on Parliament Series No 33, Department of the Senate, 1999).

5 Ibid 158-9.

from Papua New Guinea. All eleven are 'Anglo' in ethnic terms. In addition, there is one senator from Germany of German-English background. The House of Representatives contains no member from an Asian background and no Indigenous representatives. It does, however, have eight representatives born in non-English speaking countries (about 5 per cent). The Senate has none. In addition, there are ten representatives who, while Australian-born, come from 'non-Anglo' ethnic backgrounds.

The Australian population has a very different profile. The present mix comprises about 74 per cent Anglo-Celtic, 19 per cent other European, 4.5 per cent Asian and around 1.5 per cent Aboriginal and Torres Strait Islander. Twenty-three and a half per cent were born overseas, and 15 per cent speak a language other than English at home. While Australia prides itself on being multicultural, its Parliament is not. Indeed, the parliaments of the UK, New Zealand, Canada and the United States ('US') have much stronger 'ethnic' representation than does Australia.

C Gender and Representation

Half of Australia's population are women, and while neither House approaches 50 per cent representation of women, there are 23 women senators in the present Senate; or 30 per cent. These numbers strengthen the Senate's claim to being more representative in terms of gender than the House of Representatives, where 33 of 148 members are women; or 22 per cent.

The Senate has also been the house in which more women play leadership roles; thus the Senate can claim to be more representative in the sense that it enables the world views and values of women to be heard through their attainment of such leadership positions.

To conclude, in terms of representation, proportional representation has helped create a situation where the Australian Senate not only reflects the mass party majorities as well as or better than the Lower House, but it also allows for better representation of minority interests.

IV THE SENATE AS A FEDERAL HOUSE

Many of the federation fathers had doubts that creating an upper house with equal numbers of senators from each State was desirable – and some did not believe that federalism even required such a house. However, most accepted that such dual representation through two houses was the compromise necessary to achieve federation.

Nonetheless, many of the federation fathers were concerned about the powers of the Senate. Because the election of the Senate was based on equal representation of the States, there was serious concern about the relationship between that chamber, which would give a powerful voice to the States, especially the smaller States, and the more popularly elected chamber, the Lower House. There was extensive debate around the issue of Money Bills in particular.

On the one side, there was concern that were the Senate given power to block Money Bills, it would thwart the will of the popularly elected chamber in the interests of the smaller States.⁶

There was an equal concern on the other side that:

The whole principle of federation is to recognise the co-ordinate power of the population and of the states. There can be no federation if you give all the powers to the popular assembly. ... It is no use giving representation to the states house if you emasculate that house by placing all power in the other house.⁷

Over the objections of many of those federation fathers who wanted a more 'truly' federal system, the final decision of the federation fathers was to give the power to amend Money Bills only to the House of Representatives. Moreover, they decided that were the Senate to resist the will of the government chosen by the Lower House – either through the Senate's power to veto normal legislation or through its power also to veto Money Bills – the government of the day alone had the power to request the Governor-General to dissolve both Houses; call an election of both Houses (in their totality); and following that election, have a joint sitting of both Houses in order to ensure the passage of the disputed legislation. Thus, while the Australian Senate was intended to represent States' interests, those interests were meant ultimately to play 'second fiddle' to a system of responsible, parliamentary government centred in the Lower House. This view was resoundingly argued in 1897 by, for example, Mr J H Symon from South Australia:

We are introducing into this federal system responsible government, and the underlying principle is that the house of representatives, representing the people, is amenable to some degree of criticism on the part of the house which imposes the check, and that it is within the constitutional consequences that it shall go to its constituents. If it comes back supported by the people, the senate must either give way or go to its constituents.⁸

What was not foreseen in all the arguments was that the Senate would not be the voice of the States. As the Australian system developed with its powerful, disciplined parties, the Senate quickly ceased to act as a States' house in any profound way and became another party house. Thus the Australian system is not one where federal interests are in conflict with the principles of responsible government, as was feared by some of the federation fathers.

V COMPARING THE SENATES IN AUSTRALIA AND THE UNITED STATES

In one respect then, 'federalism' *qua* federalism is irrelevant to the functioning of the central government of Australia. From this perspective, the Australian Senate is not like the American Senate, though it now shares with that body the fact that it is elected and that there is equal representation of the States.

6 See, eg, Sydney, *Australasian Federal Convention Debates*, 17 September 1897, 782-9 (Richard Baker).

7 Sydney, *Australasian Federal Convention Debates*, 16 March 1891, 383 (Dr John Cockburn).

8 Sydney, *Australasian Federal Convention Debates*, 17 September 1897, 735.

In the US, however, senators do act as representatives of their State interests first, and their party loyalty will yield to their State interests if party interests and State interests are in conflict. The founding fathers created the American Senate as a States' house and American political traditions ensure that it remains a States' house. Federalism suited America's political traditions not only because it enabled its stubborn, suspicious and very different States to come together in a union, but also because it formed another layer of protection against tyranny. Some of the founders even felt that federalism was not a sufficient protection against tyranny, even with equal representation guaranteed to the States. For example, Samuel Adams, who was a representative from one of the smaller States opposed to the federal union (Massachusetts), wrote: 'I stumble at the threshold. I meet with a national government instead of a federal union of sovereign states'.⁹ He wrote again to his friend Lee:

I have always been apprehensive that misconstructions would be given to the federal constitution, which would disappoint the views and expectations of the honest among those who acceded to it, and hazard the liberty, independence, and happiness of the people. I was particularly afraid that, unless great care should be taken to prevent it, the constitution, in the administration of it, would gradually, but swiftly and imperceptibly, run into a consolidated government, pervading and legislating through all the states, not for federal purposes only, as it professes, but in all cases whatsoever. Such a government would soon totally annihilate the sovereignty of the several states, so necessary to the safety of a confederated commonwealth, and sink both in despotism.¹⁰

In Australia, there was little fear of tyranny and many federation fathers accepted equal representation of the States, not because of any philosophical principles, but because it was the only way to secure the federation of the Australian colonies.

For example, the Hon Isaac Isaacs stated:

I have supported equal representation, because I recognise, as a fact, that the smaller colonies so-called – the less populous colonies – will not come into a federation without it. I recognise that as a matter of fact; it is a political fact, and it is a fact that has the justification of expediency ... The states, as states, according to my view, have no place in the federation ... I cannot understand why it is being insisted upon that equal representation in the senate is to be regarded as any sign at all of state autonomy.¹¹

Both the US and Australian Senates are extremely powerful and can and do challenge their executive. However, in the US, the conflict between the Houses of Congress and the executive is at the heart of that country's constitutional arrangements and the philosophy behind those arrangements. To the American founders, individual freedom was best protected by a government strongly controlled through separation of powers; and, even more importantly, through constitutionally embedded checks and balances. The US Senate's functions were both to represent State interests in battles with the House of Representatives, and to keep the executive in check.

9 Quoted in Sydney, *Australasian Federal Convention Debates*, 10 September 1897, 296 (J H Symon).

10 Ibid.

11 Ibid 301 (Sir Isaac Isaacs).

In terms of the powers of the two American Houses, the job of keeping the executive in check is more strongly given to the Senate – not the popular house. The Senate must ratify treaties that the executive has negotiated; the Senate must approve presidential nominations for Cabinet positions and for the Supreme Court, and the Senate tries an impeached President and makes the final determination of his (or her) guilt or innocence.

The powers of the Australian Senate, and the philosophical assumptions of Australia's federation fathers, bear little in common with the above description of the American Senate. The Lower House in the Australian system is constitutionally the stronger house, with its power to form governments and power to amend Money Bills.

VI LIMITED, RESPONSIBLE PARLIAMENTARY GOVERNMENT

Unlike the US Senate, the Australian Senate, despite its constitutional powers and its claims to being (at least in part) a democratic, representative body, does not see itself as a fully-fledged second governing chamber. It certainly does not see itself as an equal partner in governing with the executive.

By and large, we have a system that most of the time looks and acts as if it were a unitary system of responsible parliamentary government dedicated to the idea of majoritarian democracy. The government formed from the Lower House calls the tune, dominates policy and overwhelms the Lower House.

Nonetheless, the constitutional arrangements place the Senate as a second chamber whose representative democratic character justifies its having been granted extensive powers to review and reject legislation, as well as to judge and to hold to account the government formed from the majority in the Lower House. While governments are formed from the Lower House, and only the Lower House has the power to dismiss a government through a vote of no confidence, governments are answerable to both Houses and both Houses can review and amend all normal (ie, non-money) legislation.

When I first made the case that Australia's system was unique, I argued that the system was an entirely different species, a 'Washminster' mutation, which had some genes drawn from its Westminster heritage and some genes drawn from its Washington (federal) heritage, but which had mutated into a system all of its own. I emphasised that Australia had many features of a separation of powers system (like that of the US). Separation of powers was, I argued, an important feature of the Australian system and one which had been under-emphasised in most political science books on the Australian system that concentrated almost entirely on the British heritage of responsible government and on the way the federal division of power between the States and the centre had developed.

In the 20 years since those arguments, the idea of the Australian system being unique has become commonplace. Moreover, some of my arguments, while being correct in strict constitutional terms – especially those concerned with the

powers of the formal executive (the Governor-General) – over-emphasised the theme of separation of powers.

The emphasis in this article is that the relationship between the Senate and the executive government *today* (and perhaps the relationship between the judiciary and the executive) should also be understood as part of the system of limited and responsible parliamentary government. A number of factors strengthen a view of the Senate as integrated into responsible government.

First, despite challenging the executive on individual – and often important – issues, the Senate acknowledges the legitimacy of the government formed from the Lower House, and either yields to the policy direction chosen by the government, or at least favours it *a priori*.

Second, ministers are regularly drawn from the Senate as well as the House of Representatives, and those ministers are questioned on their executive conduct in the Senate. It should be remembered that the Senate-based ministers have been elected – unlike their counterparts in the House of Lords or the Canadian Upper House whose members are appointed. Having elected ministers held answerable to an elected house makes the Senate a strong candidate for being a partial partner in a system of limited responsible government.

VII THE SENATE AS A HOUSE OF REVIEW

We do have conflict and tension between the Houses from time to time. It is not between the Senate as a States' house and the executive government formed from the Lower House; nor is it conflict between two equal chambers in a system of separation of powers; rather, it is between the government and the Senate as a second elected chamber. Conflict between the Upper House and the executive government is very much part of Australian history. For example, in the colony of Victoria, which moved quickly to elect its Upper House¹² along with the Lower House, there was serious conflict between the government of the day and the elected Upper House during the 19th century, and such conflict also made its appearance occasionally and dramatically during the 20th century.

However, for the first half of the 20th century, because of the electoral systems chosen, the party with the majority in the Lower House dominated the Senate. Hence, the Senate was the puppet of the government of the day. Since the introduction of proportional representation in 1948, the Senate has developed into a vital, representative, democratic second chamber, which actively attempts to ensure 'that laws are supported by a majority, properly representative of the country, and ... that ministers are accountable for their conduct of government to the Australian public'.¹³

The Senate, through the use of its power of censure, has developed an important role in holding ministers answerable. It will censure a minister if it

12 However, the franchise for the Victorian Upper House remained restricted until 1950.

13 Paul Palisi, 'The Role of the Senate' (Senate Brief No 10, 1998) <<http://www.aph.gov.au/senate/pubs/briefs/brief10.htm>> at 24 September 2001.

believes that a minister has not acted with propriety; has failed to declare an interest in a matter; has refused to produce documents in compliance with a Senate order; or has misled or lied to the Senate.¹⁴

The power of censure is taken very seriously not only by the Senate but by the government because a Senate censure can have, and has had, repercussions on the credibility of the government as a whole. It has led to the resignation of ministers. For example, in 1992 during the Keating Labor Government, the Senate censured Graeme Richardson, Minister for Transport and Communications, for among other things, 'attempting to interfere in the justice system of another country'. Richardson resigned.

During the period of the Howard Government, the Senate's actions also led to ministerial resignations. In 1996, the Senate passed a resolution calling on the Assistant Treasurer, Senator Short, and the Parliamentary Secretary to the Treasurer, Senator Gibson, to explain apparent conflicts of interest arising from their shareholdings. Those two office-holders subsequently resigned.

In that very direct way then, the Senate is the chamber that holds (at least some of) the executive individually accountable.

The Senate has also extended its scrutineering and oversight activities with respect to legislation.¹⁵ This process began seriously under then Senator Lionel Murphy in the late 1960s and gathered strength from 1970, when major reforms were put in place creating new standing committees. In 1970, a comprehensive system of legislative and general purpose standing committees, which would 'stand ready' to inquire into matters referred by the Senate, was introduced. These committees looked at policy and administrative issues covering the full scope of government activity. Estimates committees were also established to scrutinise the particulars of proposed government expenditure.

Between 1979 and 1982, the Senate Standing Committee on Finance and Government Operations, chaired by Senator Peter Rae, began its investigations by surveying all of the non-departmental units of government (the 'quangoes') it could find, and recommended that annual reporting, financial oversight and governmental control be vastly improved.

In the 1990s, the Senate was

instrumental in bringing the sports grants case to a constructive conclusion with undertakings that accountability mechanisms in public administration will be strengthened. In its review activity, it has revealed serious deficiencies costing millions of dollars in the performance-based pay program in the public service. It disallowed a generous determination in favour of the former controller-general of customs. And it maintains a continuing and active vigilance over the civil liberties of citizens through the work of its standing committees on regulations and ordinances and scrutiny of bills.¹⁶

14 Harry Evans (ed), *Odger's Australian Senate Practice* (8th ed, 1998) [19.5], <<http://www.aph.gov.au/senate/pubs/Html/chap1905.htm>> at 24 September 2001.

15 See, eg, Senate Legislative and General Purpose Standing Committees, *The First 20 Years 1970-1990*, <<http://www.aph.gov.au/senate/committee/history/conthist.htm>> at 24 September 2001.

16 'The Senate and Responsible Government', *The Independent Monthly* (Geelong), June 1994, 8.

In October 1994, the Senate restructured its committee system by establishing a pair of standing committees – a References Committee and a Legislation Committee – in each of eight subject areas.¹⁷

The Senate has built up its committee expertise and has developed

multi-purpose bodies, capable of undertaking policy-related inquiries, examining the performance of government agencies and programs or considering the detail of proposed legislation in the light of evidence given by interested organisations and individuals. The scrutiny of policy, legislative and financial measures is a principal role of committees.¹⁸

The Senate's committee system allows the Senate to review more effectively government decisions and to attempt to keep the government more accountable for its actions. A study by John Uhr of the 37th Parliament showed that the Parliament was able to amend a substantial numbers of Bills. Of the 482 Bills considered, 157 were amended, with a total of 1812 amendments. Of these, parties other than the Government initiated over one quarter of the successful amendments.¹⁹

The Senate also reviews the budget in ways unimagined by the federation fathers who were intent on preventing budgetary review by the Upper House, which they believed would give undue influence to small States.

In 1993, because the Government lacked a majority in the Senate, the budget was held up for so long that Parliament sat until Christmas. In recognition of the fact that the budget will no longer go through Parliament as a *fait accompli*, the timetabling for budgetary negotiation has been extended.

The difference from the past is that previously, out of the closed processes of Cabinet came a budget that was non-negotiable, and its progress through both Houses of Parliament was regarded as automatic. Today, the budget that emerges in May can be challenged by the Senate on some items at least.

In 1999, because the Australian Democrats controlled the balance of power in the Senate, central portions of the Government's major policy, the introduction of a Goods and Services Tax ('GST'), had to be negotiated with the Democrats and modifications made.

It is tempting to make comparisons with the US Congress. Like an American President, an Australian Prime Minister has to negotiate more or less in the open with senators who hold the balance of power. American-style negotiations have forced governments to back down publicly over a number of budget positions: American-style pork-barrelling with independents won support for the privatisation of Telstra; American-style negotiations won support for the GST.

17 Community Affairs; Economics; Employment, Workplace Relations, Small Business and Education; Environment, Communications, Information Technology, and the Arts; Finance and Public Administration; Foreign Affairs, Defence and Trade; Legal and Constitutional; and Rural and Regional Affairs and Transport. See Department of the Senate, 'Senate Committees' (Senate Brief No 4, 1998) <<http://www.aph.gov.au/senate/pubs/briefs/brief4.htm>> at 14 October 2001.

18 Evans, above n 14, [16.1], <<http://www.aph.gov.au/senate/pubs/Html/chap1601.htm>> at 14 October 2001.

19 John Uhr, 'Parliament' in Brian Galligan, Ian McAllister and John Ravenhill (eds), *New Developments in Australian Politics* (1997) 68, 80-1; quoted in Ian Marsh, 'Parliament and the Executive' (Paper presented to the School of Political Science, University of New South Wales, Sydney, April 1999) 9.

To reiterate, despite similarities between the Australian and US systems, there remains a profound difference. The Australian process gives considerable leverage on specific issues; in the US, all legislation, in particular the entire budget, is open to negotiation, and the American executive has to build coalitions on every issue.

VIII CONCLUSIONS

The Australian Senate is best understood as a house of review which helps hold government accountable within a modern parliamentary system of responsible party government, the hallmark of which is found in the existence of powerful, disciplined political parties and the consequent establishment of 'party' government, rather than 'parliamentary' government.

That the Senate would act as a house of review, a brake on the popular house, was foreseen by some of the federation fathers. For example, in the debate in 1897 over whether or not to give the government the power to ask for the dissolution of both Houses in the event of the Senate refusing to pass desired legislation,²⁰ the Hon J Henry, from Tasmania, argued:

The senate which we propose under this bill, as we know, will occupy the dual position of a state house, and also a house which, at the same time will perform the ordinary functions of a second chamber in general legislation. I start with this, and I know it is admitted by all reasonable democrats that a brake on democracy to prevent undue haste is absolutely necessary.²¹

From this point of view, the argument can be made that Australia is the 'true' inheritor of the Westminster traditions of limited, responsible parliamentary government. In England, the system developed from the absolute power of the monarch through to a system of majoritarian party absolutism. The House of Commons is utterly sovereign, restrained neither by a formal written constitution (and hence the rulings of a supreme court) nor by the existence of an upper house with an effective veto power. Legally, the English House of Commons could, at the stroke of a pen, abolish elections and vote in favour of its own eternal existence. The English House of Commons today is limited only by political traditions of democracy; the institutional checks that existed – in the Upper House and the Sovereign – no longer exist.²² It behaves the way it does because of the reality of, and commitment to, democratic politics; not because of any formal, legal inhibitions. Party majoritarianism then is seen in its fullest flowering in England. Is that the 'true' nature of limited responsible parliamentary government? A case could be made that responsible government is limited government – not mere majoritarianism – but government held

20 Sydney, above n 8, 709ff.

21 Ibid 732.

22 The entry of the UK into the European Union modifies this view somewhat, in that decisions made by the European Parliament, and indeed the very existence of the Union itself, limits the idea of the absolute sovereignty of any of its constituent parts.

accountable to the parliament and whose legislation is subject to oversight and review.

In Australia, by contrast, government is limited by the existence of a powerful Constitution and the all-important power of judicial review by the courts. Moreover, the Constitution divides powers among branches of government, the most important aspect of which – given the dominance of the Lower House by party majoritarianism – is through the constitutional embedding of a Senate, which today holds ministers answerable, reviews legislation and challenges sections of the budget when necessary. These developments seem to be part of a slow process of reform in which the Senate watches and monitors the government's exercise of its executive and legislative powers. That these reviews take place within a context of adversarial political parties does not detract from the Senate's role in limiting government *per se*. It should be recalled that as early as 1848, Disraeli had recognised that 'you cannot choose between party government and parliamentary government. I say, you can have no parliamentary government if you have no party government'.²³

IX THE FUTURE

Australia, following its own pragmatic and haphazard way of doing politics, has progressed from a set of colonies that were seen in the second half of the 19th century as embarking on dangerously democratic paths, where the whim of the masses might dominate over more reflective democratic procedures, to a modern system at the beginning of the 21st century in which its central government has checked the dangers of the 'tyranny of the masses' and embraced the idea of limited democratic government – at least when compared to its English 'mother' parliament.

The Constitution itself places limits on the sovereignty of the central government and, from time to time, the High Court checks the exercise of executive powers in important ways. And for the past 50 years, the Senate, drawing on its legitimacy as an elected, representative second chamber, with its powers embedded in constitutional grants of power, has expanded its role as a house of review. On occasion, it has called governments to account; questioned ministers on their executive decisions, and indeed forced ministers to resign; and reviewed legislation – in some instances forcing amendments on the executive, and in other instances, vetoing proposed government policy. In all these ways, the Australian system incorporates notions of limited government within a system of strong, responsible adversarial party government.

The role that the Senate has carved out for itself is given legitimacy through its constitutionally embedded powers and through the constitutionally embedded requirement that it is elected. However the Senate's role ultimately depends on the continued existence of proportional representation and on the Australian voters continuing their propensity to deny to either major party a majority in the

23 United Kingdom, *HC Debates*, House of Commons, 30 August 1848, vol 101, cols 205-6.

Senate, and place the balance of power in the hands of minor party senators. Were the government of the day to be given a majority in the Senate, the Senate would again become the puppet of that government. Were the opposition to be given a majority in the Senate, there would be, in all likelihood, a direct clash between the two dominant political parties, each controlling one House. Those circumstances would tend to cripple effective government and lead, sooner or later, to a clash of sufficient importance to end in an earlier election, most likely a double dissolution.

Were the Australian system to evolve in those directions on a more or less permanent basis, the Senate would have moved beyond its role as a second chamber, to a role which threatened to undermine the essence of responsible government. The system then might be one of limited government – but the results would hardly be responsible, good or stable government.