

New fangs for the platy-tiger? The Senate and the Rudd Government in 2008

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The final sitting day of the Senate for 2008 brought embarrassment for the federal opposition, with the media making much of the confusion among Liberals and Nationals about whether they should continue to support their own legislative amendment aimed at retaining special funds for telecommunications in regional areas. The Coalition was caught by surprise when the House rejected the amendment – indeed, they were surprised that the amendment went to the House at all.

Many parliamentary moves are designed primarily as gestures or tactics to show supporters that their representatives are being frustrated by lack of numbers. If that was the intention on this occasion, then the hollowness of the Coalition amendment was exposed when Fielding and Xenophon threw in their support, so sending it to the House, where the Coalition's hand was forced.

It was the culmination of an unusual year in the Senate. Senators elected anew in late 2007 took their seats mid-year, and the disposition of the parties changed from a Coalition majority to an even balance. After dealing with a Coalition government from 1996 to 2007, the Senate has made some adjustments, including changes to procedures during question time. These changes in personnel and process suggest that the Senate's relationship with the Rudd Government during 2009 might be full of surprises.

Because Senate terms do not correspond exactly with those for the House of Representatives, Labor has faced two distinct Senate dispositions since it assumed office in November 2007. For the first half year the Senate had the feared Coalition majority of 39 in the 76 seat chamber, but when the newly elected Senators arrived in mid 2008, Labor, with 32 seats, still could not legislate alone but required the support of all seven crossbenchers (five Greens, a Family First senator and Independent Nick Xenophon), assuming there were no abstentions or floor crossings from the opposition.

With the different Senate configurations between 2003 and 2008 producing such a diverse array of behaviours, we can't simply assume that the crossbenchers have disproportionate influence over the government's legislative program. As the data increases in complexity, so too do the demands for a more refined understanding of the chamber's operations and the opportunities for more mature analysis.

The ideal of democracy is that government should be accountable to the governed. In systems of representation, governments are held to account by elected assemblies. In the bicameral Australian parliament, governments by definition have the support of a majority of lower house members and strong party discipline limits the scrutiny imposed on the executive there. For several reasons – including the electoral system, realignment of parties and possibly even a conscious desire within the electorate – governments did not hold majorities in the Senate between 1981 and 2004. It has always been assumed that better laws result when the executive governments who propose most Bills must convince parliament that the laws will benefit society. This explains why many observers were alarmed about the prospect of the Howard

government holding a Senate majority of Coalition loyalists. They predicted that the Howard government would treat the chamber as a rubber stamp and rush through legislation without appropriate consideration. Some statistics comparing with earlier years support those predictions, although the figures obscure many important details.

The Howard government's Senate majority aroused fears and attracted criticism. In the broader population, the Australian Survey of Social Attitudes (Denemark et al 2007) found that most respondents (57 per cent) in 2005 disapproved of the government holding a Senate majority. Only 14 per cent approved of the situation. Perhaps it was predictable that voters who were not Coalition supporters would be most alarmed, with over 80 per cent of Labor, Democrat and Greens voters disapproving. Interestingly, fewer than 30 per cent of Coalition voters were prepared to express approval, with most apparently preferring to wait and see what developed. Other demographic groups expressing disapproval included women and university graduates. Women might feel better represented in the Senate because that chamber has usually been more feminised than the House, and it is possible that the better educated care more about democratic theories.

While voters generally approved 'divided government' (Denemark et al 2007) closer observers expressed particular concerns about the Coalition majority. Journalists were worried that information would become harder to obtain and pressure groups feared loss of access to Senate committee inquiries as times allowed for submissions were curtailed. Harry Evans, Clerk of the Senate, had earlier warned that the government intended to prevent the Senate from amending legislation (Evans 2003). Perhaps in retaliation, the government moved to remove the Clerk's security of tenure, which threatened to make the position subject to political influence. Observing the post-2004 Senate in operation, Evans (2007, p 221) remarked:

The accountability of the government to the parliament and the public, and the ability of would-be critics and dissenters to find out what is really going on, has been significantly reduced.

Political scientists sought objective evidence that the scrutiny of the executive had changed. Gwynneth Singleton (2008, p.88) suggests that the dire predictions were borne out as

the government controlled procedural matters such as the allocation of questions, sitting hours, the use of the gag and the guillotine to curtail debate on significant pieces of legislation, and the use of its majority to prevent Senate inquiries into matters that may have caused it political embarrassment. The government did not comply with orders for the production of documents, it directed public servants not to answer questions on the AWB [Australian Wheat Board] issue, its response rate to Senate committee reports was poor and it was particularly lax in providing answers to Questions on Notice in a timely manner.

Singleton concludes, however, that it is not appropriate to describe the Senate under the fourth Howard government as merely a 'paper tiger' because crossbench Senators managed to adjust their tactics somewhat, for example by making good use of supplementary questions. Singleton cites particularly the influence of the Coalition's own backbench senators, and mentions the emergence of cross-party co-operation on some gender issues and the reputation of Queensland National Barnaby Joyce for strong independence (p 90).

Examining the Senate's role in amending legislation, Stanley Bach (2008) found that it

did not often provoke negotiations leading to bicameral compromise. Most often, the House either agreed to the Senate's amendments, many of which were government proposals, or disagreed to them. In the latter cases, the Senate most often gave way, instead of insisting on the legislative changes it already had approved.

Bach also warns of the dangers of relying solely on quantitative data when examining an institution as complex as a bicameral legislature. The bare statistics do provide some avenues for more detailed research, however. So, for example, while the Senate sat for 59 days in 2006, it sat for 52 in 2008. In 2006, there were 299 divisions, while in 2006 there had been only 111 after 44 sitting days, the latest period for which the statistics were available. The chamber sat for slightly longer per day in 2006 and averaged 19.8 questions while in 2008 it managed 19. These numbers include supplementaries, which have now been extended to allow two per original question. The time limit on minister's answers has been halved to two minutes, then one each for supplementaries, so ministers will perhaps not monopolise the speaking time during question time to the same extent. However, the new system might not please everyone. Indeed, there could well be complaints from the crossbench that there is now less opportunity for participation.

The Senate had been critical of the Howard government for failing to respond promptly to committee reports. The statistics show that there were 29 responses in 2006 but only 14, according to the most recent statistics, in 2008. This might well reflect the newness of the Rudd government rather than particular tardiness. Other figures do seem indicative of a resurgence of Senate activity. In 2006 and 2007, seven and eight bills respectively were declared urgent, so curtailing debate; the latest statistics for 2008 (after 44 sitting days) showed that the guillotine had been employed only twice. In the two year period 2006–07, the Senate had made only one order for production of documents, but already in 2008 (after 44 days) it had made eight such orders. As Labor lacks a Senate majority, the criteria used by Singleton and Bach – with appropriate caveats – can be applied to the Rudd government as evidence becomes available.

Whatever one thinks about the Coalition's attitude to the Senate, or indeed about the argument that the government of the day has a right to implement its electoral mandate, there was little reason to hope that election of a Labor government would

ease the Senate's problems. The previous Labor government under Paul Keating had some negative attitudes to the Senate. Keating uttered the famous insult 'unrepresentative swill'. Generally, however, negotiations seemed to be productive. The Senate crossbench of the early nineties was praised for its role in negotiations over budgets and Native Title legislation. In more recent times, Prime Minister Howard praised Democrats' Leader Meg Lees for her pragmatic approach to the bills to introduce a goods and services tax.

Those negotiations had far-reaching implications for the Democrats themselves. It is possible that the party was damaged during the period because of a perception that it had become too close to the Coalition government. Whatever the reason for the electoral decline, however, the fact remains that the last Democrats lost their Senate seats in 2007. Although the crossbench from 2008 might seem similar numerically, it remains to be seen whether the absence of the Democrats will have a deeper impact than might at first be expected. The Democrats were exclusively a Senate party and a relatively small national membership meant that its activities were primarily parliamentary. In this regard it was noted for its professionalism and indeed its expertise. In its heyday, it had larger numbers than the Greens now enjoy, and this meant that it was able to develop a reputation across all of the Senate's activities, including its many committees. Its motto of 'keeping the bastards honest' tended to override ideological considerations and so it was noted for pragmatism – in that term's non-pejorative sense. It remains to be seen whether five Greens can cover the Senate's business as effectively as say, eight Democrats, or as pragmatically, given the party membership's tighter ideological expectations.

The Greens are not the only senators sitting on the cross benches, of course. When Health Minister Nicola Roxon answered questions 'without notice' about the Medicare Levy Surcharge from Jennie George in October and Janelle Saffin in September, she took the opportunity to 'acknowledge the efforts of the crucial Senate crossbenchers' (the Greens, Fielding and Xenophon). She described them as 'constructive and reasonable in their discussions' while the Liberals had shown no appreciation of the need for economic responsibility.

While it is true that every senator has one vote in any issue, the crossbenchers assume greater importance when the major parties vote in blocs. The attitudes of the senators in the potentially crucial positions, then, are important. During his first speech, Senator Xenophon said that he 'would rather go down fighting than still be standing because I remained silent'. Hansard reveals that Xenophon and the Greens find common ground on a number of issues. On a couple of Green motions, including a call for a halt on logging around Bermagui on the New South Wales south coast, his has been the only vote they have been able to attract.

Fielding is regarded as a more natural conservative. He was elected at a time when family values featured prominently in Coalition rhetoric and the government was criticised for close ties to conservative religious groups. While the Health Minister praised the negotiating styles of the crossbenchers, the Finance Minister accused

Fielding of being responsible for the voting down of a proposed tax on luxury cars. ABC *Lateline's* Leigh Sales (ABC 2008) asked Fielding whether he was 'the man who saved the Toorak tractor', and whether he was inexperienced in negotiations. Fielding's response was critical of the government:

[W]e had a number of meetings with officials, also discussions with the Treasurer. Look, at the end of the day, the government felt that they could push this through and I think we had three years of the Howard government just waking up and pushing things through the Senate. The whole idea of the Senate is to review things and to pick up unintended consequences, and quite clearly I don't think the Rudd government thought that this tax would probably hit farmers and tourism operators. Now that we've raised that genuine concern on their behalf, you'd think the Rudd government would use their massive resources and work out a way of clearly exempting those types of people from this unfair tax.

In an earlier paper, Stanley Bach (2003) used the objective view of an overseas visitor to describe the 'accidental genius of Australian politics'. He likened the Australian system generally and its bicameral parliament to that unique animal, the duck-billed platypus. The analogy raises some interesting and some disturbing notions. While the hybrid nature of the political system can provide some vigour, the platypus is threatened by loss of habitat. Few Australians have seen one in the wild. Perhaps only the apparently extinct thylacine or Tasmanian tiger has a more mysterious image among our native animals. When Gwynneth Singleton (2008) asked whether the Senate was more than a 'paper tiger' she raised the image of the universally recognised exotic species. Perhaps, after surviving three years with a Government majority, the Senate is now in a position to perform as a 'platy-tiger' – a unique institution with political bite.

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