

# Senate Amendments and Legislative Outcomes in Australia, 1996–2007

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There has been a recurring argument in Australia about how the Senate should exercise its constitutional power to amend government legislation that it receives from the House of Representatives. Much less attention has been paid to how the Senate has exercised this power, and how often Senate amendments have resulted in legislative changes that governments otherwise would not have made. This article explores the legislative record and finds that, during the Howard ministry, Senate amendments 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.

## Introduction

Probably the most striking feature of Australia's national political system is its combination of a cabinet government that is formally responsible to the House of Representatives and a Senate that is directly elected and constitutionally powerful. The Constitution gives the Senate and the House of Representatives the same legislative powers, except that the Senate cannot originate certain money bills nor can it make amendments to bills imposing taxes or appropriating funds for the ordinary annual services of the government. Instead, however, the Senate can request that the House make the very amendments the Senate is barred from making itself, and no such money bill can become law until any Senate requests for amendments have been resolved in one way or another. Otherwise, the two houses enjoy the same powers with respect to legislation.

The authors of the Constitution understood that this sharing of power could give rise to legislative disagreements. Their chosen means for addressing any

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such disagreements were the complex procedures of sec. 57 that can result in a double dissolution followed by a joint sitting of the two houses. It must have been obvious to the authors that these procedures were not suitable for frequent use, that they would be very time consuming, and, therefore, that they could not be used to resolve bicameral disagreements over time-sensitive money bills. It would seem, therefore, that they must have expected either that the Senate would not use its legislative powers very assertively or that the two houses would not have much difficulty in resolving whatever disagreements did arise.

These matters were of little practical import during most of the first half-century under the Constitution when governments typically enjoyed dependable majorities in the Senate. With the introduction in 1949 of proportional representation for Senate elections and the later arrival of non-government Senate majorities, the potential for legislative conflicts between the House and Senate emerged as a much more serious concern. Not surprisingly, therefore, there has been a recurring argument in recent years as to if, when and how the Senate should exercise its legislative powers. Those on either side of this debate can point to well-known cases – for example, the workplace relations bill in 1996, the ASIO terrorism bill in 2002 and, of course, the supply crisis of 1975 – to buttress arguments over whether the Senate has used or abused its constitutional powers to amend government bills from the House or decline to pass them at all.

What has been missing is a less anecdotal and more systematic exploration of the Senate's impact on legislation. How exceptional were the three instances just mentioned? How often has the Senate, in recent years, amended government bills it has received from the House of Representatives? In turn, has there been a consistent pattern over time in how the House has responded to the Senate's amendments? Has the House typically accepted or refused to accept the legislative changes that the Senate has proposed? When the House has declined to accept Senate amendments, has it also opened the door to bicameral negotiation by proposing amendments or alternatives to the Senate's proposals, or has it simply rejected those proposals, presumably with the hope that the Senate would not insist on its own amendments? Do we find a similar or different pattern with respect to the ultimate fate of Senate requests for amendments to money bills?

This article begins to address these and related questions by examining the fate of all the Senate's amendments (and requests for amendments) to the government bills that the Senate received from the House of Representatives throughout the Howard ministry, the 12-year period from 1996 through 2007. This period includes 9.5 years during which there were non-government majorities in the Senate and the last 2.5 years when the Coalition government had majorities in both houses. The effect of the 2004 Senate elections, therefore, also allows us to ask if and how the change in partisan control of the Senate affected the Senate's legislative influence.<sup>1</sup>

We shall find that the House often has accepted the Senate's legislative amendments but that this, in itself, does not tell us very much about the

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<sup>1</sup>What follows extends the analysis to be found in Bach (2003), which contains fuller descriptions of some of the parliamentary procedures discussed here and some of the data presented here.



Senate's influence on legislation. Also, we shall find that when the House has chosen not to accept a Senate amendment, the House usually has asked the Senate to give way instead of suggesting a different proposal – and one that presumably is a compromise between the initial positions of the two houses – for the Senate to consider. We shall find that this has been a successful strategy for the House to adopt because the Senate has not often stood firm in defense of its amendments. With respect to Senate requests for amendments, we shall find that, although the two houses have disagreed about whether the Senate can and should press such requests, that issue actually has arisen very infrequently in recent years. Finally, and not unexpectedly, we shall find striking differences between the Senate under non-government control and the Senate during the recent period of government control.

The analysis that follows rests on the platform of explanation and analysis of the Parliament's procedures that is to be found in *Odgers' Australian Senate Practice* (Evans 2004) and *House of Representatives Practice* (Harris 2005). It also builds on the related work of such scholars as Elliott (1997), Hamer (1996), Lovell (1994), O'Keeffe (1996), Sugita (1997), Uhr (1997, 1998), Ward (2000) and Young (1997). Readers are invited to conclude, however, that much remains to be done.

### Amendments Made in the Senate

We already know that Senators have taken advantage of their opportunity to amend bills that the Senate receives from the House of Representatives.<sup>2</sup> During the six-year period from 1996 to 2001, amendments were moved in the Senate to between 35 and 45 per cent of all the bills that it passed, the overwhelming majority of which were government bills that had originated in the House. The average number of amendments moved to all bills ranged from 7.5 to 10.5 per bill during those years.<sup>3</sup> Furthermore, proposing amendments in the Senate was not a futile exercise. The Senate agreed to amendments to between 29 and 39 per cent of the bills the Senate passed during each year, making for an average of between 4.6 and 7.8 amendments agreed per bill passed.<sup>4</sup>

In only one of these six years did the Senate fail to agree to a majority of the amendments that were moved to the bills that it passed. The percentage of successful amendments was 44.4 in 1996 but then ranged upward to three-quarters in 1999 and 78.6 per cent in 2001. At least by these quantitative

<sup>2</sup>References throughout this analysis to amendments include requests for amendments, except where the two are treated separately.

<sup>3</sup>These are means; the medians would be much closer to zero, as indicated by the percentages of bills to which no amendments were moved.

<sup>4</sup>The obverse of this finding is that the Senate approved between 61 and 71 per cent of House-passed bills without amendment (Bach 2003, 209). See the note accompanying that table for additional detail about the amendments included and excluded from these data. The corresponding data in Table 1 in the present study are somewhat different because Senate bills and amendments to them are not included in this analysis. See also footnote no. 25. (A more complete analysis would include government bills originating in the Senate, with the problems of analysis and presentation that would ensue.)



measures, therefore, the Senate sometimes has been a consequential participant in the legislative process.<sup>5</sup>

However, these data are not a fair measure of Senate challenges to government legislation as it passed the House because the government itself instigated much of the amending activity in the Senate. During none of the six years of 1996–2001 was the government responsible for much less than one-quarter of the amendments proposed to bills that the Senate passed (and that was 24.4 per cent in 1998). In 1999 and 2001, in fact, the government proposed a majority of all amendments (58.2 per cent and 55.0 per cent, respectively) and far more than those proposed by the Opposition (29.4 per cent and only 14.9 per cent).<sup>6</sup>

The government undoubtedly proposed some of these amendments voluntarily, primarily to cure defects in its bills that came to light after the bills had been drafted and introduced in the House of Representatives. Some defects certainly were technical drafting errors or oversights. Others, equally certainly, addressed substantive problems that were brought to the government's attention by affected individuals or organizations or by policy experts whom the government had not consulted during the drafting process. Some problems must even have been highlighted by government or Opposition MPs, or both, during the consideration of bills in the House of Representatives. In response to such concerns expressed in the House, the government can decide to make any needed amendments in the Senate which, among other advantages, allows more time for the amendments to be drafted with care and precision.<sup>7</sup>

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<sup>5</sup>There are limits that must be borne in mind to what reliance on quantitative measures can reveal. The reservations of a reader of an earlier version of this article deserve to be quoted at length: 'There are risks of relying too heavily on amendment statistical detail without delving into some case-by-case analysis. For example, it is not unknown for a government, when under pressure to reform a matter, to introduce a 'semi-formed' bill into the Parliament and to either 'fix it up' on the way through both the House and the Senate (by adding a large swag of amendments) or to address remaining issues and problems in subsequent legislation, thus blowing out the number of bills and amendments. A more common phenomenon materially affecting amendment statistics is related to the drafting style of federal legislation. Often when a minor technical problem is discovered in a bill, the remedy results in a very large number of virtually identical amendments (e.g. 30 out of 50 Senate amendments made to the Private Health Insurance (Transitional Provisions and Consequential Amendments) Bill 2006 omitted 'commencement time' and substituted 'Ombudsman conversion time'). These factors, which are real, prevalent and an ongoing characteristic of our legislative system, reduce the effectiveness of relying too heavily upon amendment statistics to bolster an argument.' All this is undoubtedly true, and points to the need for employing a variety of approaches when trying to understand an institution as complex as the Parliament.

<sup>6</sup>Bach (2003, 216). See the table and accompanying notes for additional detail. It bears repeating that all the data presented in this section include Senate bills and Senate amendments to them, whereas the later sections of this analysis are concerned only with House-passed bills and Senate amendments to those bills.

<sup>7</sup>Precisely the opposite also sometimes occurs because the Senate may refer the provisions of a House bill to a Senate committee even before the House of Representatives passes the bill itself and sends it to the Senate for formal consideration. 'Because the provisions of bills are often referred to committees before the bills are received in the Senate, amendments resulting from Senate committee inquiries are sometimes made in the House of Representatives. This was the case with the Customs Legislation Amendment (Border Compliance and Other Measures) Bill 2006, which was dealt with in the Senate on 6 February [2007]. Sometimes the committees have an impact before a bill is introduced, as with the Anti-Money Laundering and Counter-Terrorism



On the other hand, the government undoubtedly proposed some of these amendments involuntarily, primarily to secure the passage of its bills through the Senate in which it did not have a majority of votes. In the House of Representatives, party discipline ensures that the government can pass whatever legislation its fellow party members will accept. In the Senate, by contrast, party discipline does not produce the same result, so the government has had to accept changes in some of its bills when the alternative was to confront the united opposition of the non-government majority.

Regrettably, there is no way to ascertain how much of government-initiated amending activity in the Senate has been voluntary and how much has been involuntary, short of an amendment-by-amendment inquiry. What we do know, though, is that whatever the government's reasons for moving amendments, it was almost always successful in 1996–2001, even though the Senate had non-government majorities. During that period, the government was least successful in 1997, when the Senate agreed to 98.5 per cent of the amendments that the government proposed.<sup>8</sup>

The government's success rate in having the Senate approve its amendments was consistently and considerably higher than the comparable rates for the Opposition, for any minor party represented in the Senate during those years or for the independent Senators. In 1996, for example, the Senate agreed to only 8.7 per cent of the amendments moved by the Opposition.<sup>9</sup> But the Opposition's success rate exceeded 50 per cent in four of the next five years, and peaked at 80.2 per cent in 2000. Throughout this period, the Opposition could pass its amendments in the Senate if it had the unified support of the other non-government Senators. The Opposition's success in attracting such support varied considerably from year to year, but its success rate, whether 8 or 80 per cent, does not tell us very much about the government's position on Opposition and other non-government amendments.<sup>10</sup>

More generally, the record of offering and voting on amendments in the Senate – how many amendments were offered, who offered them, and what happened to them in the Senate – sheds much less light than we might like on the consequences of non-government control of the Senate for the content of legislation during the period preceding mid-2005 (when the Senators elected in 2004 took their seats). Obviously some amendments are far more important than others and, surely, the government's minority status in the Senate compelled it to accept Senate amendments it did not like because the alternative could have been for its bills to be stalled or defeated. But there is no way to determine how many government or other amendments that the Senate approved fell into this category, and there are too many other reasons for the

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Financing Amendment Bill 2007' (Senate 2007, 1–2). It also has been suggested that analyses of bills by the House's standing committees have led to amendments being proposed in the Senate by non-government parties.

<sup>8</sup>Bach (2003, 218) and accompanying notes.

<sup>9</sup>A large number of amendments that year were unsuccessful Opposition amendments to a few bills, especially the Workplace Relations and Other Legislation Amendment Bill 1996.

<sup>10</sup>If an Opposition amendment passed on the voices, we can draw no inference as to whether or not the government supported it. If an Opposition amendment failed to pass on the voices, on the other hand, we can infer that the government opposed it and at least some minor party or Independent Senators also must have opposed it.



government to have proposed amendments and for it to have accepted without contest amendments that were proposed by the Opposition and others in the Senate.<sup>11</sup>

What we can say with confidence is that some of the amendments the Senate approved, no matter who moved them, represented changes in the government's legislation that it accepted unwillingly, as the price it had to pay in order to secure passage of its bills. It is reasonable to presume that the government accepted only those Senate amendments that did the least damage to its bills while still enabling them to pass. There were relatively few amendments – in fact, only 53 during the entire six-year period from 1996 to 2001 – that the Senate approved on divisions and that the government opposed.<sup>12</sup> However, we also can presume that there were other – many other – Senate amendments that the government opposed but, nonetheless, allowed to pass on the voices. The government's legislative strategists then certainly would ask themselves if they could reverse some of their losses, or regain some of the ground they had to give, at later stages of the legislative process. To explore these possibilities, we turn to the record of what happened to the Senate's amendments when they reached the House of Representatives.

### Senate Amendments in the House of Representatives

When the Senate agrees to one or more amendments (or requests for amendments) to a bill that the House of Representatives already has passed, and the Senate then completes its initial work on that bill, the Senate transmits the bill with its amendments (or requests) back to the House for its further consideration.<sup>13</sup> A schedule of the Senate's amendments is attached to the bill, and the bill and attached schedule are accompanied by a message in which the Senate asks that the House concur in the amendments (or make the Senate's requested amendments).

Senators and Representatives understand that, in the normal course of events, both chambers must agree to a bill in precisely the same form before it can become law. In most bicameral systems, one house of parliament is far more powerful than the other, so this need to reach agreement with the other house rarely becomes a problem. On the other hand, when the two houses of parliament are of roughly equal constitutional strength, as is the case in Australia, the requirement for bicameral agreement means that each Senate amendment to a House bill can become a potential roadblock to enactment.

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<sup>11</sup>Furthermore, some of these reasons undoubtedly remained even when the government controlled the Senate. If anything, the government then had even more incentive to perfect its bills with Senate amendments because it had no need to fear that its amendments might lose. Also, the government still had an incentive to accept some harmless or relatively inconsequential non-government amendments in the Senate because doing so can expedite Senate passage of government bills and because there is an expectation of at least some greater inter-party comity and accommodation in the Senate than in the House of Representatives.

<sup>12</sup>Bach (2003, 228) and accompanying notes.

<sup>13</sup>The Senate completes its initial work on a bill to which it has approved *amendments* with the third reading of the bill, which marks its passage; the Senate completes its initial work on a bill to which it has approved *requests* before the third reading.



There are at least four generic ways by which agreement can be sought.

First, a constitution can empower one house to prevail over the other in cases of disagreements about amendments. This can take the form, for example, of votes in the more powerful house to reject the amendments from the other house; then the originating house may secure enactment of the bill by passing it again, in the form it prefers, either by a simple or absolute majority, or perhaps by an extraordinary majority, such as a two-thirds vote. Under this or any similar arrangement, no bicameral agreement ultimately is required; one house can impose its will on the other if it is sufficiently determined to do so.

Second, the two houses can convene in a joint sitting to debate and vote on the issues that need to be resolved. Australia's Constitution provides for such joint sittings but the relevant provisions of sec. 57 have been invoked only once – in 1974, following a double dissolution and the re-election of the Whitlam government. The reason lies, in part, in the demanding and time-consuming prerequisites for a joint sitting. Before it can be convened, the House of Representatives must pass a bill three times without being able to reach agreement with the Senate on it, with a double dissolution and an election for all seats in both houses intervening between the second and third time the House passes the bill. Obviously, joint sittings cannot be part of Australia's normal legislative process.

Third, the two houses can designate some of its members to meet as negotiators in a temporary conference committee, as in the United States, or a standing mediation committee, as in Germany. The standing orders of the Australian House of Representatives and the Senate also provide for creating conferences (but not conference *committees*) when one house amends a bill that the other already has passed. Such conferences, however, are envisioned as a last resort only, and there have been only two of them since Federation. One reason probably lies in a dual asymmetry in the Australian situation.

In Washington, members of the House of Representatives and the Senate negotiate with each other in conference, with the President an influential bystander, but a bystander nonetheless. In Canberra, the Senate would be negotiating in conference with the House of Representatives in principle but with the government in practice. Also in Canberra, resort to a conference would seem to place the Senate on an equal standing with its negotiating partner, whether that is taken to be the government or the House of Representatives, and neither of the latter has been inclined to grant such status to the Senate as a legislative decision maker.

Fourth, if neither house has a convenient and constitutional way to prevail over the other, the two houses can rely on a limited exchange of messages between them. Each house accepts or rejects positions of the other or proposes alternatives to them, in the hope that, sooner or later, each will manage to agree with the other on every matter that has to be resolved so that both houses will have passed the bill in the same form. It is on this fourth alternative that the Commonwealth Parliament relies.

The process begins, in most cases, when the House of Representatives acts on whatever amendments the Senate has made to a bill that the House had passed



previously. From this point on, the parliamentary possibilities and procedural permutations become dauntingly complex.<sup>14</sup>

To summarize the primary possibilities, the House of Representatives can react to an amendment of the Senate by agreeing to it, by amending it with a relevant amendment of its own, by disagreeing to it, or by disagreeing to it and instead adopting a House amendment to the bill in place of the Senate amendment.<sup>15</sup> If the House does not simply agree to the Senate's amendment, it then is up to the Senate to react to the House's new amendment or its disagreement to the Senate's original amendment. For example, the Senate can insist or not insist on its amendment, or disagree to the new House amendment, or offer the House either a new Senate amendment to that House amendment or a new Senate amendment in lieu of its original amendment to the bill.<sup>16</sup> And so the process can continue for additional rounds, until the two houses reach agreement or deadlock, or until the opportunities for exchanging amendments and messages are exhausted.<sup>17</sup>

Some of these possibilities are illustrated by the following summary of action on the Australian Research Council Bill 2000 after the House of Representatives passed it and the Senate agreed to 11 amendments to it:<sup>18</sup>

House of Representatives disagreed to the amendments made by the Senate (7 December 2000).

Senate did not insist on its amendments nos 1, 2, 8 and 9 to which the House had disagreed; made amendments in place of amendments nos 1, 8 and 9; and insisted on amendments nos 3 to 7, 10 and 11 (8 February 2001).

<sup>14</sup>On this process generally, see Evans (2004, 252–8) and Harris (2005, 431–50).

<sup>15</sup>'A Senate amendment may be agreed to with or without amendment, agreed to with a consequential amendment, agreed to in part with a consequential amendment, agreed to with a modification, agreed to with a modification and a consequential amendment, disagreed to, or disagreed to but an amendment made in its place. An amendment to a Senate amendment may be made, as long as it is relevant to the Senate amendment' (Harris 2005, 433).

<sup>16</sup>'When an amendment made by the Senate to a bill received from the House of Representatives is modified by a subsequent amendment also made by the Senate, both amendments may be included in the schedule of amendments made by the Senate to the bill. The rationale of this is that the successive decisions of the Senate are taken to mean that, although the Senate wishes the first amendment to be made to the bill, it has a preference for the second amendment. The inclusion of both amendments in the schedule of amendments gives the government the options of agreeing to either or both amendments. This also provides greater flexibility for subsequent dealings between the two Houses on the matter. If the government in the House of Representatives agrees to the first amendment but disagrees with the modifying amendment, in effect it adopts the second preference of the Senate, the third preference being the relevant provision in the bill unamended. In effect, the government in that situation accepts part of the Senate's position. If the bill is returned to the Senate with only the first amendment agreed to, the Senate then may determine whether it accepts this partial adoption of its position or whether it will insist on its preferred position' (Evans 2004, 252).

<sup>17</sup>'Unlike the rule in standing order 127(1) relating to bills originating in the Senate, there is no limitation in the [Senate's] standing orders on the number of occasions on which the bill can be returned to the House of Representatives before the bill is laid aside or a conference with the House is sought' (Evans 2004, 258).

<sup>18</sup>*Business of the Senate* (2001, 85).



House insisted on disagreeing to amendments nos 3 to 7, 10 and 11 insisted on by the Senate; and disagreed to amendments made by the Senate in place of amendments nos 1, 8 and 9 (5 March 2001).

Senate insisted on its original amendments nos 4 to 7; did not insist on original amendments nos 3, 10, and 11 and agreed to a Government amendment in place of original amendment no. 3; and did not insist on the amendments which replaced original amendments nos 1, 8 and 9 and agreed to a Government amendment in place of replacement amendment no. 1 (7 March 2001).

House agreed to original Senate amendments nos 4 to 7; and agreed to amendments made by the Senate in place of replacement amendment no. 1 and original amendment no. 3 (8 March 2001).

Bill passed both Houses.

In this case, after the House disagreed to all 11 of the Senate's amendments, the Senate took three different kinds of actions. First, it immediately gave way on one amendment (no. 2) by not insisting on it. Second, it did insist on seven of its amendments (nos. 3, 4, 5, 6, 7, 10 and 11). And, third, it replaced the three remaining amendments (nos 1, 8 and 9) with different amendments. The House then remained adamant by insisting on its disagreement to the set of seven original amendments and disagreeing to the new set of three Senate replacement amendments.

In reaction to the House's continuing objections to its amendments, the Senate proceeded to drop four more amendments (nos 10 and 11 of its original amendments and the amendments it had adopted to replace amendments nos 8 and 9). That left six Senate amendments at issue. The Senate continued to insist on four of them (nos 4, 5, 6 and 7). With respect to the two remaining amendments (its original amendment no. 3 and its replacement amendment for its original amendment no. 1), the Senate agreed to a government amendment in place of each of them. The House then completed the process by agreeing to these two new replacement amendments and by finally agreeing to the four original Senate amendments on which the Senate had refused to budge. The bill now could become law.

This example does not exhaust the possibilities of what can be the most complex stage of the legislative process. (There are a similar but lesser range of possibilities that arise when the Senate requests the House to make an amendment to a money bill that the Senate cannot amend directly.<sup>19</sup>) We can cut through much of this complexity, however, by bearing in mind that when two groups of people want to reach agreement on something, they ultimately have only three choices: one must accept the position of the other or they must

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<sup>19</sup>When the House fails to make an amendment that the Senate has requested, the Senate's options are to press or not press the request. There is no House amendment to which the Senate can agree, disagree, amend or replace. On this distinction and the Senate's claim of the right to press requests, see Evans (2004, 305–7). For a more critical analysis of the same claim, see Harris (2005, 441–7).



agree on a third position instead. From this trinity of choices, we can specify four assumptions on which the next stage of this analysis will rely:

1. When the House agrees to a Senate amendment, that signifies that the government finds the amendment acceptable; for example, because it may do some good or at least it will do no material harm, or because it was part or all of the price that the government already had agreed to pay in order to secure Senate passage of the bill.
2. When the House agrees to a House amendment to a Senate amendment or a House amendment to the bill in place of the Senate amendment, that action signifies that the government prefers not to accept the Senate's amendment but also that it prefers to negotiate instead of fighting over the issue.<sup>20</sup> The House does not disagree to the Senate amendment with the hope that the Senate then will drop it by failing to insist on it. Instead, the House proposes an alternative that, in the normal course of events, we can expect to be a middle ground of sorts between the government's original position, as embodied in the bill as passed by the House, and the Senate's position, as embodied in its original amendment. (See the fourth assumption, given below.)<sup>21</sup>
3. When the House simply disagrees to a Senate amendment (without also proposing an amendment to it or an amendment in its place), that action signifies the government's strong preference for the relevant provision of the original House bill and its opposition to the Senate's proposed change. In this case, the House is willing to fight instead of negotiating, although it may have to agree to a negotiated resolution of the disagreement at a later stage of the process. Most important, if the House disagrees to a Senate amendment and, at a subsequent stage, either accepts that amendment or a later House or Senate replacement for it, we can reasonably infer that the Senate has compelled the House of Representatives to accept a change in legislation that it and the government actively sought to avoid making.<sup>22</sup>
4. Underlying the second and third assumptions is a final one that needs to be explicit and to stand separately: that when either the House of Representatives or the Senate amends (or adopts a replacement for) an amendment proposed by the other, that new amendment is assumed to be offered as a compromise between the immediately prior positions of each house. This assumption is necessary to the argument that when the House and government disagree to a Senate amendment and then accept an alternative for it, they have given ground involuntarily and as a result of the Senate's insistence that the bill, as passed initially by the House of Representatives, be changed. This assumption is eminently reasonable because it would rarely serve any useful purpose for either the Senate or the

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<sup>20</sup>The House amendment also may constitute a further refinement of a Senate amendment that the government had moved in the Senate at its own initiative to improve or correct its bill.

<sup>21</sup>If the Senate does not respond by giving way on the amendment, the House retains the opportunity to disagree to the amendment at a later stage.

<sup>22</sup>The amendment in question may be one that the government allowed to pass the Senate on the voices, with the intention already in mind of asking the House to reject it and hoping the Senate then will give way.



House of Representatives to conduct negotiations by proposing a position that is presumptively more objectionable to the other house than its previous one.

Under these assumptions, we look for evidence that the process of reaching legislative agreement between the two houses results in unwelcome changes in government legislation when the House of Representatives first disagrees to a Senate amendment without also proposing an alternative.<sup>23</sup> We assume that when the House responds to a Senate amendment by agreeing to an amendment to it or a replacement amendment for it, the House (which is acting for the government) does so because it is willing to accommodate the Senate position in some way and to some degree. If the House and government were unwilling to do so, we would expect that the House first would just disagree to the Senate amendment in the hope that the Senate might not insist on it, and that the House might propose an alternative to the Senate amendment only after the Senate had insisted on it.

We also assume that when the House of Representatives first acts on a Senate amendment only by disagreeing to it and then, at a later stage, either agrees to the same Senate amendment or agrees to an amendment to it (or a replacement amendment for it), the House and government do so because otherwise their bill may not become law. We make the same assumption when the Senate rejects a House amendment to (or a House replacement amendment for) a Senate amendment, and the House ultimately gives way by accepting the original Senate amendment.<sup>24</sup> In these cases, we conclude that there is evidence of the Senate compelling the government, acting through the House of Representatives, to accept changes in its legislation that it preferred not to make and that it sought to avoid making.

The strength of the analysis to follow depends on the strength of these assumptions. We shall proceed on the premise that they will hold in the overwhelming majority of cases and, therefore, are an acceptable basis on which to draw inferences about the political implications of how the two houses deal with Senate amendments. It should be appreciated, however, that the result of this analysis is a conservative estimate of the Senate's legislative influence for two reasons: first, because of the unknowable number of amendments that the government believed it had to accept in the Senate if its bill was to pass both houses in the first place; and second, because of the unidentifiable instances in which the House's failure to disagree to Senate amendments disguised the government's strong objection to them.

### **Do the Two Houses Disagree?**

From the Senate's annual publication, *Business of the Senate*, data relating to the disposition of Senate amendments to government bills from the House of Representatives, and Senate requests for House amendments to such bills, have

<sup>23</sup>These changes are in addition to whatever changes in its bill that the government thought it was compelled to make in order to secure Senate passage of the bill in the first place.

<sup>24</sup>Or when the Senate amends a House amendment to, or a House replacement amendment for, an original Senate amendment, and the House then adopts that later Senate amendment.



been gathered for the 12-year period from the beginning of the Howard ministry in 1996 through to the end of 2007, a period that includes 2.5 years after the government gained control of the Senate in mid-2005.<sup>25</sup>

Table 1 presents data on Senate amendments (and requests for amendments) to House-passed bills, and documents that large majorities of government bills passed through the Senate without being amended at all. For the first nine years of the period, these data are consistent with the data presented earlier for the first six of these years and for somewhat different sets of bills and amendments. Of the House-passed bills on which it acted during 1996–2004, the Senate passed between 62.0 and 75.7 per cent of them without any amendments or requests. To put it differently, the Senate approved amendments or requests to as few as 24.3 per cent of the House bills it passed (in 2002) and to a maximum of 38.0 per cent of those bills (in the following year, 2003). The average number of amendments to which the Senate agreed during its consideration of House-passed bills ranged from 3.0 in 2002 to 6.3 in 2003. Not surprisingly, Senate amendments were far more common than Senate requests for amendments, which relate only to those money bills that the Senate is constitutionally barred from amending directly. In none of the nine years did the Senate request amendments to more than 14 bills, and in no other year did this total exceed ten bills.

The record for 2005–07 is different. During those three years, the Senate passed 88.1 per cent of House-passed bills without any proposed changes. In 2006, in fact, the Senate approved amendments to only five House-passed bills, and the Senate requested no amendments at all. During the three years, the total number of agreed Senate amendments to House-passed bills dropped markedly in comparison to the nine preceding years, as did the average number of such amendments to the same bills – to less than one amendment per House-passed bill in 2006 and 2.2 such amendments in 2007. The government regained majority control of the Senate in the middle of 2005, so a year-by-year analysis cannot capture accurately what difference this change of control may have made. In a later section, we will break the data for 2005 into two halves in order

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<sup>25</sup>Specifically, the data for 1996–2006 have been gleaned from the sections on ‘Details of Bills’ and ‘Amendments and requests – Disagreements’. Data for 2007 have been taken from the *Bills List*, as of 15 October 2007, compiled by the Senate Table Office after the prorogation of Parliament in anticipation of the 2007 election. This list is to be incorporated in the 2007 edition of *Business of the Senate* as the basis for the two sections of that publication from which all the other data have been drawn. Excluded from this analysis are Senate bills as well as Private Members’ and Private Senators’ bills. The bills included are House bills that the Senate passed and, when necessary, returned to the House for further action. In most cases, these bills were enacted, but the analysis also includes the small number of bills that the House of Representatives or the Senate laid aside or on which one house or the other took no further action. With regard to amendments, the analysis encompasses only those amendments that the Senate passed in Committee of the Whole, and does not include amendments to those amendments, or second reading amendments, or others, such as on a motion that a report of the Committee of the Whole be adopted. To make the analysis manageable and understandable, House amendments to Senate amendments and House amendments to bills in lieu of Senate amendments are treated together. Clauses and items that the Senate negatived in Committee of the Whole are included here, but were not included in the analysis of amendments in Bach (2003) and, therefore, in the data from it that were cited above. The analysis of the disposition of Senate amendments is restricted only to Senate amendments adopted during its initial consideration of bills, and does not include amendments that the Senate adopted during subsequent stages of the process by which it sought to reach agreement with the House of Representatives.



Table 1. Senate passage of House bills, 1996–2007<sup>a</sup>

	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Number of House bills that the Senate passed	70	214	128	186	173	149	144	150	143	142	77	166
Number of such bills passed without any amendments or requests	52	140	88	121	114	111	109	93	98	117	72	146
Number of such bills passed with proposed changes <sup>b</sup>	18	74	40	65	59	38	35	57	45	25	5	20
Number passed with amendment(s) only <sup>c</sup>	14	60	33	55	51	33	33	53	40	23	5	18
Number passed with requests(s) only	1	10	4	1	2	5	2	1	0	1	0	1
Number passed with amendment(s) and request(s)	3	4	3	9	6	0	0	3	5	1	0	1
Percentage of such bills passed without any amendments or requests	74.3	65.4	68.8	65.1	65.9	74.5	75.7	62.0	68.5	82.4	93.5	88.0
Percentage of such bills passed with proposed changes:	25.7	34.6	31.2	34.9	34.1	25.5	24.3	38.0	31.5	17.6	6.5	12.0
Percentage passed with amendments(s) only	20.0	28.0	25.8	29.6	29.5	22.1	22.9	35.3	28.0	16.2	6.5	10.8
Percentage passed with requests(s) only	1.4	4.7	3.1	0.5	1.2	3.4	1.4	0.7	—	0.7	—	0.6
Percentage passed with amendment(s) and request(s)	4.3	1.9	2.3	4.8	3.5	—	—	2.0	3.5	0.7	—	0.6
Total number of amendments to such bills	399 <sup>d</sup>	1284 <sup>e</sup>	796 <sup>f</sup>	997 <sup>g</sup>	756	721 <sup>h</sup>	432	949 <sup>i</sup>	774	620 <sup>j</sup>	71	372
Average number of Senate amendments passed per bill	5.8	6.0	6.2	5.4	4.4	4.8	3.0	6.3	5.4	4.4	0.9	2.2

<sup>a</sup>Includes the few bills passed by both houses but not enacted. Also includes bills that the Senate returned to the House of Representatives with requests for amendments before third reading of the bills in the Senate.

<sup>b</sup>Includes only Senate amendments and requests that were adopted during the Senate's initial consideration of House bills on which the Senate completed action.

<sup>c</sup>Includes schedules, items, clauses, and parts that were negotiated.

<sup>d</sup>180 of the amendments were to the Workplace Relations and Other Legislation Amendment Bill 1996.

<sup>e</sup>Amendments to three bills accounted for 45.6% of the total.

<sup>f</sup>222 of the amendments were to what became the Native Title Amendment Act 1998.

<sup>g</sup>Amendments to four bills accounted for 51.6% of the total.

<sup>h</sup>Amendments to two bills accounted for 43.5% of the total.

<sup>i</sup>Amendments to four bills accounted for 42.8% of the total.

<sup>j</sup>56.0% of the amendments were to the Workplace Relations Amendment (Work Choices) Bill 2005.



to compare the record of the Senate under non-government control from 1996 through June 2005 and then under government control from July 2005 through the end of 2007.

The data in Table 1 reveal that, although it was not unusual for the Senate to approve amendments to House bills, far larger percentages of such bills survived Senate passage each year without any proposed changes. Even the government found no need to propose amendments in the Senate to more than 60 per cent of its bills that had originated in the House during any of the years between 1996 and 2007. Furthermore, as the notes accompanying this table indicate, Senate amending activity often was concentrated on only one or a small handful of the most contentious House bills. For this reason, the data presented on the average number of Senate amendments passed per House bill are somewhat misleading; the number of Senate amendments to the average House bill was far smaller. Our interest here is primarily in the fate of amendments that the Senate adopted to bills it had received from the House. Before continuing, though, it is important to emphasize once again that there were no such amendments to most of the House bills that the Senate passed.

How did the House of Representatives respond to the amendments to its bills that it did receive from the Senate? In most cases, as Table 2 indicates, the House agreed to them.<sup>26</sup> During each of the nine full years of non-government control of the Senate during this period, the House approved a majority of the Senate's amendments in each year, and in only one year (2002) did that percentage fall below 64 per cent.

For the reasons discussed already, we must be reluctant to find in these data conclusive evidence of the Senate's legislative influence. We know that, for the 1996–2001 period, the government proposed no fewer than 43.2 per cent (in 2000) and as much as 77.0 per cent (in 1999) of all the amendments to which the Senate agreed.<sup>27</sup> However, there is no convenient way to discover which of the Senate amendments that the House accepted had been moved by the government in the Senate.<sup>28</sup> Strictly speaking, we lack the evidence to link the large percentages of successful Senate amendments that were moved by the government to the even larger percentages of Senate amendments to which the House agreed initially. If we fall back on common sense, however, it certainly is reasonable to presume, absent evidence to the contrary, that many or perhaps

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<sup>26</sup>No reasonably parsimonious coding scheme can account precisely and fully for all the procedural possibilities and permutations that can arise as the House of Representatives and the Senate do or do not reach agreement on bills. Inevitably, some judgment calls also have been necessary in the process of compiling the data presented here; in some cases, another analyst might well make some different judgments. So, although data are presented here with apparent quantitative precision, it should be understood that a re-compilation of the same data from the same primary sources might produce slightly different results.

<sup>27</sup>Bach (2003, 218) and accompanying notes. Again, it should be remembered that these data are not based on precisely the same sets of bills and amendments.

<sup>28</sup>The Senate's *Business of the Senate* reveals, for each bill, how many amendments the Senate approved that were moved by the government, the Opposition, each minor party, and each Independent Senator, respectively, and it also reveals how the House disposed of each Senate amendment. However, it does not distinguish between how the House disposed of Senate amendments from the government as opposed to Senate amendments from other parties and the Independents. Developing this information would require a bill-by-bill review of parliamentary records.



Table 2. Initial House action on Senate amendments

	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Number of Senate amendments: <sup>a</sup>												
To which the House initially agreed	374	917	562	772	536	646	233	614	526	494	71	358 <sup>b</sup>
That the House initially amended or replaced <sup>c</sup>	0	11	5	4	24	47	61	51	15	2	0	0
To which the House initially disagreed	25	165	104	221	111	25	122	284	233	42	0	0
On which the House laid the bill aside or reported the message on the bill but took no other action	0	191	125	0	85	3	16	0	0	82	0	14
Percentage of Senate amendments:												
To which the House initially agreed	93.7	71.4	70.6	77.4	70.9	89.6	53.9	64.7	68.0	79.7	100.0	96.2
That the House initially amended or replaced	—	0.9	0.6	0.4	3.2	6.5	14.1	5.4	1.9	0.3	—	—
To which the House initially disagreed	6.3	12.8	13.1	22.2	14.7	3.5	28.2	29.9	30.1	6.8	—	—
On which the House laid the bill aside or reported the message on the bill but took no other action	—	14.9	15.7	—	11.2	0.4	3.7	—	—	13.2	—	3.8

<sup>a</sup>Includes only Senate amendments that were adopted during the Senate's initial consideration of House bills that the Senate then passed.  
<sup>b</sup>In one instance, the House disagreed to one Senate amendment but then replaced it with an *identical* House amendment to which the Senate then agreed. To treat this as an instance of the House disagreeing to a Senate amendment would be to elevate form over substance.  
<sup>c</sup>Includes amendments that the House adopted to replace Senate amendments after the House first disagreed to those Senate amendments.



most of the Senate amendments that the House accepted without change or disagreement were amendments that the government itself had moved in the Senate.

Table 2 focuses our attention on the minority of Senate amendments to which the House did not agree initially. In a few cases, the Senate's action on a House-passed bill apparently caused the government to so despair of reaching any acceptable agreement with the Senate that the House either laid the bill aside or took no further action on it at all, thereby allowing it to die.<sup>29</sup> That is evidence of the Senate's ability to veto proposed legislation – a powerful form of legislative influence, to be sure, but influence of an entirely negative sort. Of more interest are the Senate amendments to which the House disagreed or that the House amended or replaced with alternative amendments of its own. The House was much more likely to take the former action than the latter. In all but one of the nine years between 1996 and 2004, the House disagreed to far more Senate amendments than it replaced. This ratio was 2 : 1 in 2002 and was many times greater than that in the other seven years.

In 1999, to take an extreme case, the House disagreed to 221 Senate amendments while amending or replacing only four. In all the other years but one (2001), the ratios were different but the pattern was clearly the same. When the House chose not to agree to a Senate amendment, its consistent inclination during recent years was to fight, not to negotiate – to disagree to a Senate amendment, presumably in the hope that the Senate would abandon it, and not to amend the Senate amendment or replace it with an alternative House amendment that the Senate might accept instead of its amendment, or that might lead to a mutually agreeable compromise. (This choice did not arise in 2006 or 2007 because the House did not amend, replace, or disagree to any of the amendments to its bills that it received from the Senate during those years.<sup>30</sup>)

In Table 2, the unit of analysis is the individual Senate amendment and how the House acted on it. Table 3 addresses much the same topic in a different way by taking as its unit of analysis each House bill that the Senate returned to the House with one or more amendments.

If we again set aside the years 2005, 2006 and 2007 for later consideration, Table 3 confirms that, even during the other nine years when the government lacked a voting majority in the Senate, the clear tendency of the House was to agree to the Senate's amendments to the House's bills. When the Senate returned House bills with one or more amendments, the House responded most often by agreeing to *all* those amendments. In each of the nine years, the House did so more than half the time. In five of those years, the percentages ranged from more than 69.7 per cent to almost 90 per cent. When we combine instances in which the House agreed to all Senate amendments to its bills with instances in which the House agreed to some of those amendments, we find that in all but one year between 1996 through 2004, the House accepted Senate amendments

<sup>29</sup>These tended to be bills to which the Senate had approved numerous amendments. This action does not preclude the possibility of such a bill being enacted in a subsequent year.

<sup>30</sup>In one 2007 instance, the House laid a bill aside after receiving it back from the Senate with 14 amendments. Also in that year, the House actually did disagree formally to one Senate amendment, but the House then proceeded to replace that amendment with an *identical* House amendment.



Table 3. Initial House action on bills returned from the Senate with amendments

	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Number of such bills on which the House initially: <sup>a</sup>												
Agreed to all Senate amendments <sup>b</sup>	15	43	26	50	33	23	19	33	23	15	5	18 <sup>c</sup>
Agreed to some but not all Senate amendments	1	11	4	10	7	1	6	7	5	2	0	0
Disagreed to all Senate amendments	1	5	1	2	6	5	4	16	16	5	0	0
Disagreed to some but not all Senate amendments	1	9	2	9	6	2	7	7	5	1	0	0
Replaced or amended all Senate amendments	0	0	1	1	3	1	0	0	1	0	0	0
Replaced or amended some but not all Senate amendments	0	2	2	3	4	2	3	2	1	1	0	0
On which the House laid the bill aside or reported the message on the bill but took no further action	0	0	4	0	5	1	3	0	0	2	0	1
Percentage of such bills on which the House initially: <sup>d</sup>												
Agreed to all Senate amendments	88.2	75.0	72.2	78.1	57.9	69.7	57.6	58.9	51.1	62.5	100.0	94.7
Agreed to some but not all Senate amendments	5.9	17.2	11.1	15.6	12.3	3.0	18.2	12.5	11.1	8.3	-	-
Disagreed to all Senate amendments	5.9	7.8	2.8	3.1	10.5	15.1	12.1	28.6	35.6	20.8	-	-
Disagreed to some but not all Senate amendments	5.9	14.1	5.6	14.1	10.5	6.1	21.2	12.5	11.1	4.2	-	-
Replaced or amended all Senate amendments	-	-	2.8	1.6	5.3	3.0	-	-	2.2	-	-	-
Replaced or amended some but not all Senate amendments	-	3.1	5.6	4.7	7.0	6.1	9.1	3.6	2.2	4.2	-	-
On which the House laid the bill aside or reported the message on the bill but took no action	-	-	11.1	-	8.8	3.0	9.1	-	-	8.3	-	5.3

<sup>a</sup>These categories are not all mutually exclusive. In 1996, for example, there was one instance in which the House agreed to some Senate amendments to a bill but disagreed to the other amendments. In that case, the bill was recorded as one to which the House 'agreed to some but not all Senate amendments' and also one to which the House 'disagreed to some but not all Senate amendments'. Each of those rows also would include instances in which the House agreed (or disagreed) to some Senate amendments, but replaced or amended the others. In the case of the Native Title Amendment Bill 1996, the Senate returned it to the House with 218 amendments. The House proceeded to agree to 125 of the amendments and disagree to the remaining 93 amendments; then the House lay the bill aside. So, in this case, the House agreed to some but not all Senate amendments and disagreed to some but not all Senate amendments, and also laid the bill aside. This bill was recorded in all three categories above.

<sup>b</sup>Includes only Senate amendments that were adopted during the Senate's initial consideration of House bills that the Senate then passed.

<sup>c</sup>In one instance, the House disagreed to one Senate amendment but then replaced it with an *identical* House amendment to which the Senate then agreed. To treat this as an instance of the House disagreeing to a Senate amendment would be to elevate form over substance.

<sup>d</sup>For the reasons identified in footnote no. 1, these percentages do not necessarily add to 100%.

to at least 70 per cent of the House bills that the Senate had amended, with highs of more than 90 per cent in 1996, 1997 and 1999.

During the nine-year period, the Senate passed a total of 405 House bills with one or more amendments.<sup>31</sup> The House responded by agreeing to all the Senate's amendments to those bills almost two-thirds of the time (65.4 per cent); the House agreed to at least some of the Senate amendments 78.3 per cent of the time. What of the relatively few remaining bills? Table 3 confirms the findings from Table 2. In only seven instances over nine years did the House respond to all of the Senate's amendments with amendments of its own; in a total of only 26 instances (6.4 per cent of the total) did the House propose to amend or replace any of the Senate amendments.

When the House failed to approve all the Senate's amendments, it was most likely to disagree to them instead. If we look only at the 140 instances in which the House did not accept all of the Senate's amendments, the House disagreed to all those amendments 40.0 per cent of the time, and it disagreed to at least some of those amendments 74.3 per cent of the time. By contrast, the House proposed to amend or replace one or more Senate amendments in only 18.6 per cent of the instances in which it declined to agree to all the Senate's amendments.

To summarize, these data point to four conclusions. First, the Senate approved most House-passed bills without any amendments or requests. In other words, bicameral legislative agreement was reached most often by the Senate approving legislation from the House of Representatives without change. Second, the House agreed to most amendments that the Senate did make. Third, and consequently, the two houses avoided legislative disagreement most often by the House accepting the Senate's amendments to its bills. And fourth, when the House did not agree to the Senate's amendments, it usually disagreed to them instead of amending or replacing them. Most amendments that the Senate made to House bills would seem to have been either friendly amendments, in that they were amendments that the government proposed, or politically necessary amendments, in that they were amendments that the government already had agreed to accept. When the House was presented with Senate amendments that the government would not accept, the House was much more inclined to reject them (or even to allow bills to die) than to open negotiations with the Senate by proposing alternatives to the Senate's amendments.

### **When the House Does Not Agree**

When the House amends or replaces a Senate amendment, this is an invitation to negotiation. When, instead, the House disagrees to a Senate amendment without also proposing an alternative, this is an invitation to deadlock. It is fair to assume that the government sought enactment of all the House-passed bills included in this analysis. (Private Members' bills are not included.) So it is particularly striking that, when the government could not accept the Senate's

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<sup>31</sup>This includes bills passed with both amendments and requests.



amendments, its preferred recourse was to disagree to them. The next step in this analysis, therefore, must be to ask how the Senate reacted to House messages announcing that it had disagreed to one or more Senate amendments or, less often, that it had agreed to alternatives to one or more Senate amendments.

First, consider the 27 instances over the entire span of 12 years in which the House proposed alternatives to one or more Senate amendments to a House-passed bill. In fully three-quarters of those cases (21 of 27, or 77.8 per cent), the Senate responded by agreeing to the House's amendment or all its amendments. Only twice did the Senate disagree to some or all of the House's amendments and insist on its own original amendments to the House bill.<sup>32</sup>

There are several possible explanations for these findings. For example, the House alternatives to the Senate amendments may have reflected a process of informal bicameral (or Senate-government) negotiation that produced agreements acceptable to majorities in both houses, so that the Senate's formal acceptance of them was a foregone conclusion. Or perhaps the Senate may have welcomed any concessions that the government was prepared to make and that were embodied in the House's alternative amendments. Some of these House amendments even may have been technical amendments intended only to improve the way in which government bills were drafted. The data do not permit us to distinguish among such possible explanations, nor do they enable us to gauge how different the House's alternative amendments, to which the Senate agreed, were from the corresponding provisions of the original House-passed bills.

Second, consider the 104 instances between 1996 and 2004 in which the House disagreed to one or more Senate amendments. In seven of the nine years, the Senate decided in at least half the cases not to insist on any of its amendments. Although there is considerable year-by-year variation, as Table 4 indicates, the striking fact is that more than half of the time (actually, 57.7 per cent), the Senate gave way entirely when the House disagreed to any of the Senate's amendments to House bills. Almost 70 per cent of the time, the Senate decided not to insist on at least some of its amendments. On only ten occasions (9.6 per cent of the total) did the Senate propose its own alternatives to any of its original amendments to which the House had disagreed. Almost twice that often the Senate insisted on all its amendments.

We cannot say that the Senate routinely gave way whenever the House objected to its amendments. Nonetheless, the Senate was three times as likely not to insist on any of its amendments as it was to insist on all of them. It bears repeating that the bills covered by this analysis presumably were more important to the government that conceived them, and to its majority in the House that first passed them, than to the Senate with its non-government majorities throughout these years. So it would seem that the Senate would have put less at risk if it had stood firm behind its amendments – in effect warning the government that it might lose its bills altogether if it refused to accept the Senate's amendments or acceptable alternatives to them. Yet, it was the House that consistently demonstrated more determination when confronted with

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<sup>32</sup>The numbers and frequencies are too limited to necessitate tabular presentation.

Table 4. Initial Senate responses to House disagreements to Senate amendments

	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Number of instances in which the Senate: <sup>a</sup>												
Insisted on its amendments	0	4	0	2	2	2	3	3	3	1	0	0
Insisted on some but not all of its amendments	0	2	0	3	2	2	1	2	1	0	0	0
Did not insist on any of its amendments <sup>b</sup>	0	7	2	6	7	3	7	15	13	5	0	0
Agreed to new amendments to replace all of its original Amendments <sup>c</sup>	1	0	0	1	0	1	0	0	3	0	0	0
Agreed to new amendments to replace some but not all of its original amendments	0	0	0	1	1	1	0	0	1	0	0	0
Reported message but took no further action	1	1	1	1	2	0	0	3	1	0	0	0
Percentage of instances in which the Senate:												
Insisted on its amendments	-	28.6	-	18.2	16.7	28.6	27.3	13.0	14.3	16.7	-	-
Insisted on some but not all of its amendments	-	14.3	-	27.3	16.7	28.6	9.1	8.7	4.8	-	-	-
Did not insist on any of its amendments	-	50.0	66.7	54.5	58.3	42.9	63.6	65.2	61.9	83.3	-	-
Agreed to new amendments to replace all of its original amendments	50.0	-	-	9.1	-	14.3	-	-	14.3	-	-	-
Agreed to new amendments to replace some but not all of its original amendments	-	-	-	9.1	8.3	14.3	-	-	4.8	-	-	-
Reported message but took no further action	50.0	7.1	33.3	9.1	16.7	-	-	13.0	4.8	-	-	-

<sup>a</sup>These categories are not all mutually exclusive. After the House disagrees to a set of Senate amendments, the Senate can, for example, insist on some but not all of those amendments and also agree to new amendments to replace some but not all of its original amendments. For instance, after the House disagreed to all the Senate's 11 amendments to the Australian Research Council Bill 2000, the Senate insisted on seven of those amendments, made amendments in place of three others, and did not insist on the remaining amendment.

<sup>b</sup>Includes instances in which the Senate first insisted on its amendments and then, after the House insisted on disagreeing, did not insist further.

<sup>c</sup>Includes instances in which the Senate insisted on its amendments, the House insisted on disagreeing to those amendments, and the Senate then made new amendments instead of its original amendments.



Senate amendments, and it was the Senate that was far more likely to withdraw from confrontation.

Again, to summarize: when the House did amend or replace Senate amendments, the Senate almost always agreed to those House amendments; and when the House disagreed to one or more Senate amendments, more often than not the Senate gave way instead of either insisting on its amendments or proposing alternatives to them for the House to consider (or some combination of the two).

We can carry this analysis one step further by turning to Table 5, which once again takes the individual amendment as the unit of analysis and asks about the ultimate fate of the Senate's amendments to which the House disagreed. The first thing to be noted is the large number of amendments that failed of enactment when the Senate and the government (or, formally, the Senate and the House) failed to reach agreement on the bills to which they were attached. As noted before, this certainly is evidence of the Senate's legislative influence, but not of its ability to shape the content of newly-enacted laws.<sup>33</sup> As these data document, the Senate sometimes has exercised a veto over new legislation, although it also should be noted that recent governments apparently have appreciated the advantage of having one or more bills fail of enactment and thereby begin to qualify as constitutionally required triggers for double dissolutions.

If we wish to focus, however, on the Senate's ability to compel the government to compromise in the process of enacting its legislative agenda, then we may put aside these instances of failure to enact bills and concentrate on the ultimate fate of Senate amendments to bills that did become law. From this perspective, Table 5 reveals that, over the course of the nine years from 1996 through 2004, the Senate ultimately gave way to the House on 82.7 per cent of these amendments to which the House had disagreed.<sup>34</sup> Once again, there were significant year-to-year variations, but only in 2001 were most bicameral disagreements resolved in some way other than by the Senate giving way to the House. In four of the nine years, the Senate ultimately did not insist on more than 90 per cent of its amendments to which the House had disagreed.<sup>35</sup>

As just noted, the House was successful in fending off fully 80 per cent of the Senate amendments to which the government had disagreed when the House first received those amendments from the Senate. The remaining one-fifth (actually, 17.3 per cent) of these amendments, therefore, would seem to represent instances in which the Senate has exerted legislative influence by compelling the government to accept legislative changes that it would not

<sup>33</sup>This does not take account of the possibilities that: (1) a bill that failed of enactment in one year might be revisited and enacted later during the same parliament; or (2) the death of a bill can inspire the government to propose a new bill on the same subject and to be more amenable to Senate amendments to it in order to protect that bill against encountering the same fate.

<sup>34</sup>This includes instances in which the Senate first insisted on its amendments after the House had disagreed to them, but then ultimately failed to insist on the same amendments when the House continued to disagree to them.

<sup>35</sup>According to one close observer of the Senate, the Opposition sometimes would give its support initially to Australian Democrat amendments in the Senate, but then give way if and when the House disagreed to them. In these and perhaps other cases, the Opposition may have been motivated, at least in part, by a desire to avoid having bills become double dissolution triggers.



**Table 5.** The fate of Senate amendments to which the House of Representatives disagreed<sup>a</sup>

	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Number of such amendments:												
To which the House subsequently agreed	0	9	0	6	12	8	3	5	74 <sup>b</sup>	0	0	0
On which the Senate did not insist	0	107	101	33	76	9	52	180	142	42	0	0
That provoked alternate House or Senate amendments on which the House and Senate agreed <sup>c</sup>	1	0	0	1	8	8	0	0	11	0	0	0
On which the House and Senate failed to agree (and the bill was not enacted)	24	240	128	181 <sup>d</sup>	100	3	90	99	6	82	0	1
Percentage of such amendments:												
To which the House subsequently agreed	-	2.5	-	2.7	6.1	28.6	2.1	1.8	31.8	-	-	-
On which the Senate did not insist	-	30.1	44.1	14.9	38.8	32.1	35.9	63.4	60.9	33.9	-	-
That provoked alternate House or Senate amendments on which the House and Senate agreed	4.0	-	-	0.4	4.1	28.6	-	-	4.7	-	-	-
On which the House and Senate failed to agree (and the bill was not enacted)	96.0	67.4	55.9	81.9	51.0	10.7	62.1	34.9	2.6	66.1	-	100.0

<sup>a</sup>Includes only Senate amendments that were adopted during the Senate's initial consideration of House bills that the Senate then passed. Includes only instances in which initially the House only disagreed to Senate amendments; does not include instances in which the House initially disagreed to Senate amendments and also amended them or replaced them with its own House amendments. Also includes: (1) instances in which the House reported the Senate's message, transmitting its amendments or insisting on its amendments, but the House took no further action; and (2) instances in which the House replaced or amended Senate amendments but the Senate then insisted on its original amendments.

<sup>b</sup>All to one bill.

<sup>c</sup>The number of amendments to which the Senate and House ultimately agreed may be larger or smaller than the number of the Senate's initial amendments to the House bill. Includes instances in which the Senate approved one or more requests in place of one or more Senate amendments to which the House had disagreed.

<sup>d</sup>Amendments to one bill accounted for 87.8% of the total.



otherwise have made – in addition to whatever changes were made before initial passage by the Senate. Putting aside the year-to-year variation for which there were many possible causes and looking at all the Senate amendments to which the House disagreed between 1996 and 2004, we find that the House eventually agreed to 13.8 per cent of the Senate amendments to which the House initially had disagreed – plausibly, instances of the Senate insisting successfully on its amendments – and that a mere 3.4 per cent of the Senate’s amendments to which the House had disagreed led to alternative House or Senate amendments on which the two houses were able to agree.

In short, we have found evidence that, during the process of reaching bicameral agreement, the Senate apparently has had some success in compelling changes in government legislation that the government did not welcome.<sup>36</sup> But we also have found evidence that, far more often, the Senate has failed to insist on amendments to which the House objected. It probably is fair to conclude, therefore, that, during 1996–2004, the Senate had considerably more legislative influence than the government would have liked, but considerably less legislative influence than the Senate might have had if it had been more determined to exercise its constitutional legislative powers to their fullest.<sup>37</sup>

We also have here some intriguing evidence suggesting, without demonstrating conclusively, that there has been a zero-sum quality to the legislative process in Canberra. When the House has disagreed to Senate amendments, the result, with very few exceptions, has been that the House has prevailed or the Senate has prevailed (or that the bill has died). Either the Senate has failed to insist on its amendments or the House has agreed to them eventually (after disagreeing to them initially), and the Senate has given way far more often than the House. What rarely seems to have occurred is a process leading to votes in both houses on agreeing to alternatives to, and presumably compromises between, the initial positions of the House and Senate.

The Senate’s evident reluctance to stand firm in support of more of its amendments may be attributable, in part, to long-term strategic calculations made by the Opposition and the other Senators who joined to pass those amendments in the first place. The Opposition, whatever its political complexion, undoubtedly thinks of itself most of the time as the government-in-waiting, and may even believe that its natural place is in government. If so, the Opposition of today may fear that, if it displays determination or intransigence in pressing for its legislative amendments now, it will thereby create a precedent that soon will come back to haunt it when it again becomes the governing party. Similarly, minor party and independent senators may have their own fear: that if their insistence on Senate amendments allows the government to blame them for the failure of bills to pass, the voters may penalize them at the next election.

<sup>36</sup>It bears repeating that we have been assuming that when the House has accepted, amended or replaced a Senate amendment, it has thereby agreed to change its legislation more or less willingly. Undoubtedly, there have been instances in which this assumption does not hold.

<sup>37</sup>This last observation must be tempered by a reminder that these findings apply only to House and Senate actions that took place after the Senate already had passed the House’s bills. The findings do not reflect whatever concessions the government made in the form of amendments that it accepted (or did not oppose) in order to assemble the majorities it needed in order to secure Senate passage of its bills in the first place. So, the data presented here can tell only part of the story.



If so, the members of a non-government coalition that secures Senate passage of an amendment may be satisfied with staking out their position and perhaps embarrassing the government in the process, and less concerned with pressing for enactment of the amendment into law.

More generally, the pattern of Senate acquiescence that we have observed 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. From Federation to the present, the prevalent understanding seems to have been that, at its heart, the Australian political system is parliamentary in nature – that it owes its essential character to Westminster, notwithstanding the existence of an elected Senate with almost the same legislative powers as the House of Representatives. With this in mind, 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 what the Senate's appropriate role in the legislative process should be.

Finally, it must be emphasized that there are important limits to what this kind of quantitative analysis can reveal. Notwithstanding the patterns of data that have been presented here, ministers might well say that, throughout this period, the Senate was a thorn in their collective foot as they sought to march their legislation to enactment. And, unquestionably, there have been instances when the Senate caused important legislative changes, delays and failures. The data suggest that these were more occasional than regular effects. If, however, the Senate's legislative influence was greatest on bills of the greatest importance, this quantitative approach may well understate the Senate's impact on national policy.

### **The Disposition of Senate Requests**

Before continuing, a short discussion is in order about the fate of Senate requests that the House make amendments to money bills that the Senate could not make for itself. This subject has been the source of some controversy and bicameral tension over the years. It would not be too much of an exaggeration to say that the House interprets the Constitution as giving it pre-eminence over money bills, and that the Senate asserts that the special constitutional provisions for enacting money bills are more differences of procedure than substance because no such bill can become law until Senate requests for amendments to the bill have been resolved in a manner that satisfies the Senate.<sup>38</sup>

Between 1996 and 2004, as Table 6 indicates, the Senate made a total of 244 requests for amendments, with their number varying from as few as two in 2002 to as many as 61 in 1997. The House agreed to make 197 of the requested amendments or 80.7 per cent of all those requested. In each of the nine years, the House made at least half the requested amendments (and in 1998, the House

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<sup>38</sup>This is not to attribute these positions to the House of Representatives and the Senate as collective bodies, but to summarize, in somewhat exaggerated form, the way in which requests are addressed in Harris (2005) and Evans (2004).



Table 6. The disposition of Senate requests<sup>a</sup>

	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Total number of requests that the Senate made	6	61	35	49	44	7	2	17	23	9	0	4
Total number of amendments that the House made at the request of the Senate <sup>b</sup>	5	45	35	48	35	5	1	9	14	6	0	4
Percentage of requested amendments that the House made	83.3	73.8	100.0	98.0	79.5	71.4	50.0	52.9	60.9	66.7	—	100.0
Number of instances in which:												
House made all the requested amendments	3	12	7	9	4	3	1	3	3	1	0	2
House made some but not all of the requested amendments	0	0	0	0	1	0	0	0	1	0	0	0
House made none of the requested amendments	1	2	0	1	4	1	1	1	1	1	0	0
House made different amendments to which the Senate agreed	0	0	0	0	2	1	0	0	0	0	0	0
Senate initially pressed some or all of its requests <sup>c</sup>	0	0	0	0	2	1	1	1 <sup>d</sup>	1	0	0	0
Senate initially did not press its requests <sup>e</sup>	1	2	0	1	3	1	0	0	1	1	0	0
Percentage of instances in which: <sup>f</sup>												
House made all the requested amendments	75.0	85.7	100.0	90.0	44.4	60.0	50.0	75.0	60.0	50.0	—	100.0
House made some but not all of the requested amendments	—	—	—	—	11.1	—	—	—	20.0	—	—	—
House made none of the requested amendments	25.0	14.3	—	10.0	44.4	20.0	50.0	—	20.0	50.0	—	—
House made different amendments to which the Senate agreed	—	—	—	—	22.2	20.0	—	25.0	—	—	—	—

<sup>a</sup>Includes only Senate requests that were adopted during the Senate's initial consideration of House bills on which the Senate completed action.  
<sup>b</sup>Includes House amendments made in place of amendments that the Senate had requested, if the Senate then agreed to the House amendments.  
<sup>c</sup>Subsequent to the House's initial decision not to make the requested amendments.  
<sup>d</sup>The House of Representatives reported the Senate message but took no further action on the bill.  
<sup>e</sup>Subsequent to the House's initial decision not to make the requested amendments. Includes instances in which the Senate either replaced its requested amendment or pressed its request for an amendment once or more before ultimately acquiescing in the House's decision not to make it.  
<sup>f</sup>These categories are not all mutually exclusive. For example, the House can make some but not all of the Senate's requested amendments, and then propose some different amendments to which the Senate may or may not agree. Therefore, the percentages need not add to 100%.

made all of them). If we ask instead about the bills that the Senate requested the House to amend in one or more respects, Table 6 reveals that only in one of the nine years did the House fail to make all the requested amendments at least half of the time. In five of the nine years, in fact, the House acquiesced in at least three-quarters of the instances in which the Senate requested one or more amendments. Furthermore, there were only six occasions during the nine-year period in which the Senate pressed its requests for one or more amendments that the House had declined to make (and nine instances in which the Senate did not). It would seem, therefore, that it must have been a matter of principle or at least the substantive importance, not the number, of the instances in which the Senate pressed its requests for amendments that has provoked bicameral tension over this practice.

### **The Senate Under Government Control**

The 2004 parliamentary elections put the Senate back in government hands for the first time since 1981 when the newly-elected Senators took their seats in July 2005. Some observers hoped that the election results would free the government from constraints imposed by a Senate that too often had failed to honor the mandates that successive governments had received at national parliamentary elections. Others feared that the newly constituted Senate no longer would attempt, however imperfectly, to hold the government accountable for its proposals and decisions. In any event, it certainly was reasonable to expect that the change in partisan control would make the Senate a more cooperative partner of the government and the House of Representatives, and that it also would make the Senate far less likely to try to make legislative changes that the government and the House opposed.

Harry Evans (2007, 203–4) has illustrated what actually happened by referring to three related bills, one considered before the 2005 change in Senate control, and two afterwards:

The government's first major anti-terrorism bill, the Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002, was passed only after extensive scrutiny and amendment in the Senate, and compromise over many of the amendments. This treatment of the legislation was widely praised as ensuring that basic civil liberties were not fatally undermined and that the government's more draconian proposals were not passed. In 2006, however, the Telecommunications Interception Amendment Bill, greatly expanding the power of law enforcement agencies to intercept and access electronic communications, was passed after the rejection of all non-government amendments, including amendments for which government backbenchers had expressed support during committee examination of the bill.

The same situation occurred with the Anti-Terrorism Bill (No. 2) 2005, which introduced for the first time detention without charge. Some government amendments to that bill were said to allay some concerns of government backbenchers, but other amendments for which they had expressed support were rejected.



We can look for quantitative evidence of change in the Senate's legislative activity and influence by returning to the data we have been using and comparing data from the beginning of 1996 through the end of June 2005 with data from the beginning of July 2005 through the end of 2007 – contrasting a period of non-government control of the Senate with the short period of government control brought to an end by the 2007 elections.

The data generally confirm what we would expect. On an annualized basis, for instance, the number of House bills that the Senate amended or requested that the House amend dropped by 70 per cent between the first period and the second. In percentage terms, the total share of House bills that the Senate passed with amendments or requests for amendments declined from 30.8 per cent during the first period to 11.9 per cent in the second. This is what we would expect of a Senate under government control. Correspondingly, the total number of Senate amendments passed went down from 757.0 per year before July 2005 to 391.6 per year thereafter. And of the amendments that the Senate did approve after July 2005, almost all were government amendments. Of the 979 amendments that the Senate passed from then until the end of 2007, 99 per cent of them were government amendments; only five were made by non-government parties or senators.<sup>39</sup> Clearly, the government continued to find the Senate to be a convenient forum for correcting and fine-tuning its legislation, especially when it could be confident of its ability to secure passage of its amendments.

Of the amendments the Senate did approve, the House accepted almost all of them – again, not a surprising finding because they were, with no more than a handful of possible exceptions, the government's own amendments. With the exception of one 2005 bill and another in 2007 that the Senate amended and the House did not consider further, the House did not disagree to even one of the nearly one thousand amendments that the Senate passed during the 30 months of government control in the Senate. There were only two Senate amendments that the House initially amended or replaced – perhaps instances of the government changing its mind or making further refinements in amendments it had proposed in the Senate. As for requests, the House made the ten government amendments that the Senate requested the House make to three bills.

In short, the data for the 30 months that the Howard ministry enjoyed majorities in both houses appear bereft of any evidence of the Senate inducing or compelling the House and the government to make any unwelcome changes in their legislation. At least as far as these data indicate, the 2004 Senate elections evidently brought the government what it must have hoped to receive: a Senate that became much more accommodating and cooperative, or more quiescent and ineffectual, as a legislative body than it had been during the years before. The earlier parts of this analysis did not reveal a Senate that challenged House legislation frequently and forcefully, and that regularly compelled the government and the House to accept legislative outcomes that they otherwise would not have accepted. However, the Senate before mid-2005 was much more

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<sup>39</sup>An additional handful of amendments took the form of motions to negative parts of bills or accompanying schedules; such motions are not attributed in *Business of the Senate* to any party or Senator.



an arena of legislative activity and influence than it evidently became in the 2.5 years that followed.<sup>40</sup>

### **A Final Word**

What readers make of these data and the accompanying analysis will depend on their beliefs as to how active and assertive a role the Senate should play in the legislative process. Those who believe that the government should be able to enact its legislative program without hindrance or delay may find here evidence of inappropriate interference in that process by non-government Senate majorities. On the other hand, those who believe that the Senate has a constitutional responsibility to exercise its legislative powers with some vigor and determination, and that doing so is healthy for the political system, may find here evidence of regrettable institutional reticence. Undoubtedly, arguments about the Senate will continue; this article presents empirical findings that both sides will need to take into account.

This article also should demonstrate that the legislative process in Canberra is a richer subject for inquiry than has been reflected in the work of political scientists. How are coalitions formed to pass bills when the Senate has a non-government majority? What are the negotiating strategies that the government, the Opposition, and other senators employ during this process of coalition-building? In drafting its legislation, to what extent does the government anticipate the need to find allies to pass its bills in the Senate under non-government control? In deciding what amendments to propose or support, how much do Senators of all parties try to anticipate how the House of Representatives is likely to respond to those amendments? How often does the government accept amendments in the Senate, or oppose them without calling for divisions, because it anticipates that the House will reject them and the Senate will not insist on them? Why has the Senate been so willing to give way when the House has disagreed to its amendments? And just why is it that so few Senate amendments seem to have given rise to compromises between the initial positions of the two houses?

These are just some of the questions that deserve study and that cannot be answered by reliance on the kinds of data presented here. Questions such as these can be answered only through close observation of Parliament at work and by interviews with participants in the legislative process. More research of this kind will enrich understanding of governance in Australia among political scientists and interested citizens alike.

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<sup>40</sup>Some implications of this analysis are considered in Bach (2008).



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