

Crisp, The Senate, And The Constitution

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This essay explores the development of L.F. Crisp's understanding of the appropriate role of Australia's Senate in the national political system. A review of his widely-used textbook over three decades reveals that, to Crisp, the Senate was conceived primarily to protect state interests, but that role was nullified almost immediately by the emergence of disciplined parties. Thereafter, the Senate usually was an ineffectual irrelevancy until the introduction of proportional representation transformed it into a threat to the constitutional system as it should operate. Crisp also appreciated that disciplined parties undermined effective control of government by the House of Representatives, yet he consistently failed to recognize in the Senate an institution capable of doing what the House of Representatives cannot: enforcing accountability on the government of the day.

During the 1960s and 1970s and into the 1980s, when many of Australia's current political leaders were university students, one book on Australian government dominated the academic market. Although there were others available, the odds are good that today's senior Representatives and Senators, and other political influentials, who enrolled in an Australian government and politics course during this time were assigned to read one edition or another of *the book* by L.F. Crisp.¹ Crisp published the first edition of *The Parliamentary Government of the Commonwealth of Australia* in 1949. Subsequent editions appeared in 1954 and 1961. In 1965, *Parliamentary Government* was succeeded by Crisp's *Australian National Government*, the fifth and last edition of which was published in 1983 and reprinted thereafter. Although Crisp wrote other books, it is primarily on this one that his reputation and lasting influence rest, and it is because of this book that a building on the Australian National University's campus was named in his honor.²

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¹ L.F. (Leslie Finlay) Crisp was one of a handful of scholars who pioneered political science in post-Second World War Australia. He had a distinguished career as a public servant as well as a teacher and scholar. A Rhodes Scholar, Crisp joined the Commonwealth public service in 1940 and ultimately became the Director-General of the Department of Post-War Reconstruction. In 1949, he was appointed Head of Political Science at what was then the Canberra University College, and became the Foundation Professor of Political Science at the Australian National University (after the two institutions merged in 1960). Even before his retirement from the Australian National University in 1977, he was appointed to the Board of Directors of the Commonwealth Banking Corporation and served as its Chairman from 1975 until his death in 1984. He was active for several decades in the Labor Party which, coincidentally or not, long advocated abolition of the Senate.

² Crisp's book reads more like a treatise than a textbook in that he assumes that his readers already are somewhat familiar with Australian government and politics. Much of the book is analysis and commentary, with far less description and explanation than usually is found in a textbook intended for students who are new to the study of a subject.

In this essay I explore the development of Crisp's understanding of the role of the Australian Senate. What did the most widely-recognized and widely-read authority of modern times on Australian government teach successive generations of Australians about their political system and, in particular, what did he teach about the place in it of the Australian Senate? To explore this question, I examined three versions of Crisp's book that, together, were used over a period of more than a quarter-century. I selected for examination a copy of the third edition of *The Parliamentary Government of the Commonwealth of Australia*, published in 1961, and two copies of *Australian National Government*, one published in 1974 (a revision of the third edition, published originally in 1973) and the other a 1988 reprint of the fifth edition originally published in 1983.

Why was the Senate created? What should it do, and what should it not do? And how should the Senate relate to the House of Representatives and the government? There are many other questions that could be asked, of course, but the purpose and role of the Senate, as well as how it should or should not exercise its constitutional powers, have been such a recurring source of controversy in recent decades that surely we can benefit from reviewing what Crisp had to teach us. Firstly we shall examine how Crisp understood the Senate and its place in the constitutional order in 1983 at the end of his career, and then engage in a bit of intellectual archaeology by asking how this understanding in the 1980s differed from what he had written about the Senate in each of the two preceding decades.

Crisp's View of the Senate in the 1980s

More than thirty years after the first edition of his book was published, Crisp's attitude toward the Senate is encapsulated in this paragraph:

There seems to be insufficient evidence in the record of the subsequent seven decades to produce dissent from [historian H.G.] Turner's 1911 verdict on the Senate. Its role has been essentially secondary and quite other than many of the Founding Fathers envisioned for it. Party loyalty and solidarity — and indeed, party discipline — ordinarily temper the great power of the Senate. But if the Senate majority is opposed to the Government of the day the party factor there has real and inappropriate nuisance value.³

This brief statement points to Crisp's answers to two of the questions I raised at the outset — why was the Senate created and how should it exercise its constitutional powers — and clearly implies his answer to the third — how should the Senate relate to the House of Representatives and the government.

Crisp precedes his chapter on the Senate by juxtaposing two quotations. The first is a quotation from W. Harrison Moore, writing in 1901: "As the Courts are the guardians of the rights of the States in matters which lie outside the federal power, so the Senate is the guardian of the interests of the States in matter which are within the federal power." The second is a statement by a joint parliamentary committee of 1958-1959 that includes the following:

[...] the evolution of political parties has upset the speculations of many of the Founders as to how the Senate would function. The Senate has for many years been as susceptible to party political influences as the House of Representatives and proceedings in the Senate usually find party divisions corresponding to those in the House of Representatives [...] It is on the popular appeal of

³ L.F. Crisp, *Australian National Government*, 5th edn (Melbourne, 1983), p. 345. This reference is to the 1983 edition, as reprinted in 1988. Other quotations in the text attributed to Crisp's 1983 text are taken from the same source. Crisp died at the end of 1984, so we cannot assume that his positions and opinions would have remained unchanged between 1983 and 1988.

these policies [the national policies of the parties], and not on particular State interests, that Senators as well as members of the House of Representatives are almost invariably elected.⁴

For Crisp, the Senate was established first and foremost as a House of the States, as Moore had asserted shortly after Federation. When disciplined political parties soon emerged, therefore, the Senate lost its essential *raison d'être*. Even as the Constitution was being written, “[c]ontemporary developments were producing a situation where major parties would be based on distinct groups and classes with common interests from State to State”. Crisp quotes, with apparent approval, Deakin’s famous statement that “[i]t is certain that once this Constitution is framed it will be followed by the creation of two great national parties. Every State, every district, and every municipality will sooner or later be divided on the great ground of principle, when principles emerge.”⁵

Crisp notes that there were a few state-specific issues that did cut across party lines in the Senate — issues that he later dismisses as those “few tired parochial issues”.⁶ But his general conclusion still was that “[t]he emergence of the two-party system by 1908-9 ended any hope to which the Constitution lent colour that the Senate might be a ‘States’ House’, except in the purely arithmetical sense that State-wide electorates returned equal numbers of Senators irrespective of widely differing populations”.⁷ Presumably for this reason, “[t]his Senate ‘with a stronger position than any Second Chamber in the Empire’ soon came to be marked down as the great failure of the Constitution”.⁸

In fact, he argues later in his chapter on the Senate that, even in the absence of disciplined parties, the states really would not have needed the Senate to ensure that their individual interests always were kept in mind. Crisp notes the argument that, no matter how Senators may vote in divisions, they still can argue in their party rooms as advocates for their states. However, he disparages this argument as “a desperate resort of those who would justify the Senate as in some sense a “States’ House” to what Senators as *party members* are said to do in *party* caucus for their respective States”.⁹ Then he dismisses even this role of Senators as unnecessary:

Moreover, those who urge the extra-cameral value of Senators tend to turn a blind eye to the fact that much (probably almost all) of what they imply has been the work of Senators has in fact been pressed just as vigorously by Representatives from the States in question. Governments are dependent for office on holding or winning marginal house seats in all the States. For this reason they are not going to risk neglecting this or that State even if the Senate vanishes tomorrow, for the political forces of the Opposition in the neglected State will capitalize every *iota* of the neglect.¹⁰

To summarize, Crisp argues that the Senate was created in the Constitution to protect state interests, but this function was nullified almost immediately by the emergence of disciplined parties to which Senators owed their first loyalties. Furthermore, Crisp implies that this was no great loss for the political system because governments and

⁴ *Ibid.*, p. 324.

⁵ *Ibid.*, p. 327.

⁶ *Ibid.*, p. 341.

⁷ *Ibid.*, p. 330.

⁸ *Ibid.*, pp. 329-330.

⁹ *Ibid.*, p. 341. Italics in the original.

¹⁰ *Ibid.*, p. 342.

their majorities in the House of Representatives have a strong political incentive to remain sensitive to state interests without any prodding from Senators.

Then what else was there for the Senate to do? Crisp refers to Lord Bryce's British report of 1917-1918, in which Bryce enumerated four useful functions for second chambers, which Crisp summarizes in these terms:

(1) comparatively leisurely and thorough examination of Bills dealt with necessarily more hastily by the busier Lower House; (2) initiation and careful shaping of less controversial Bills in order to economize time when they reach the Lower House; (3) 'interposition of so much delay (and no more) in the passing of a Bill into law as may be needed to enable the opinion of the nation to be adequately expressed upon it'; (4) full and free discussion of large and important questions in circumstances which do not involve the fate of the Government.¹¹

On the fourth function, Crisp finds that there had been "some very notable debates on major policy issues" in the Senate's early years. "In later days", however, "there have been few Senate debates of note — and some of those have been notable mainly for 'sensational' happenings (in the newspaper sense) rather than for their illumination of the issues at stake." On the first three functions, he quotes Turner's assessment, made more than sixty years earlier and more than five years before the Bryce report appeared: "[a]s a chamber of review, as a check on hasty legislation, or as the originator of statesmanlike measures of national utility, it [the Senate] has been a failure. [Yet] it had great possibilities under the Constitution, ample leisure to do good work and thoroughly to investigate the basis upon which proposed legislation rested."¹² Evidently, nothing much had changed in the decades following 1911, at least not enough to convince Crisp to reconsider and modify Turner's assessment.

"So long as the party majorities in the two Houses were of the same political camp, the position was ordinarily satisfactory enough as regards sheer despatch of business. There was not always, however, a corresponding dignity and luster about the Senate."¹³ The Senate may not have done much good, but at least it did little harm. But more often than not during the past few decades, there have been non-government majorities in the Senate. (The recent government majority during 2005-2007 was a striking exception to that pattern.) So what does Crisp make of that development?

The Senate enjoys a very different position when the colours of the majorities in the two Chambers are not identical or when numbers in the Senate are equal [...]. The Senate majority [then] is in a strong position to snipe at and obstruct every measure of Government business and, if it is prepared to invite a double dissolution, to reject items of that business.¹⁴

The use of "snipe at and obstruct" leaves little doubt about Crisp's opinion. But to eliminate any remaining question, he goes on:

The fact that the Senate is directly elected by adult suffrage does not mean, however, that any such action by a Senate majority hostile to the Government of the day is any the less an affront against the essential democratic principle of majority rule.¹⁵

But why? Crisp first offers two familiar arguments: that Senators represent constituencies of different sizes, and that half the Senate usually is elected three years before the sitting government receives its "mandate". There are rebuttals to these

¹¹ *Ibid.*, pp. 342-343.

¹² *Ibid.*, p. 343.

¹³ *Ibid.*, p. 333.

¹⁴ *Ibid.*, p. 336.

¹⁵ *Ibid.*

arguments, however, that Crisp does not present and assess. Notwithstanding the population differences among the states, the share of votes received by the major parties in recent decades usually has been more closely reflected in the distribution of seats in the Senate than in the House of Representatives. And three years of prior experience need hardly disqualify Senators from making sound policy judgments that reflect national interests and needs as well as durable public sentiments and preferences.

Several pages later, Crisp reveals a third argument that evidently loomed large in his thinking:

A Senate for whose election the Constitution and the laws combine to provide conditions likely to produce at least party stalemate in that Chamber, and even a party majority hostile to, and empowered to frustrate, the Government of the day, is in the 1970s not simply an anomaly but, ultimately, a threat to the essential status of responsible government in the eyes of citizens.¹⁶

This usually was not a concern during the first half-century after Federation, but the “threat” to which Crisp alludes became very real thereafter: “the difficulty about the Senate from a democratic viewpoint has, on balance, increased since 1949”, because the introduction in that year of Senate elections by proportional representation increased the likelihood of non-government majorities in the Senate. Crisp claims not to be opposed to all Senate legislative influence. “It is not argued here that Government legislative measures (supply apart) should never be strenuously criticised, delayed, amended, or even (very occasionally) defeated in the Senate.”¹⁷ However, he contrasts this with “the steady, unrelenting havoc wreaked by anti-Government Senators as a phalanx in 1973, 1974, and 1975 on long lists of major Government Bills, culminating in threats to refuse, and repeated deferral of, the voting of Supply, which produced two double dissolutions in April 1974 and November 1975”.¹⁸

It was the crises of these years that Crisp evidently had in mind when he continues in the next paragraph:

It is impossible to reconcile sound democratic principles with the power of a Second Chamber constituted as is the Australian Senate to hold to ransom a Government with a clear House of Representatives majority and mandate to govern from the latest House general election.¹⁹

By comparing what Crisp had to say about the Senate in 1983 with the corresponding sections of earlier editions, we may be able to discern the extent to which it was the perceived excesses of 1974-1975 that shaped his position *vis-à-vis* the Senate. It is instructive, however, that he concludes his 1983 chapter on the Senate with a quotation from Menzies in 1968, well before the first inklings of the constitutional crisis that later developed.

‘It would be a falsification of democracy’, wrote Menzies in 1968, ‘if, on any matter of government policy approved by the House of Representatives, possibly by a large majority, the Senate, representing the States and not the people, could reverse the decision [...]. Otherwise a Senate opposition whose party had just been completely defeated at a general election would be in

¹⁶ *Ibid.*, p. 341. As the reference here to the 1970s suggests, this statement was carried over without change from the revised version of the third edition of 1973. In neither version does Crisp elaborate on his assertion that this is a threat “in the eyes of citizens”.

¹⁷ *Ibid.*, p.348.

¹⁸ *Ibid.*, pp. 348-349.

¹⁹ *Ibid.*, p. 349.

command of the government of the nation. This would be absurd, as a denial of popular democracy.²⁰

That Crisp would endorse a statement asserting that the Senate represents the states and not the people, and that a non-government Senate majority “would be in command of the government of the nation” certainly suggests how little respect and support Crisp was prepared to extend to the Senate, notwithstanding his brief bow to its role in criticizing, delaying, amending, or even (very occasionally) defeating government bills.

The reason for Crisp’s posture toward the Senate undoubtedly lies in his understanding of what the Australian Constitution was intended to mean and how it was to be interpreted at the time he wrote. In his opening chapter, on the writing of the Constitution, he discusses the various attitudes and concerns that delegates brought with them to the 1891 and 1897-1898 conventions, quoting Garran: “During the course of the sessions of the Conventions there were cross-currents and divisions of every kind. Sometimes the divisions would be between freetraders and protectionists, sometimes between conservatives and liberals; sometimes large States against small States”.²¹ Their debates included discussions about whether the British or American approach to the organization of government was most suitable for the federation they were forming. Crisp defines the fundamental differences between the two approaches in these terms:

The British responsible Cabinet system, which was the basis also of the then existing Australian Colonial government, meant that the political Executive was necessarily both in and of Parliament and was at all times responsible to Parliament and dependent for its retention of office upon the continuing support of a majority of the Lower House, which was crucial for the day-to-day needs of government. American congressional government, on the contrary, provided for an Executive separately and popularly elected for a fixed term irrespective of the favour or feelings of the members of Congress, wherein, incidentally, the States’ House (the Senate) had at least equal powers and equal prestige with the Lower House.²²

Although in 1891, there were “a significant number of delegates inclined to favour an independent Executive” along the lines of the American system, there was a “more general demand in 1897 for parliamentary control over the Ministers. The popular following was readily convinced that opposition to responsible government came only from conservatives who aimed to make the Senate another bulwark of Property, like the Colonial Legislative Councils”.²³

Crisp’s discussion of the constitutional debates about the Senate focuses on it as a potential “States House” (and one that also might be a protector of wealth and property, especially if Senators were to be chosen by the state parliaments). As noted earlier, however, he cites with apparent approbation those delegates who doubted that the less populous states needed protection against New South Wales and Victoria, and who foresaw the development of strong political parties that soon would define and control political divisions in both houses. So the political and constitutional rationale for the Senate was disappearing just as it was being created.

²⁰ *Ibid.*

²¹ *Ibid.*, p. 13.

²² *Ibid.*, pp. 34-35. It is interesting that Crisp refers to the political Executive being responsible to *Parliament* while needing the continuing support of a majority of the *Lower House*. Since it is implausible to think that he believed the government was or should be responsible to both houses, we probably should conclude that he was thinking of Parliament as the Lower House.

²³ *Ibid.*, pp. 35-36.

“For the proper construction of the Australian Constitution”, he quotes Isaac Isaacs, “it is essential to bear in mind [...] the texture of responsible government [...] interwoven in its texture. [It is] in the words of a distinguished lawyer and statesman, Lord Haldane, ‘permeated through and through with the spirit of the greatest institution which exists in the Empire [...]. I mean the institution of responsible government.’” Lest there be any doubt about what inference to draw from this quotation, Crisp makes it explicit that “this applies [...] to Sections 53-57 [of the Constitution] where the respective legislative powers of the House and Senate are indicated”.²⁴ Although he does not say so in quite these words, it is hard to avoid the conclusion that Crisp believed that the Senate’s exercise of its powers should be subordinate to the requirements of responsible government. Responsible government is the prime characteristic of Australian governance; the Senate was created because it was needed to secure the political support required to achieve Federation, not because it was needed for the successful operation of the Constitution after Federation. Fortunately,

Responsible government — the Founding Fathers’ undoubted constitutional choice — lived comfortably enough with the Money Bill compromise²⁵ for seventy-four years, until in 1974 and 1975 the Liberal-National Country Party Opposition ended an era by its frontal attack on the convention that the majority Government of the day is entitled to supply.²⁶

What changed, of course, was the introduction in 1949 of proportional representation for electing Senators, which made the possibility of non-government majorities in the Senate far greater than during the first half-century under the Constitution. Although Crisp’s opinion about this development should not be difficult to predict, it still is worth quoting for what it tells us about his understanding of how the Senate now should co-exist with the House of Representatives and the Government:

Above all the criticisms which can be made against the choice of a variety of proportional representation for the election of a constitutionally potent Senate in a country where party strengths are so equally matched as they are in Australia is the likelihood of recurrent deadlock and the consequent frustration of the Government of the day returned with a mandate to govern [...].

Since 1965 the clear authority of Australian Governments has been at the mercy, sometimes of a Senate Opposition majority, but more frequently of Senate splinter groups and independents whose existence and balance of power rested on the voting system alone. The ultimate absurdity and perversion of democratic principle was reached in 1973-74 when a Government returned with a fresh, clear mandate evidenced by a majority of nine Representatives in December 1972 was held to ransom by splinter minorities in the Senate, half of which had been elected in 1970 and half as long ago as 1967.²⁷

If we put aside for the moment the events of 1973-74, we are left with this lesson that Crisp imparted to several generations of Australian students: The Senate had to be created to secure Federation. However, the governmental function of the Senate — to protect state interests — disappeared almost immediately, if it ever really existed at all, with the development of a strong party system. For the next fifty years or so, the Senate made little difference. Because of the introduction of proportional representation, however, the frequency of non-government majorities in the Senate now has made it a

²⁴ *Ibid.*, p. 38.

²⁵ That is, (1) the requirement that money bills which the Senate cannot originate must, like all others, receive Senate approval, and (2) the Senate’s authority to request that the House make certain amendments to these bills, amendments that the Senate is constitutionally barred from making itself.

²⁶ *Ibid.*, p. 37.

²⁷ *Ibid.*, pp. 48-149.

recurrent threat to the core feature of Australia's political system — responsible Cabinet government. The more energetically the Senate exercises its constitutional powers, the greater the threat it poses. In short, Crisp gives us good reason to think that he would agree with the terse conclusion, attributed to Abbé Sieyès, that if a second chamber dissents from the first, it is mischievous; if it agrees, it is superfluous.²⁸

Interestingly, nowhere does Crisp credit the Senate with making, or having the potential to make, other important contributions to the political system — whether the four functions that Lord Bryce enumerated in 1917-1918, or any others. As already noted, he does make a perfunctory bow to the potential value of Senate amendments. He also argues, however, that Australia does not need a Senate to refine Government legislation:

Until recently, the overwhelming proportion of amendments made in the Senate were Government amendments, reflecting second thoughts by Cabinet, in response to the suggestions from both sides in debate in the House of Representatives, to pressures from outside Parliament, or simply to the tidying-up instincts of parliamentary draftsmen. If the National Parliament were, like that of New Zealand, a single-chamber institution it would be possible for these opportunities for last-minute amendments to be provided for in the procedure of the House.²⁹

Does Crisp really mean to suggest that the Senate should be abolished, or at least that it could be abolished without great cost? Possibly so.³⁰ In his chapter on the Senate, he touches on three, thus far unsuccessful, proposals for constitutional change that would affect the Senate. The first would break the nexus that requires the size of the House of Representatives to be twice that of the Senate, presumably to enable the House to become more effectual and the Senate less so.³¹ The second would eliminate the possibility for half-Senate elections that do not coincide with House elections, presumably to increase the likelihood that the political complexion of the Senate would mirror that of the House. The third would revise the deadlock provisions of sec. 57 to permit the government and its majority in the House of Representatives to enact a bill that the Senate has not passed without the need for a double dissolution and an election that puts at risk all seats in the House as well as the Senate.

He quotes with evident approval an excerpt from the report of a 1950 Senate select committee:

Theory to the contrary notwithstanding, when the Government of the day commands a majority in the Senate that Chamber becomes very largely an echo or instrument of the House of Representatives, and when the Government lacks a majority in the Senate that Chamber, subject to the penalty of a double dissolution, can act and sometimes has acted in a way that, while strictly constitutional, is not compatible with the principle of responsible government. The Committee is of opinion that in the tempo of modern times it is in the best interest of the nation that this principle of responsible government should prevail.³²

It is in this context that Crisp then discusses a fourth proposal — abolishing the Senate altogether — and ruminates with apparent regret about the constitutional difficulties that an amendment for this purpose would encounter.

²⁸ Or, depending on one's source: if the second chamber agrees with the first, it is useless; if it disagrees, it is dangerous. The version quoted here is found, among other places, in Robert Luce, *Legislative Assemblies* (New York, 1924), p. 38.

²⁹ *Ibid.*, p. 343.

³⁰ Recall the quotation above in which Crisp does not seem to envision dire consequences "even if the Senate vanishes tomorrow". *Ibid.*, p. 342.

³¹ See n.35 below.

³² *Australian National Government*, p. 347.

Although Crisp disparages the Senate, it is not because he sees it as interfering with the operation of a national political system that otherwise conforms well with the classic principles and practices of British-style responsible government. This is how he opens his chapter on the House of Representatives:

It is nowadays a commonplace in British countries that Parliament is in eclipse, a pale, even a sickly pale, moon reflecting but a little of the shining sunlight of Executive power. Amongst British Parliaments around the world the Australian has perhaps suffered a more substantial eclipse than most. If it were not likely to mislead the literal-minded Australian who has watched, or listened by radio to, his Parliament in its less happy moods and moments, we should adopt Bagehot's terms and say that in many respects it is today not unfairly to be classed with the *dignified* rather than the *efficient* parts of the Constitution.³³

Such an acute observer as Crisp could not be blind to the impact of strict party discipline on relations between government and the House of Representatives. He is perfectly well aware of it.

Paradoxically, the need for more legislation has had the effect of depressing the stature of the legislature: more legislation has meant increasing Government control of parliamentary business and timetable. The initiative and the power of decision are with the Government. The informed sections of the electorate, at least, are aware that even on parliamentary sitting-days most decisions of consequence are effectively made elsewhere [...].

The tight party loyalties and disciplines, from one point of view admirably adapted to popular government, have given parliamentary proceedings an air of unreality and frequently of irrelevance and have undermined the former dramatic tension and classic balance between 'a strong government and strong popular control through a representative body which is the underlying principle of our system [...]. Ministers [...] as party leaders [...] are in a position to control their controllers'.³⁴

In light of this characterization, it would seem natural for Crisp then to dwell on answers to two questions: firstly, what have been the consequences of the developments he describes, and especially the strong party discipline in parliament, for the effective operation of a system of responsible government; and secondly, if these consequences have been detrimental, what might be done about them?

Instead, after the first three pages of his chapter on the House of Representatives, this critique of it effectively disappears from view and Crisp devotes the remaining fifty pages of the chapter to a variety of other subjects, including the effects of judicial review, the size of the House, the office of Speaker, the nature of Standing Orders, limits on the length and content of debates, Private Members' bills, backbenchers, staff and allowances, the role of the Opposition, financial legislation and control, and the value of a strengthened committee system. Seven pages are devoted solely to the subject of members' pay and allowances. The result is a somewhat puzzling disjunction, in which Crisp first identifies a fundamental problem — or at least a serious disconnect between the theory of responsible government and its practice in contemporary Australia — but then ignores it in favor of a collection of topics that, individually or collectively, do not begin to reach to the core of that problem or its consequences.³⁵

³³ *Ibid.*, p.267. Emphasis in the original.

³⁴ *Ibid.*, p. 270. Here Crisp is quoting an article by a former Clerk of the House of Representatives, F.C. Green, "Changing Relations Between Parliament and the Executive," *Australian Journal of Public Administration*, Vol. 13 (June 1954), pp. 65-75.

³⁵ The only explicit connection that Crisp draws between these matters and his less-than-flattering depiction of the House is a suggestion that increasing the number of Representatives would yield a

Crisp on the Senate in the 1960s and 1970s

The 1961 (and third) edition of Crisp's *The Parliamentary Government of the Commonwealth of Australia* appeared in a different political context than its successor editions of *Australian National Government*. The preface indicates that the 1961 text actually was completed in 1960, so by that time there had been only two elections, in 1955 and 1958, in which a minor party had won Senate seats under the proportional representation election system.³⁶ Non-government majorities in the Senate had yet to become a familiar phenomenon.

Crisp wrote then, as he would later, that “when the colours of the majorities in the two Houses are not identical [...] [t]he Senate majority is in a position to snipe at, obstruct, reject or hold up to ransom every measure of Government business”, and to argue that “any such action by a Senate majority hostile to the Government is any the less an affront against the essential democratic principle of majority rule”.³⁷ It seems likely, though, that in 1961 Crisp was not anticipating the prospect of non-government Senate majorities in the future so much as he was looking back to the 1913 and 1929 elections that had produced governments holding less than 20 per cent of the seats in the Senate.

Even in 1961, not surprisingly, Crisp was no proponent of proportional representation. In reviewing state electoral systems, he concluded that “the overwhelming majority of Australians [are] quite uninterested in jettisoning normally clear-cut, stable government in order to embrace superficial, but essentially fictitious, arithmetical exactitude”, and quoted approvingly the contention that “proportional voting is an unmitigated nuisance for it attributes to the citizen’s opinion an exactness and definition which it does not really possess”.³⁸ Rather than conceiving the Senate to be a threat to responsible government, however, in 1961 he saw it more as an ineffectual and irrelevant disappointment.

For example, after quoting from sec. 53 of the Constitution, on the powers of the Senate in the passage of money bills, Crisp commented on how it had exercised those powers:

Under this Section, it should be immediately noted — for the Senate was quick to exact recognition of the point — that Supply is still a vote of both Houses; it must be passed by both, though it can be initiated and varied by the Lower House only [...].

Whenever in the history of the Commonwealth the Senate has stuck fast to the “requests” it has made to the House of Representatives regarding the amending of particular Money Bills, and has repeated them after their first rejection, the latter House has, without admitting the

larger number of backbenchers who “could enjoy greater freedom from narrow party discipline”. Crisp proceeds to argue that governments had been reluctant to increase the size of the House because the “nexus” provision of the Constitution would have required a proportionate increase in the size of the Senate: “Few people had ever suggested, in the light of its performance, or even of its potentialities realistically considered, that any increase in the Senate’s size was either desirable or necessary—one major party [Labor, of course] was even formally pledged to its ultimate abolition. By 1947-48, however, the case for increasing the House membership was so overwhelming that the Chifley Government decided to accept and act upon it, taking a proportionate Senate increase in its stride”. He then refers sympathetically to a proposal to strike the nexus from the Constitution. *Ibid.*, pp. 275-277.

³⁶ The splinter Australian Labor Party (Anti-Communist) won one seat in the 1955 election and its successor, the Democratic Labor Party, was equally successful in the 1958 election.

³⁷ L.F. Crisp *The Parliamentary Government of the Commonwealth of Australia*, 3rd edn (London, 1961), p. 69.

³⁸ *Ibid.*, p. 69.

constitutionality of such persistence by the Senate, conceded the immediate point at issue. So, contrary to the intention of those of the Founding Fathers who prevailed in the protracted debates over Section 53, the Senate, when thoroughly determined, can in practice apparently force amendments to Money Bills upon a House of Representatives unwilling to insist on a double dissolution [...].

*That fact is just one, but that one an outstanding reason why the general failure of the Senate to realize in practice anything like its intended stature is so truly remarkable.*³⁹

Similarly, Crisp blamed the Senate for the time pressures that sometimes constrained its legislative deliberations:

From the earliest years the Senate has voiced regular protests at the absurd manner in which it is given the task of suspending Standing Orders and of passing numerous Bills through all stages in the last day or two of Session. With the passing of the years this state of affairs has, if anything, deteriorated [...].

While the Senate can fairly castigate the House of Representatives and the Cabinet for their indifference to [the Senate's] interests, it has ample remedy if Senators would just once or twice make common cause in their own behalf. *They apparently do not assess the issue at stake sufficiently highly and are prepared to accept their lot quietly.*⁴⁰

He also enumerated several early instances in which the Senate attempted to assert itself, only to encounter “[d]isregard by the House of Representatives” and “Cabinet discrimination amongst the actions of the Senate as to which should be the objects of serious attention”.⁴¹

More generally, Crisp’s view of the Senate, as of 1961, is best captured by the closing paragraph of his chapter on the Senate:

If the Senate will do so little to draw itself up by its own enterprise it can blame no one else for its conspicuous failure to make its mark in national politics. Without setting itself in obstructive opposition to the Government of the day and to the Lower House of Parliament, it has had before it throughout its history great opportunities to develop its potentialities. To-day it enjoys little public interest and evokes no enthusiasm. Rather than obstruct the processes of government it perhaps does well to remain relatively inactive; but rather than discredit by its ineffectiveness the standing of parliamentary institutions some critics have suggested the Senate would do better to disappear from the scene. In practice, however, institutions are usually reluctant to vanish and it would seem unlikely that the Australian electorate, with its high propensity to vote against centripetal tendencies in the Constitution, would liquidate the Senate in cold blood. There would appear, therefore, to be a very heavy obligation upon the Senate itself to extend and improve its performances.⁴²

So it would seem that in 1961 Crisp thought of the Senate more as its own worst enemy than as an enemy of (or at least a threat to) responsible government. At that time, he dismissed abolition of the Senate as too unlikely to contemplate seriously, whereas he had become much more drawn to the idea by 1983. In 1961, he urged the Senate to do more, and to do it better. By 1983, an active Senate threatened to disrupt the constitutional order.

Two things changed in the interval, of course. One was the trend toward non-government majorities in the Senate. The other was the way in which those majorities twice challenged the government of the day during the 1970s. Several of Crisp’s

³⁹ *Ibid.*, pp. 182-183. Emphasis added.

⁴⁰ *Ibid.*, pp. 179-180. Emphasis added.

⁴¹ *Ibid.*, pp. 187.

⁴² *Ibid.*, p. 191.

statements that I quoted from the 1983 edition of the successor volume, *Australian National Government*, refer to the double dissolution of 1974 and the Whitlam-Fraser-Kerr imbroglio of 1975. He makes clear his conviction that Whitlam was wronged in 1975 and that both Kerr and Fraser, with his Senate majority, were in the wrong.⁴³ So we might expect a 1974 edition of his book to constitute an intermediate stage in the evolution of Crisp's thinking about the Senate.

The 1974 edition (a revised version of the third edition, published in 1973) was, according to Crisp's preface, current through the joint sitting of August 1974. In that preface, he makes clear that his concern for the health of parliament was not something new to the later, 1983 edition: "Though sometimes institutionally inventive, Australians have usually been slow in developing and adapting their institutions. The Australian parliament, in particular, remains notoriously under-developed and ill-adapted for serving currently its ostensible purposes."⁴⁴

In comparing the chapters that are most relevant to this study,⁴⁵ what is most striking is the continuity between the 1974 and 1983 editions (especially in comparison to the greater differences between the 1961 and 1974 volumes). There are only minor differences between the 1974 and the 1983 chapters on all the topics of primary interest here. Almost all the text is carried over *verbatim* from the earlier edition to the later, and most of the changes that are found are relatively minor ones that reflect developments and events after August 1974.⁴⁶

This degree of continuity, with virtually the same text appearing on the same pages of both editions, makes it easier than it otherwise could be to notice the changes that were made. Most of the statements, quoted above, from the 1983 edition were taken unchanged from the 1974 edition, including quotations so disparaging of a Senate elected by proportional representation and with non-government majorities. However, the differences between the two editions leave no doubt at all that the crisis of 1975 soured Crisp on the Senate, even in comparison with the already-critical views he had expressed the year before it occurred. In 1974, for instance, the Senate with a non-government majority had "a real nuisance value"⁴⁷ in 1983, it had become a "real *and inappropriate* nuisance value".⁴⁸

It is with regard to supply, not surprisingly, that there is the clearest difference in substance and tone between Crisp's treatments of the Senate in 1974 and 1983. Compare, for example, an excerpt from the 1974 edition on the Senate and supply with the same excerpt as it appeared in the 1983 edition. In 1974, Crisp was prepared to allow that, in contrast with the situation in Britain, supply in Australia was the responsibility of both houses:

While it probably has been indifferently effective down the years, the final constitutional authority for financial control lies with Parliament rather than with the Executive. In Australia this means the whole Parliament. Unlike the House of Lords since 1911 in Britain, the Senate in Australia shares that authority and responsibility with the House of Representatives in virtually full measure.

⁴³ *Australian National Government*, 5th edn, pp. 410-415.

⁴⁴ *Australian National Government*, 3rd edn, revised 1974, p. xi.

⁴⁵ Those are the chapters discussing the drafting of the constitution, the electorate, the House of Representatives, the Senate, and the prime minister and cabinet.

⁴⁶ In fact, Crisp's discretion may have been limited by his publisher. In almost every case, the changes on one page evidently were made so that it would not be necessary to re-typeset the following page as well.

⁴⁷ *Ibid.*, p. 345.

⁴⁸ *Australian National Government*, 5th edn, p. 345. Emphasis added.

The initial federal compromises written into the Constitution caused some difficulties and uncertainties regarding the financial powers of the two Houses. Supply, under the Constitution, is undoubtedly a grant of *both* Houses of Parliament, a fact upon which the Senate in its early years was quick to insist [...]. Some degree of unresolved disagreement remains — the Australian situation contrasts sharply with the clear-cut and exclusive responsibility of the House of Commons to control and supervise British finances.⁴⁹

After the events of 1975, however, Crisp no longer was willing to assert that the two houses of parliament share authority and responsibility “in virtually full measure”:

While it has been indifferently effective down the years, final constitutional authority for financial control lies with Parliament rather than Executive. In form it lies with the whole Parliament, but the limitations imposed by Section 53 on Senate powers regarding Money Bills clearly reflect the Founding Fathers’ understanding in the late 1890s of the Commons’ then long-acknowledged conventional financial supremacy — soon to be statutorily vindicated under the Parliament Act 1911 in the face of the Lords’ challenge. Nevertheless, compromises and uncertainties lie embedded in Australia’s Constitution, and the Senate (more recently and revealingly, the House leadership of parties with a Senate majority) has insisted on the widest interpretation of Senate financial powers.⁵⁰

Can there be any question that Crisp thought this “widest interpretation” to be constitutionally defective?

Similarly, in 1974, Crisp quoted the Senate Clerk, J.R. Odgers, in the fourth edition of *Australian Senate Practice*, as writing that if the Senate refused supply, “the machine of government would come to a stop. Obviously, the Government of the country cannot remain at a standstill for months while the constitutional requirements for a double dissolution are being satisfied. For that very reason the Senate’s power to refuse to join in the granting of Supply is its greatest power [...]. *It is a power which could be used to force concessions from an unwilling Government concentrated in the House of Representatives, or perhaps it could be used to force a dissolution of the House of Representatives*”.⁵¹ However, when it came time to insert the same quotation in the 1983 edition, Crisp thought it best to omit the italicized sentence, perhaps not wanting to seem to legitimize the strategy that was employed in 1974 and 1975 — a strategy that he deplored.

The 1975 crisis clearly made Crisp more skeptical and critical of the Senate than he had been in his 1974 book, and that bleaker view of the Senate was not restricted to the subject of supply. It also colored his more general opinion of the Senate as a legislative body. In both editions, for example, Crisp quotes Menzies as having argued in 1929–1930 that “the Upper House occupies a comparatively minor position in relation to [legislative] matters of substance and should, therefore, devote more attention to matters of form”.⁵² Crisp’s response to this statement in 1974 was, for him, quite sympathetic to the Senate:

Proportional representation having brought, since 1949, such a nice balancing of their Chamber, individual Government Senators have occasionally taken advantage of the situation to introduce a little welcome, if momentary, dramatic excitement to the parliamentary scene by standing up to

⁴⁹ *Australian National Government*, 3rd edn, revised 1974, p. 303. Emphasis in the original.

⁵⁰ *Australian National Government*, 5th edn., p. 303. Curiously, the footnote accompanying the 1974 quotation (p.303) cites several “authoritative accounts of the Senate’s point of view from senior Senate officials” whereas the same footnote in 1983 (also p. 303) refers only to “Senate Clerks’ viewpoints”. Considering how few differences there are between the two editions, it is very likely that Crisp meant these two formulations to convey somewhat different meanings.

⁵¹ *Australian National Government*, 3rd edn, revised 1974, p. 329. Emphasis added.

⁵² *Australian National Government*, 3rd edn revised and 5th edition, p. 334.

their leaders and briefly obstructing items of Ministerial business. Perhaps they have been brought to the point of rebellion by being taken too much for granted or being condescended to by Ministers. Perhaps they have been stung by talk of a need to abolish their irrelevant or superfluous Chamber. At all events, the outcome and national impact have usually been inconsequential and fleeting. Few Senators — Opposition or Government — are in sufficiently strong a position to ‘buck’ party discipline and sanctions.⁵³

Crisp could accept in 1974 that some occasional Senate obstruction might be a good thing, that some independence of the Senate from the Government might be welcome. The corresponding excerpt from the 1983 edition is much more downbeat:

[T]he latter-day Senate, at least, has had pretensions neither compatible with Menzies’s estimate of its status in matters of substance nor yet consistent with self-organisation for the scoring of golden opinions as a mere arbiter of legislative form and detail [...]. Though it has frequently had the stronger alibi in terms of its treatment by the Executive, its record of improvements in legislative detail even in those periods when the Government has not ‘had the numbers’ in the Upper House — whether before or after the closer balancing of forces in the Senate by the introduction of P.R. elections — is little to its credit.⁵⁴

Those moments in the Senate of excitement, obstruction, and rebellion that had some merit to Crisp in 1974 had, by 1983, lost their appeal.

In 1974, Crisp could be generally supportive of recent moves in the Senate to expand and strengthen its committee system, though with the caveat that it may have been too ambitious.⁵⁵ In the 1983 edition, by contrast, that paragraph was replaced by one endorsing several constitutional amendments that would have diminished the Senate, noting that “[t]he champion of democratic responsible Cabinet government will find each of these proposals sound and welcome, though even had *all* of them been carried they would not have removed the fundamentally undemocratic basis of the Australian Senate”.⁵⁶ This followed immediately after his somewhat wistful discussion of the constitutional barriers to abolishing the Senate, a discussion that was carried over from 1974.

Whatever the differences between the 1974 and 1983 editions, there is no difference between them in Crisp’s devotion to responsible government as inherited from Britain. In a 1974 statement that was not carried over to the 1983 volume, Crisp concluded that:

Though the two Houses of the Commonwealth Parliament were given virtually equal powers, the hunches of men like Deakin were vindicated by events: the emergence of strong parties, together with the force of traditional British usages, made democratic responsible Cabinet government the pivot of the national system”.⁵⁷

The development of strong parties evidently contributed to responsible government, instead of presenting a lasting challenge to it.

In summary, we can take away several lessons from these three editions of Crisp’s seminal book, taken together. In his judgment, the Senate was conceived primarily as a House of the States, but it was not needed to protect state interests. In any event, party competition soon became the dominant theme in the Senate as well as the House of Representatives. During the first half-century under the Constitution, the Senate usually was ineffectual and largely irrelevant, for which it had to bear some of the

⁵³ *Australian National Government*, 3rd edn revised, pp. 334-335.

⁵⁴ *Australian National Government*, 5th edn, pp. 334-335.

⁵⁵ *Australian National Government*, 3rd edn, revised, p. 348.

⁵⁶ *Ibid.*, Emphasis in the original.

⁵⁷ *Ibid.*, p. 38.

responsibility. There were, however, several episodes in which non-government majorities did interfere with the conduct of responsible government. The introduction of proportional representation improved what often had been lopsided party ratios in the Senate but, on balance, it was an unfortunate development because it led to regular non-government majorities in the Senate. This reconfigured Senate has become more assertive and so has become a threat to responsible government and the constitutional system as it should, and was intended to, operate.

I suspect that if Crisp were writing today, there would be some post-1983 developments in the Senate of which he would approve, especially the Senate's efforts to strengthen its committee system.⁵⁸ However, he also would be quick to remind us that if there must continue to be a Senate, it should seek only to complement, and never to obstruct or compete with, the essential relationship of power and responsibility between the House of Representatives and its government. That relationship, after all, is the heart of responsible government and responsible government is the heart of the Constitution.

Implications for Governance Today

I have quoted Crisp frequently to give him a fair opportunity to speak for himself. Indeed, he has much of interest to say on many topics, and he undoubtedly left generations of readers with a rich understanding of their political system. His commitment to responsible government is fundamental and unchanging. To Crisp, it is the essence of the Australian constitutional order. Yet he leaves us with a fundamental dilemma that he identifies but does not resolve, a dilemma involving the compatibility of responsible government with a system of highly disciplined parliamentary political parties.

A strong party system can make it possible for voters to anticipate with confidence how their votes will contribute to the formation of the next government. By voting for a party's candidate, each Australian understands that he or she also is voting to create a government formed by that party. If, on the other hand, each parliamentary candidate were unaffiliated with any others, an election would be a prelude to a difficult, even tortuous, process of coalition-building within parliament which might well produce an unstable government that lacked dependable majority support. So disciplined political parties may well be essential to a system of responsible government that is reasonably stable and efficient.

However, Crisp also appreciates that the eclipse of parliaments *vis-à-vis* governments may be another, and more dubious, consequence of strong, highly-disciplined political parties. Strong parties *in* parliament make strong government possible, but they also undermine the prospects for effective accountability of government *to* parliament. In this context, a statement of Crisp's that I quoted earlier deserves to be re-stated:

The tight party loyalties and disciplines, from one point of view admirably adapted to popular government, have given parliamentary proceedings an air of unreality and frequently of irrelevance and have undermined the former dramatic tension and classic balance between 'a strong government and strong popular control through a representative body which is the underlying principle of our system [...]. Ministers [...] as party leaders [...] are in a position to control their controllers'.⁵⁹

⁵⁸ For example see John Halligan, Robin Miller and John Power, *Parliament in the Twenty-first Century: Institutional Reform and Emerging Roles* (Melbourne, 2007).

⁵⁹ *Australian National Government*, 3rd edn revised and 5th edition, p. 270.

I observed earlier that Crisp does not pursue this theme. Perhaps the reason is that he really did not see the government's domination of the House of Representatives through the mechanism of party discipline as a situation that needed correction, or perhaps he saw it as something akin to a fact of nature — an inevitable consequence of the equally inevitable development of two strong and highly competitive political parties. Whatever the reason, he did not present proposals to address it in the same way he endorsed proposals for constitutional changes affecting the Senate. And he certainly did not offer the possibility that the most effective, available solution to the situation in which “ministers are in a position to control their controllers” could rest with the institution he denigrated, the Senate, and for the very reason he denigrated it: the electoral system that so often produces non-government majorities in the Senate.

The essential question, in Crisp's terms, is whether “the underlying principle” of the political system — that is, the “dramatic tension and classic balance” between “a strong government” and “a representative body” that exerts “strong popular control” over it can be said to persist when those who are to be controlled “control their controllers”. Crisp himself finds that “tight party loyalties and disciplines” have undermined the principle. But that is as far as he is prepared to go, either in diagnosis or prescription.

It has become commonplace to argue that, for almost all of its national life, Australia has had a system of responsible *party* government. Party discipline ensures that the government always can work its will in the House of Representatives, and that it can prevail in the Senate as well when the latter also has a government majority. A government is not responsible in any practical sense to the parliament as a whole or even to the House of Representatives as a collectivity; it is responsible to its parliamentary majority. With this assessment Crisp certainly would concur.

One result is that, while the government is accountable directly to the people at elections, between one election and the next there is insufficient accountability of government to the people through the House of Representatives as an institution of constitutional governance. The House of Representatives is the government's subservient partner. This is a condition that Crisp recognizes and apparently regrets, but it also is a condition for which he has no remedy to propose. In particular, he does not suggest a remedy that requires no constitutional change. That is a self-confident and assertive Senate with a non-government majority.

Crisp does not look to the Senate that is so constituted as an integral part of parliament that can and should compensate for some of the influence that the House of Representatives cannot be expected to exert. It is such a Senate that has both the constitutional authority and the political incentive to hold the government to account for its actions and decisions. Furthermore, such a Senate is compatible with a somewhat broader understanding of what the Constitution's authors thought they were doing. They understood that they were not creating a pure “Westminster-style” political system, and that they were mixing elements of British constitutional practice with a Senate to which they gave strong constitutional powers that it was expected to exercise, albeit with care and restraint.⁶⁰ In short, the responsibility of government to the House of Representatives need not and should not preclude the accountability of government to the people through the Senate.

⁶⁰ It probably would be fairer to say that support for this understanding of the Constitution can readily be found among statements by influential members of the constitutional conventions. Too many speeches were made by too many delegates at too many meetings to expect to find universal agreement among them on such important and contentious issues.

Here, then, is an important flaw in what otherwise is a masterful exposition on the political system that, in one version or another, helped to shape Australians' understanding of it for almost four decades, if not longer. Crisp was profoundly committed to the virtues of the British system of cabinet government, a system that neither required nor, in his judgment, could accommodate a constitutionally-powerful and assertive Senate. He recognized that, while strong political parties might be an essential ingredient of that system, they also created a problem for it. Ironically, he could not see that the solution to this dilemma lay in the very institution that he considered superfluous at best and destructive of good government at worst.

