

BALANCE OF POWER POLITICS AND TAX REFORM

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ABSTRACT

Since 1978 it has been unusual for the Federal Government to have a majority in both houses of Parliament. Where the government does not have a majority in the Senate it must negotiate with the Opposition and minor parties to pass legislation. The issue is further complicated in relation to money bills as they are subject to specific constitutional requirements that limit the powers of the Senate to deal with such bills. The influence of the minor parties can be seen both in the process applied in dealing with money bills and in the policy outcomes of negotiations. This article* explores this influence through four case studies relating to tax legislation, and finishes by speculating on the passage of tax reform legislation through the Senate following the 2013 election.

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I INTRODUCTION

In modern Australian politics it is unusual for a federal government to have control of both houses of Parliament. Since the Second World War government in Australia has been dominated by the centre-right Liberal Party, usually in coalition with the National Party¹ (Coalition) and the Australian Labor Party (ALP). Thus Australia has been regarded as a two party system, with a government and a clear opposition.

The Commonwealth Government² is formed in the House of Representatives, but since 1950 it has been unusual for the government to also have control of the Senate. It has had an absolute majority in the Senate in only five parliaments over that time.³ Between 1950 and 1971 the most significant 'other voice' was that of the Democratic Labor Party, which emerged from a split with the ALP in 1954. The DLP tended to support the Coalition, and used its position primarily to leverage support for its constituents.⁴

Since the first election of the Australian Democrats (Democrats) in 1978, minor parties have become a significant voice in the Senate. The Democrats and the Greens have been influential in shaping the form of much legislation, including tax legislation. This article focuses on the effect that the Democrats and Greens have had on tax legislation over this period, during which they have been consistently represented in the Senate.

The first part sets out the balance of power equation, which may require a theoretical framework to examine the effectiveness of the minor parties, while the second part outlines the constitutional framework that applies to tax legislation. The paper then goes on to discuss four cases where minor parties were influential in tax legislation: the 1981 and 1993 Budgets; A New Tax System in 1999, and the Carbon Pollution Reduction Scheme in 2009.

Finally, the paper applies this framework to the prospects of tax reform following the 2013 Federal election, at which the Palmer United Party was successful in winning representation in both houses of Parliament, holding the balance of power in the Senate from 1 July 2014.

¹ The National Party was formerly known as the Country Party. State parties that identify with the Liberal, National or Country parties are included as such in this paper.

² This article will focus on the Commonwealth Parliament, as that is where the laws relating to the most significant Australian taxes are made: income tax, corporate taxes and excises.

³ Parliamentary Library, *43rd Parliamentary Handbook* (Australian Parliament, 2011).

⁴ Campbell Sharman, 'The Representation of Small Parties and Independents in the Senate' (1999) 34(3) *Australian Journal of Political Science* 353.

II HOW MINOR PARTIES WIELD INFLUENCE

A The Balance of Power Equation

The Australian parliamentary system is based on the Westminster system. Government is formed in the lower house, the House of Representatives, which is made up of 150 members of parliament. One member represents each seat, the boundaries of which are drawn on the basis of population. The Cabinet, the executive arm where government policy decisions are made, is drawn from government members of both houses of Parliament.

It is relatively unusual for a member of the House of Representatives to be elected without the backing of either the Coalition or the ALP, as the candidate elected is the first candidate to achieve more than 50 per cent of the vote, which may require distribution of preferences. Accordingly, relatively few cross-benchers are elected, although recently a number of high-profile members have been elected as independents or representatives of a minor party⁵ on the basis of the strong local profile of either the individual candidate or the party they represent. These cross-benchers may support the government of the day, offering either full support or committing to support the government on matters of confidence and supply while reserving their position on other matters.⁶

The Senate, which was constitutionally designed to represent the interests of the states, is made up of an equal number of senators from each of the six states, plus, since 1975, two from each of the Northern Territory and the ACT. The number of senators elected from in each state has been increased twice since federation: from six to ten in 1949, then twelve in 1984. Significantly, the requirement that half of the Senate face election every three years means that when changes in electoral support occur it may take two parliamentary terms to be reflected in the Senate. For example, although no Democrats were elected after 2001, they continued to influence the balance of power in the chamber until 2007. Further, senators serve fixed terms commencing on 1 July, but half-Senate elections are generally held in conjunction with House of Representative elections. This can result in a period of many months⁷ during which a new government is working with a Senate that is due to be reconstituted, influencing the timing of the government's legislative program, which may be accelerated or deferred.

The Senate is elected on a proportional representation system under which the elected senators must each obtain a quota, currently 14 per cent of the vote in a half-Senate election. Under the preferential system the votes of lowest achieving candidates are redistributed, as are the surpluses of candidates who achieve a quota in their own right.

⁵ Notably following the 2010 election, the balance of power in the House of Representatives was held by four Independents and a Green.

⁶ For example, following the 2010 election cross-benchers entered into agreements with the Labor Government to support the Government on matters of confidence and supply coupled with agreements on particular policy and procedural matters
Greens <<http://democraticaudit.org.au/?p=618>>; Rob Oakeshott MP
<http://roboakeshott.com/system/files/images/letter_of_agreement.pdf>.

⁷ In 2010 the election was held on 21 August 2010, and the new Senators took their seats more than 9 months later, on 1 July 2011.

In 1983 when the size of the Senate was increased it was considered that electing an even number of senators would increase the probability that one political party would gain a majority at each election;⁸ however, changes in voter behaviour have disproved this prediction. The representation of minor parties has continued to increase, and as shown in Figure 1 (below), the government has only held a majority in the Senate in one Parliament since 1981: the final Howard term from 2005 to 2008.

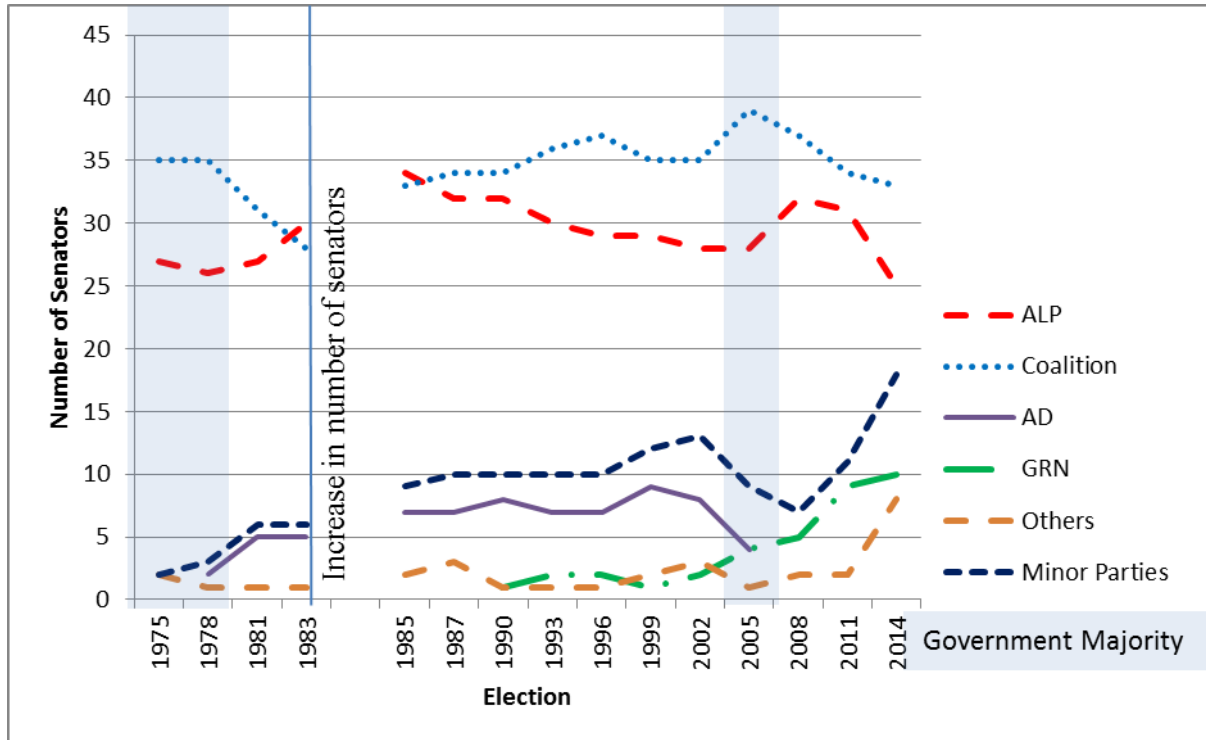


Figure 1: Political Party Representation in the Senate

The numbers in the Senate affect the outcome of legislation differently depending on whether the legislation needs to be passed, requiring a positive vote, or whether it is to be blocked. A range of combinations govern the impact of the minor parties. To pass legislation requires more than half of the members present and voting — up to 39 votes if all are present — to agree to the bill. If the numbers are even, the vote is determined in the negative. The President retains a deliberative vote in order to maintain the balance of states' rights in the Senate,⁹ but does not have a casting vote. An absolute majority, which is required for certain procedural matters, requires 39 votes, being half of the whole number of senators regardless of the number of senators present.

Therefore a range of scenarios may arise:

1. Where the government proposes legislation it requires a simple majority to be passed.
2. Legislation can be blocked if the government does not get the required majority. This can be at any of the three reading stages, although it is not usual practice to vote against a bill at the first reading.

⁸ Joint Select Committee on Electoral Reform, 'First Report' (Parliament of the Commonwealth of Australia, 1983), 143.

⁹ Rosemary Laing (ed), *Odgers' Australian Senate Practice* (Dept of the Senate, 13th ed, 2012), 277.

3. The bill may be amended. Following the second reading the bill is debated in committee, at which stage amendments may be proposed. Any proposed amendments require a simple majority, which dictates whether the non-government parties achieve changes to the bill. If the non-government parties are not successful in making changes they may decide to vote against the bill at the third reading stage.

The negotiation skills of the key players on both sides of the house are critical, particularly as the possible combinations have become more complex. In the simplest situation where the government and the opposition agree, the role of the minor parties is marginal. However where they do not agree, the complexity of the negotiation depends on whether there is a single party that has the required number of votes for the legislation to pass (or be blocked).

Section 57 of the Constitution sets out the procedure required to resolve a difference between the houses on legislation. If a bill is amended in the Senate the amendments must also be agreed by the House of Representatives. The bill is returned to the House, and if the amendments are agreed the bill is passed into law. However, if the amendments are rejected by the House, in the first instance the bill is returned to the Senate. If the Senate insists on the amendments the bill can be reintroduced after a three month waiting period, and the process commences again. The second rejection can trigger a double dissolution as long as it is not within six months of the expiry of the House of Representatives. The bill can then be presented again to the Parliament and, if not passed by the new Parliament, considered at a joint sitting of the two houses. A double dissolution election requires all senators to face the electorate.

The length of time required by this procedure is problematic for the Appropriation Bills, as it can restrict the ability of the government to continue to operate.¹⁰ If a Senate is regarded as obstructionist the government will often threaten to call a double dissolution election to regain control of the legislative process. It is common for a government to present a rejected bill to the Senate a second time without amendment in order to have a double dissolution trigger available, allowing it to ask the Governor-General to dissolve the Parliament within a shorter time frame.

However, a double dissolution election has not been held since 1987. The quota required for election reduces as the number of senators to be elected increases, and at a double dissolution election the quota reduces to 7.6 per cent of the vote. In a double dissolution campaign the focus is on the legislative program and the actions of each party in the Senate, and each party is expected to explain its position. Although this gives a tactical advantage to the government, the lower threshold allows various interest groups to coalesce around the candidates, and minor parties can more easily reach the lower quota. At the 1987 double-dissolution election the number of independents elected increased.

¹⁰ As in the 1975 constitutional crisis, when the wages of Commonwealth employees were at risk of being unpaid.

B Minor Parties and the Mandate

The growth of the minor parties' numbers in the Senate has led to an increased involvement by the Senate in the policy-making process, raising the question of what the role of the Senate should be. Weller¹¹ identifies three alternative propositions for the role of the Senate, each of which is defensible on constitutional and electoral grounds:

1. The government is elected in the lower house, and the Senate should allow the government to enact its legislative agenda;
2. The Senate is a near equal partner in the legislative process; or
3. The Senate is a house of review, and as such will review and amend legislation but will not block supply.

The first proposition is based on the government having an electoral mandate, which gives it the authority to prosecute a particular policy agenda. The concept of the mandate is difficult to define, but has been summarised as: 'a simple version of the mandate implies that the party which wins a majority of seats in the House is entitled to govern and implement its previously stated policies'.¹² All elections give voters the opportunity to express an opinion on the government and its performance, but some elections are a clear endorsement of a particular political agenda.¹³ Following a resounding victory the incoming government will claim a mandate, arguing that the voters have accepted the proposed policy direction.

There are two major theories regarding the extent of an electoral mandate. Under a narrow interpretation, a specific mandate applies to the specific policies that the government took to the election, as these are the policies that the electors endorsed at the election. In British elections the manifesto has been an important feature of election campaigns since 1945, when the House of Lords stated that it would not prevent the passage of election promises that were part of the election manifesto.¹⁴ This form of mandate is based on the delegate theory of political representation,¹⁵ which sees the relationship between the voters and the government as based on promises made prior to the election, and expects the government to act within the scope of those promises.

The broader interpretation of mandate holds that the outcome of an election gives a government the right to govern, which includes the right to pursue a broad policy agenda.¹⁶ This power is vested in the executive — the Cabinet in the Australian system — and Parliament should not frustrate this right. As the government generally has a majority in the House of Representatives, any impediment is more likely to arise in the Senate. Proponents of this interpretation highlight the need for the government to be able to respond to circumstances as they arise: for example global economic or national

¹¹ Patrick Weller, 'The Australian Senate: House of Review, Obstruction or Rubber Stamp?' (2006) 25(3) *Social Alternatives* 13.

¹² Hugh Emy, 'The Mandate and Responsible Government' (1997) 32(1) *Australian Journal of Political Science* 65, 65.

¹³ Michal Shamir, Jacob Shamir and Tamir Sheafer, 'The Political Communication of Mandate Elections' (2008) 25(1) *Political Communication* 47.

¹⁴ Meg Russell, 'Upper House Reform in the United Kingdom and Australia' (2001) 36(1) *Australian Journal of Political Science* 27, 33.

¹⁵ Emy, above n 12.

¹⁶ *Ibid.*

security issues do not correspond to the electoral cycle. Under this interpretation, the promises made prior to the election serve as a touchstone for policies and actions implemented during the term of the government.

The argument that a minor party has a mandate to intervene in a government agenda stems from the specific mandate that the party takes to the election. They will respond to key policies announced by the major parties during the election campaign, basing their claim of mandate on this manifesto: for example, as discussed in Case Study 3, in the 1998 federal election the Democrats published a response to the proposed imposition of a Goods and Services Tax (GST) in which the party opposed a GST on food. Policy ideas are a major factor in the role of minor parties, which are more likely to be motivated by particular policy views held by the members and supporters of that party; thus ideation is a major driver of change where minor parties have a voice in the parliamentary process.¹⁷ Where participants have an interest in the outcome of a particular policy they are more likely to engage in the process to influence the design of that policy.¹⁸

The second proposition, based on the US tradition, claims that as the Senate has near-equal legislative power under the Constitution, it acts as a partner in policy development. In a bicameral system the Senate has the power to thwart the government's legislative program, often relying on a separate mandate. A range of difficulties stem from competing mandates in a bicameral system.¹⁹ First, if the legitimacy of the Upper House is questionable, there could be concern over interference with the government agenda. However, the Australian Senate is a strong bicameral system: it is elected; there is no significant malapportionment of the vote; and the elections are held concurrently with those of the House of Representatives.²⁰

Second, minor parties tend to poll better in those upper houses where proportional representation is adopted,²¹ as they mobilise around particular campaigns that reflect the views of a significant minority of voters. The increased influence of minor parties in the Westminster system has been attributed to the extent to which such parties are able to focus on a particular policy area that reflects the concerns of a sector of the electorate²² and harvest the vote of that group of voters. Where there is a fundamental policy difference that cannot be reconciled, the minor parties will base their stand on their own mandate and negotiate from that base, becoming a partner in policy making. This was typical of the way the Australian Democrats operated, accepting that incremental change was more achievable than major reform.²³

¹⁷ Christopher Rootes, Anthony Zito and John Barry, 'Climate change, national politics and grassroots action: an introduction' (2012) 21(5) (2012/09/01) *Environmental Politics* 677.

¹⁸ Mark Blyth, 'Structures Do Not Come with an Instruction Sheet: Interests, Ideas, and Progress in Political Science' (2003) 1(4) *Perspectives on Politics* 695.

¹⁹ Murray Goot, 'Whose Mandate? Policy Promises, Strong Bicameralism and Polled Opinion' (1999) 34(3) *Australian Journal of Political Science* 327.

²⁰ *Ibid* 332–3.

²¹ Note that state systems may differ, notably Queensland operates a unicameral system and the Tasmanian electoral system applies the Hare Clark system in the lower house.

²² Colin Copus et al, 'Minor Party and Independent Politics beyond the Mainstream: Fluctuating Fortunes but a Permanent Presence' (2009) 62(1) *Parliamentary Affairs* 4.

²³ Richard Mulgan, 'The Australian Senate as a 'House of Review' (1996) 31(2) *Australian Journal of Political Science* 191.

The third proposition is that the Senate is a house of review, but there is debate over how far that review should extend.²⁴ Referring back to mandate theory, arguably the role of the upper house is to ensure that the government acts in accordance with its own mandate, as epitomised by the early Australian Democrats, but without going to the point of disrupting or thwarting the government agenda. In the Australian context there is an additional dimension to the extent that voters deliberately vote differently in the two houses of Parliament, making their choice of a preferred government in the lower house but consciously voting differently in the upper house to ensure that the government is held accountable.²⁵ As most senators vote along party lines in the chamber unless there is a compelling reason to vote against their own party (crossing the floor), the election of senators that are not aligned with the government or the opposition provides voters with the reassurance that bills are being re-examined. The Senate Committee system, which was revitalised in the 1980s, also offers members of the public an opportunity to be heard in relation to legislation. Thus many voters see the Senate as a 'watchdog' that will ensure further scrutiny of legislation through a different lens than that applied in the House of Representatives.

The extent to which a minor party will negotiate as a partner with the government or act as a check on legislative excesses varies depending on the issue and the party. As noted previously, the Democratic Labor Party generally supported the conservative Coalition on legislative matters,²⁶ whereas the Greens are regarded as conviction politicians who are less likely to negotiate where a matter of principle is involved.²⁷

The Australian Democrats, who were part of the 'balance of power' equation over the period from 1981 to 2007, took the approach of working with governments of either persuasion to achieve incremental change²⁸ — a factor that contributed to their demise following the GST negotiations (see case study 3). They had a clear set of principles outlined by Senator Cheryl Kernot in 1997²⁹ as follows:

1. agreeing not to block supply (ie refusing to take the whole process of government hostage in order to achieve an outcome);
2. refusing to cross-trade on issues (ie refusing to trade-off a good outcome in one area for a bad outcome in another completely unrelated area); and
3. transparency in policy making (ie ensuring public reasons are given for all decisions, with the process as open as practicable).³⁰

²⁴ Ibid.

²⁵ Sharman, above n 4.

²⁶ Ibid.

²⁷ Mulgan, above n 23, 195.

²⁸ Hiroya Sugita, 'Parliamentary Performance in the Senate' in John Warhurst (ed), *Keeping the Bastards Honest* (Allen & Unwin, 1997).

²⁹ Leader of the Australian Democrats from 1993 to 1997.

³⁰ Cheryl Kernot, 'Balancing Acts — Wielding the Balance of Power' (1997) 56(2) *Australian Journal of Public Administration* 32.

These principles guided the Democrats in their approach to negotiating legislation with the government of the day. Other parties, including the Greens, have adopted similar principles.

However, there were some issues where the party did claim a mandate — for example the decision by the party to block the sale of Telstra after the 1996 election generated extensive public debate over the meaning of mandate.³¹ The Australian Democrats claimed a mandate to block the sale based on the increased vote for its candidates at the election, which included a specific policy opposing the sale. However, the legislation was passed when, in an example of cross-trading on issues, the independent senator Senator Brian Harradine agreed to pass the legislation required to privatise Telstra if access to medical abortion through RU486 was restricted.³²

The Greens have been less willing to negotiate in legislation and more likely to claim a mandate to oppose legislation. Although they have not blocked supply (and following the 2010 election the party entered into an agreement with the Labor Government to support supply), as conviction politicians the party is more likely to hold their ground on core issues, making negotiation more difficult — particularly with conservative governments.³³ As can be seen in case study 4, they did negotiate with the Rudd ALP Government on the Carbon Pollution Reduction Scheme (CPRS), but when the final outcome was too far from their own policy mandate, they did not support the CPRS legislation.

The evidence shows that voters do vote intentionally to impose checks and balances on the government, and that they are willing to accept the actions of the Senate in blocking unpopular measures, regardless of claims of mandate.³⁴ Thus when claiming a mandate in the Senate two aspects need to be considered: if a party has been elected on a platform that supports a particular policy, the behaviour of that party in relation to that policy should be predictable, based on party ideology; however, when other matters come before the Parliament the party may be required act pragmatically to formulate a response or establish a set of principles to guide the decisions made — working in partnership with the government to achieve an outcome.

C Constitutional Requirements for Money Bills

Given that the voting system for the Australian Parliament facilitates election of minor parties in the Senate, it is important to understand the extent to which the Constitution constrains the powers of the Senate in relation to money bills.

Section 53 of the *Constitution* requires that Appropriation Bills and bills imposing taxation may not originate in or be amended by the Senate. However this does not mean

³¹ J R Nethercote, 'Mandate: Australia's Current Debate in Context' (Research Paper No 19, Parliamentary Library, Parliament of Australia 1998-99).

³² Marian Sawyer, 'What makes the substantive representation of women possible in a Westminster parliament? The story of RU486 in Australia' (2012) 33(3) *International Political Science Review* 320.

³³ David Charnock, 'Can the Australian Greens Replace the Australian Democrats as a 'Third Party' in the Senate?' (2009) 44(2) *Australian Journal of Political Science* 245.

³⁴ Goot, above n 19, 347.

that the Senate cannot participate in the legislative process. The Senate must still pass the Appropriation Bills, and if it does not agree with the appropriation it can request that the House of Representatives amend the bills, or request further information — a procedure commonly referred to as ‘blocking supply’. This power has been regularly exercised by the Senate: between 1950 and 1975 there were 170 instances where the Senate requested amendments.³⁵ The most notorious instance was in 1975, when the impasse led to the Dismissal at which the Governor General terminated the commissions of Prime Minister Whitlam and all other ministers.³⁶

Section 53 is a procedural limitation that clarifies whether the amendment is one that can be made by the Senate or should be returned to the House of Representatives.³⁷ This power is moderated by the requirement that the Appropriation Bills must only appropriate for the ordinary services of government (s 54) and that bills imposing taxes must only impose one tax (s 55). This is the source of the separate tax assessment bills, and it allows the Senate to make changes that are not directly related to the imposition of the taxes or the appropriations.

Accordingly, the ability of minor parties to influence taxation measures arises in two ways: the ability to block supply and the ability to amend the assessment provisions, including the tax base and the tax unit but not (generally) the rate of tax.

The ability to block supply is further dependent on the numbers in the Senate. While the presence of minor parties in the Senate is now usual, the most common scenario is that the major parties vote together on legislation, thus limiting the ability of the minor parties to influence the outcome. This is particularly the case where a minor party is pursuing a special interest agenda that mainstream actors see as marginal. In these cases, minor parties may find that the only way to pursue that agenda is through negotiation outside the terms of the bill under consideration.

There are also instances where a reform agenda includes a taxation measure that falls outside the appropriation — for example a tax or charge is applied to address a market failure or undesirable behaviour. These Pigouvian taxes include various excises or, as discussed in case study four of this article, carbon emissions reduction proposals.

Where a major party sees a coincidence of interest with a minor party, the outcome will depend on whether a simple majority is required. A bill or amendment can be defeated by equal votes, as a tied vote is determined in the negative; but a majority is required to pass an amendment. This can lead to a range of parliamentary tactics: for example if an amendment is proposed in the committee stages but fails, there may be the opportunity to defeat the bill at the third reading.

When multiple groupings are possible, the inevitable outcome is that much of the negotiation over legislation happens outside the Parliament as the Manager of Government Business and the Opposition equivalent try to identify the position that

³⁵ David A W Smith, ‘The Whitlam Government, the Dismissal and All That’ (2006) 18(1) *The Sydney Papers* 142.

³⁶ *Sir John Kerr’s Letter Of Dismissal* <<http://whitlamdismissal.com/1975/11/11/kerr-letter-of-dismissal.html>>.

³⁷ Laing, above n 9, 345.

each party will take, and the likelihood of reaching an acceptable compromise. The strong committee system in the Senate now examines most bills prior to debate, which facilitates this negotiation process.

III FOUR CASE STUDIES

A 1981: 'No Sales Tax on Necessities of Life'

The first of the four case studies examined in this paper is the 1981 Budget. The Australian Democrats had been formed in 1977, and following the 1980 election, the second that it contested federally, the party held 5 of the 64³⁸ seats. The Coalition held 30 seats, Labor 28 and the independent, Senator Harradine, held the remaining seat. Therefore the balance of power equation was relatively simple: the Coalition needed the agreement of either the ALP or the Democrats to pass bills. An important element of the Democrats' election platform, rooted in the events of 1975, was a pledge signed by candidates not to block supply or money bills if elected. Notably it was during this period that Senator Don Chipp, the party leader, described the role of the party as 'keeping the bastards honest' — articulating the role of the party as an accountability mechanism.

In 1981 the Fraser Government introduced a budget that would increase the rate of sales tax across a range of goods, which was contrary to both the policies of the Democrats and an election commitment of the Coalition Government. The Democrats took a position that rejected the imposition of 2.5 per cent sales tax on goods regarded as 'necessities of life', specifically clothing and footwear; wrappings that could affect the cost of food; building materials for private dwellings; and books and newspapers as they were medium for disseminating information. Significantly, on this instance the party acted as an agent of review, applying pressure to the government to keep its election commitments in accordance with the specific mandate conferred at the election.

It is worth noting that the form of the original bills³⁹ departed from the convention under which the imposition of the tax is separated from the machinery of the provisions that assess the tax, as each of the nine amendment bills was drafted to amend both the relevant *Sales Tax Act* and the *Sales Tax Assessment Act*. Senator Janine Haines, who was acting Leader of the Australian Democrats while Senator Don Chipp recovered from a heart attack, speculated that this was to 'frame the Bills in such a way that they would be clearly seen as money Bills and unamendable by the Senate',⁴⁰ which would leave the Senate no other option than to reject the bill, thus blocking supply. Accordingly the Senate passed a resolution to the effect that although it would deal with the bills that did not indicate that it accepted that the form was constitutional.

³⁸ The number of seats in the Senate was increased from 64 to 76 with effect from 1985, in part to increase the likelihood that a major party would gain a majority at a half senate election — refer to n 8.

³⁹ Sales Tax Amendment Bills (Nos 1–9) 1981; Sales Tax Amendment Bills (Nos 1A–9A) 1981; Sales Tax Amendments and Classifications Bill 1981.

⁴⁰ Commonwealth, *Parliamentary Debates*, Senate 9 September 1981, 576 (Haines).

The bills were introduced into the Senate in August 1981 and the Senate made amendments to delete the clauses that imposed sales tax on the contentious items. The bills were then returned to the House of Representatives in September with a message asking that the relevant clauses be deleted. The amendments were rejected by the House of Representatives on 14 October. When the Senate received the message that the House of Representatives would not accept the changes, it voted to press the changes, triggering a three month delay before the bills could be reintroduced, during which time the Democrats planned to further consult the Australian public.⁴¹

The bills were reintroduced the following year, at which stage the position of the Democrats firmed to block, rather than attempt to amend, the bills. Accordingly on 10 March 1982 the reintroduced Bills failed to pass the second reading. This led to criticism of the Democrats who were regarded as having broken their election commitment to not block supply. A number of factors have been identified as contributing to the dilemma that the Democrats faced in 1981⁴²: the Democrat senators were inexperienced, and this was the first major balance of power crisis that they were required to negotiate; the most experienced senator and leader, Senator Don Chipp suffered a heart attack at a crucial point leaving the rest of the team to try to implement a strategy without his advice; and the election pledge was unduly restrictive in that it committed the party 'not to use the voting numbers ... to cause the blocking of supply or money bills'.⁴³ As discussed previously the concept of blocking supply does not necessarily extend to approving all of the measures in the budget, a distinction that was not yet fully understood.

From the perspective of the government, although it took a particular position to the election, the general mandate to govern, and the need to address economic issues, took precedence over the electoral mandate conferred the previous year. However the Senate took the view that the government had made a commitment and its role included holding the government to that commitment.

As a footnote, the 1982/83 Budget specifically excluded 'what some have regarded as the necessities of life'.⁴⁴ When the opposition attempted to block that budget the Democrats did not support that course of action.⁴⁵

B 1993: Lessons in Negotiation

The second case study was twelve years later in respect of the 1993 Budget. The composition of the Senate at this time was more complex due to the presence of the WA Greens⁴⁶: Senator Chamarette had filled a senate vacancy in 1992 and was joined by Senator Margetts following the 1993 election, accordingly both were regarded as parliamentary novices. The ALP Government held 30 seats in the Senate and the

⁴¹ Commonwealth, *Parliamentary Debates*, Senate 20 October 1981, 1399 (Evans).

⁴² Liz Young, 'The Australian Democrats and the Budget Process' in John Warhurst (ed), *Keeping the Bastards Honest* (Allen & Unwin, 1997).

⁴³ *Ibid*, 179.

⁴⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 17 August 1982, 61 (Howard).

⁴⁵ Commonwealth, *Parliamentary Debates*, Senate, 20 August 1982, 1650 (Chipp).

⁴⁶ The Australian Greens were not formed until 1992. Prior to that date Senators were affiliated with state-based Green parties.

Coalition held 36, therefore the passage of legislation required eight votes from the ten senators that occupied the cross benches: Senator Harradine (independent), seven Australian Democrats and the two Greens. If the Democrats voted with the government, one further vote was still required to pass legislation.

The 1993 Budget was the year after the Prime Minister, Paul Keating, had referred to the Senate as 'unrepresentative swill'.⁴⁷ The ALP had promised tax cuts to middle income earners, and passed legislation prior to the 1993 election to implement these cuts — with Keating campaigning on the basis that they were already in place, and describing them as the L-A-W tax cuts. However in the face of an economic downturn it was also committed to a budget deficit reduction strategy. In the budget the Treasurer, John Dawkins, introduced a package of increases in indirect taxes, expenditure cuts and deferral of the promised tax cuts.

Again the form of the Bills was contentious. The original *Taxation (Deficit Reduction) Bill 1993* included amendments to the rates of a range of taxes, including income tax, fringe benefits tax and several categories of sales tax. Questions over the constitutional validity of the Bill were referred to the Legal and Constitutional Affairs Committee⁴⁸, and in order to limit the possibility of a constitutional challenge, the government presented a new set of Bills that addressed each subject of taxation separately. A test bill that increased two different taxes was passed in order to allow the question of what constitutes the imposition of a tax to be tested in the High Court, but after passage of the legislation no test case was taken.

Setting aside the constitutional issues, the content of the budget was electorally unpopular. In particular the deferral of the personal income tax cuts promised in the 1993 election campaign; increases in sales tax and petrol excise; and reductions in childcare and some Medicare benefits caused a backlash from the public. Once again the government was introducing measures that were contrary to its election commitments, calling into question whether it had a mandate to introduce these changes.

The Democrats and the Greens were concerned over what they regarded as inequitable changes in the tax mix, identifying the proposed personal income tax schedule coupled with increases in indirect taxes as regressive. The budget was tabled on 17 August, and Dr John Hewson, the Leader of the Opposition, which had campaigned in the 1993 election on the 'Fightback'⁴⁹ proposal for a GST, stated in the Budget reply that the Coalition would not support the budget measures. On 25 August the Treasurer, John Dawkins, announced that he was willing to discuss the details of the budget with the minor parties.

Over the following week the Democrats, under the leadership of Senator Cheryl Kernot, were able to negotiate four changes to the budget, worth about \$1bn:

- the proposed low income tax offset was increased;
- the tax on leave payments was not made retrospective;

⁴⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 4 November 1992, 2547 (Keating).

⁴⁸ Laing, above n 9, 385–6.

⁴⁹ Liberal Party, 'Fightback: A Coalition Strategy for Growth and Jobs' (1992).

- Medicare rebates continued to apply to optometric services; and
- the difference in the fuel tariff between leaded and unleaded fuel was reduced.

These concessions, gained by negotiation outside the chamber, were unlikely to have been achieved by amendment in the Senate as they would not have gained the support of the Coalition.⁵⁰ The Democrats reserved their position on the proposal to increase the sales tax on wine, but agreed to support the remainder of the budget.

The Greens also entered into a process of negotiation with the government, however the position of the Greens was not resolved for nine weeks. Senator Dee Margetts had a background in green economics, which views economics through a different framework from the conventional rational economic approach of Treasury; accordingly they negotiated from a position that focused on sustainable development and distributive justice.⁵¹ When the budget was passed on 22 October 1993 the Greens had negotiated a further \$634m of concessions for low income earners.⁵²

This outcome needs to be put into context: the government had already secured the agreement of the Democrats for the budget, with the negotiated changes, and the Coalition was philosophically unlikely to support the policy direction of the Greens. Accordingly it was unlikely that the Greens would have achieved a better outcome by attempting to amend the budget in the Senate.

When the government entered into negotiations with the minor parties, it effectively acknowledged a partnership between the houses. Over the period of the negotiations the government and sections of the media were critical of the actions of the minor parties, portraying them as holding the government to ransom.⁵³ However, polling showed that voters regarded the minor parties as fulfilling the mandate of holding the government to account when it introduced legislation that was contrary to its election promises.⁵⁴ This was reinforced as the parties negotiated in accordance with a stated policy position, fulfilling the expectations of voters sympathetic to those policies.⁵⁵

C 1999: The GST Deal

The third case study examines the role of the Australian Democrats in negotiating with the Coalition Government in the design of the GST introduced in 2000.⁵⁶ The Democrats

⁵⁰ Liz Young, 'Minor Parties and the Legislative Process in the Senate: A Study of the 1993 Budget' (1999) 34(1) *Australian Journal of Political Science* 7.

⁵¹ Stephen Ellis, 'Greens: What They Are On About', *Sydney Morning Herald* (Sydney), 4 September 1993.

⁵² Wilson daSilva, 'Greens Most Powerful Women in Australian Politics', *Reuters News* (Sydney), 10 November 1993.

⁵³ See, for example: Mike Steketee, 'Perils of Cheryls and Ferals', *Sydney Morning Herald* (Sydney), 7 September 1993 Amanda Buckley, 'Are These Two Women Running The Country? ', *Sunday Age* (Melbourne), 28 November 1993.

⁵⁴ Young, above n 42.

⁵⁵ Young, above n 50.

⁵⁶ During this period the author was the Leader of the Australian Democrats in the WA Legislative Council. In this role she observed, but was not directly involved in, the negotiations around the introduction of the GST.

reached the peak of their electoral popularity in the late 1990s under the leadership of Senator Cheryl Kernot, holding seats in the WA, NSW and SA Legislative Councils and the ACT Legislative Assembly as well as the Senate.

The balance of power equation in the Senate was still complex. The Democrats held seven seats after the Coalition Government was elected in 1996, with two Greens and two independents⁵⁷ also on the crossbenches, and although the Howard Government only needed two votes to pass legislation in its first term, the ideological positioning of the parties in the Senate meant that key legislation was frequently negotiated with the Australian Democrats to obtain its passage.⁵⁸ During this period the Australian Democrats claimed a mandate that went beyond the review and accountability function that characterised the 1981 stance; and the party was more active in negotiating legislation: notably the Telstra privatisation and the Workplace Relations legislation during the term of the first Howard Government.

It was clear that the Howard Government intended to introduce a GST, and in 1997 the Democrats initiated a consultation process within the party to clarify the party policy, culminating in a ballot of the revised policy. The outcome of that process was to endorse a rather ambiguous position on consumption taxes that did not support a broad based tax but allowed different rates of tax to be applied to different goods and services. The following year tax reform became a core theme of the 1998 election campaign with the Coalition Government publishing its proposal for a GST⁵⁹ and the ALP publishing a competing tax policy that rejected a GST. The Democrats responded by setting out the principles that they would apply in negotiating with the government if they held the balance of power after the election.⁶⁰

From 1 July 1999, following the 1998 election, the Australian Democrats held nine seats in the Senate. The government needed three votes to pass legislation: accordingly if it could not obtain the support of the Democrats it would have needed the votes of all three cross bench senators Harradine, Brown and Oldfield⁶¹ who came from disparate political ideologies. After Senator Harradine announced that he could not support a GST, the government needed the support of the Australian Democrats.⁶²

The Democrats entered into negotiations with the government, and ultimately achieved significant changes to the package.⁶³ Notably, food was exempted from the GST as were certain non-commercial educational, charitable and disability services. A compensation package also increased rent assistance and the government undertook to address the impact of the GST on low income earners who were not in receipt of government benefits; long-term residents of boarding houses and caravan parks; and the arts

⁵⁷ Senator Colston represented the ALP until August 1996 then sat as an independent until 1999.

⁵⁸ For example the provisions of the *Workplace Relations Act 1996* were negotiated with the Australian Democrats who moderated some of the proposals in the initial legislation and subsequently voted against attempts to amend the legislation in 1999 and 2000.

⁵⁹ Australian Treasury, *Not A New Tax: A New Tax System* (AGPS, 1998).

⁶⁰ Australian Democrats, 'The Australian Democrats' Taxation Policy Response' (Australian Democrats, 18 September 1998) <www.parlinfo.aph.org.au>.

⁶¹ NSW Senator David Oldfield was elected from Pauline Hanson's One Nation.

⁶² Richard Eccleston, *The Thirty Year Problem The Politics of Australian Tax Reform*, Research Study No 42 (Australian Tax Research Foundation, 2004) 153–6.

⁶³ *Ibid.*

community.⁶⁴ Although the Democrats could not achieve an exemption for books generally, they did negotiate subsidies for textbooks. Assessed objectively, the outcomes were close to the 1981 stance of 'no tax on the necessities of life'. The 'New Tax System' bills were to come into effect from 1 July 2000, and they extended beyond the imposition of the GST to introduce new reporting and administrative requirements as well as a range of compensation measures.

Much has been written about the demise of the Democrats,⁶⁵ but ironically it was the party's ability to use its numbers to negotiate to moderate the GST that led to its decline. The GST deal is generally accepted as the point at which the Democrats political influence was at its greatest, but also the point from which the party's electoral decline commenced. Although there was only a minor drop in electoral support for the Democrats between 1998 and 2001, which was the first election after the implementation of the New Tax System measures, that election was the last at which a Democrat was elected to the Senate.

There were two major factors that affected the public perception of the Democrats after the GST negotiations. First, the electorate clearly perceived a change in the positioning in the political spectrum as the Democrats had not communicated clearly the commitment that the party took to the 1998 election: the policy to negotiate for a fairer tax policy was interpreted by sections of the electorate as a pledge to block the GST, and this was exploited by the opposition and the government who successfully portrayed the Democrats as being responsible for an inequitable and complex tax respectively.⁶⁶ Accordingly the involvement of the Democrats in negotiating the passage of the GST was interpreted as the party becoming a player in the system, contrary to the 'watchdog' role they had previously played.

This highlights the tension between the three constructs of mandate: in this instance the Democrats formal commitment was to review and moderate the legislation introduced, and they acted in accordance with this role; but the negotiation process established a partnership between the government and the Democrats. The voters interpreted the mandate differently to the party, leading to a breakdown of the relationship of trust that had developed over the previous 25 years.

Secondly, there was also unrest among the senators and party members, some of whom felt that the negotiated outcome was not consistent with the balloted party position. This culminated in a split within the party room with two senators voting against the GST,⁶⁷ and a lengthy period of leadership instability. This internal instability was arguably more significant in the electoral fortunes of the Australian Democrats,⁶⁸ coupled with the increasing profile of the Greens throughout Australia. Between 2001

⁶⁴ John Howard, 'Letter to Meg Lees on the GST 22/06/1999' (1999) <<http://australianpolitics.com/1999/06/22/howards-commitments-to-meg-lees-on-the-gst.html>> accessed 28/03/2014.

⁶⁵ Scott Brenton, 'Policy traps for third parties in two-party systems: the Australian case' (2013) 51(3) *Commonwealth & Comparative Politics* 28; Anika Gauja, 'Evaluating the Success and Contribution of a Minor Party: the Case of the Australian Democrats' (2010) 63(3) *Parliamentary Affairs* 486; Don Chipp, *Keep the Bastards Honest* (Excelsior Press, 2004).

⁶⁶ Eccleston, above n 62, 157.

⁶⁷ Commonwealth, *Parliamentary Debates*, Senate, 28 June 1999, 6597 (Division).

⁶⁸ Chipp, above n 45 67-9.

and 2004 the senate vote collapsed dramatically from 7.25 per cent to 2.09 per cent, and no Democrat has been elected to any Australian parliament since the South Australian election the following year. Under the senate electoral system, with half of the Senate facing election every three years, the last Democrat senators gave their valedictory speeches in June 2008.⁶⁹

D 2009: Green Politics and Carbon Emissions

The final case study considers the role of the Greens in emission reduction policy. As the parliamentary representation of the Democrats declined, the number of Greens in the Senate increased. The Greens place a high priority on environmental policy, and accordingly claim a mandate to implement policies to control carbon emissions. In relation to the carbon tax, policy design was critical in negotiations.

During the last term of the Howard Government the government had an absolute majority in both houses of Parliament and did not need to negotiate legislation through the Senate. From 1 July 2008, following the election of the ALP Rudd Government in 2007, the Greens held five seats, the government held 32 seats and the opposition 37 with the remaining two seats held by Senator Nick Xenophon and Senator Steve Fielding of the Family First Party. Therefore to pass legislation the government needed the votes of all of the Greens and one of the two other senators.

Prior to the 2007 election the State Governments had commissioned a report into climate change, authored by Professor Ross Garnaut. The terms of reference required an analysis of the economic consequences of climate change,⁷⁰ and that the report be finalised by September 2008. In the time between the report being commissioned and finalised Kevin Rudd had been elected as Prime Minister and had ratified the Kyoto Protocol.

The Garnaut Report⁷¹ recommended that Australia implement an emissions trading scheme that would allow emissions trading permits to be traded on the developing international market. Part of the proceeds of the sale of permits would be applied to compensate low income earners who would bear part of the cost of the scheme. However if such a scheme was to be heavily compromised, Garnaut preferred a Pigouvian carbon tax. The Greens election policy favoured a 'polluter pays' emissions trading scheme with emission reduction targets,⁷² which was consistent with both ALP⁷³

⁶⁹ The Democrats are still registered with the AEC, and continue to run candidates in federal and state elections.

⁷⁰ At <http://www.garnautreview.org.au/pdf/Garnaut_terms_of_reference.pdf>.

⁷¹ Ross Garnaut, *The Garnaut Climate Change Review* (Cambridge University Press, 2008).

⁷² Bob Brown and Christine Milne, 'IPCC Synthesis Report: Greens respond with comprehensive climate action plan' (18/11/2007) <http://pandora.nla.gov.au/pan/22488/200711260818/greens.org.au/election/downloads0/greens_1195426935.pdf>.

⁷³ ALP, 'Federal Labor's Clean Energy Plan To Help Tackle Climate Change' (14 Nov 2007) <pandora.nla.gov.au/pan/22093/20071124-0102/www.alp.org.au/media/1107/msloo143.html>.

and the Coalition⁷⁴ policies. Therefore it would seem that the implementation of such a scheme would be easily negotiated through Parliament.

The events that led to the defeat of the proposed *Carbon Pollution Reduction Scheme Bill 2009* (and associated Bills) have been detailed elsewhere.⁷⁵ Firstly, the original proposals were extremely broad, which mobilised industry stakeholders to secure major concessions, and communication strategies with the electorate were inadequate.⁷⁶ Based on the numbers in the Senate the government chose to firstly negotiate with the opposition to secure its support for the legislation at the time under the leadership of Malcolm Turnbull. Given the policies put forward during the campaign it seemed likely that a compromise could be reached, but within the Coalition party room there were a number of climate sceptics who had considerable influence, resulting in a change of leadership in the Coalition and the agreement that had been reached in relation to the legislation lapsed.

At this point the government entered into negotiations with the Greens however the positions of the various stakeholders could not be reconciled. In the third reading debate Senator Bob Brown stated that the core issue that the government would not negotiate was the targets for greenhouse gas reductions: the government target was 5 to 25 per cent; the Greens were seeking 25 to 40 per cent.⁷⁷ They also expressed concern over the extent of concessions to industry stakeholders. Accordingly the Greens voted against the legislation at the third reading, and the Bill was lost.

The package of bills was reintroduced the following February, and if rejected again could have been used as a trigger for a double dissolution. However by the middle of the year leadership instability within the ALP resulted in a change of Prime Minister. Following the 2010 election, in an exercise in second-best policy making, Julia Gillard introduced the *Clean Energy Future Bill 2010* which applied a Pigouvian style price on carbon emissions.

From a policy perspective the actions of the Greens in not passing the original Carbon Pollution Reduction Scheme was justifiable. It was in accordance with the policy that the party took to the election and the recommendations of the Garnaut Report⁷⁸ that preferred a carbon tax to a compromised emission trading scheme, and it appears that the stance taken in 2009 did not harm the party electorally. In the 2010 election the Greens vote in the Senate increased by 4 per cent to 13.11 per cent, and the party also elected a member of the House of Representatives.

⁷⁴ Coalition, 'A Climate Resilient Future: A Clean Energy Plan for Australia' (2007) <<http://pandora.nla.gov.au/pan/22107/20071129-346/www.liberal.org.au/about/documents/CleanEnergy.pdf>>.

⁷⁵ See Ian Ward and Andrew Bonnell (eds), 'Special Issue: The Politics of Climate Change in Australia' (2013) 59(3) *Australian Journal of Politics & History* 331–500; Christopher Rootes, 'Denied, deferred, triumphant? Climate change, carbon trading and the Greens in the Australian federal election of 21 August 2010' (2011) 20(3) *Environmental Politics* 41; Ian Bailey et al, 'The fall (and rise) of carbon pricing in Australia: a political strategy analysis of the carbon pollution reduction scheme' (2012) 21(5) *Environmental Politics* 691.

⁷⁶ Bailey et al, above n 75.

⁷⁷ Commonwealth, *Parliamentary Debates*, Senate 30 November 2009, 9582, (Brown).

⁷⁸ Garnaut, above n 71.

Comparing the impact of the CPRS with the impact of the GST on the Democrats supports the thesis that the damage done to the Democrats was largely the result of the leadership instability that followed. In 2010 the leadership instability occurred in the Labor Party, and there was a significant electoral backlash against the ALP in the election that year resulting in a hung parliament in the House of Representatives as well as the Senate. Much of the increase in the Green vote at that election has been attributed to leakage from the ALP.⁷⁹ The instability continued through the term of the 43rd Parliament, allowing the opposition to campaign heavily on the negative aspects of the carbon tax, which was portrayed as a Labor-Greens initiative. In the 2013 election the Greens vote dropped to 8.65 per cent.

The incoming Abbott Government has now repealed the carbon tax. Although the position taken by the Greens was based on the ideals of the party and its own electoral mandate, the question remains: if the Greens had compromised to save the emissions trading scheme, what would the outcome have been? Although the Coalition would have still campaigned against the CPRS would such a campaign have been as effective as the campaign against the carbon tax, and could the Abbott Government claim it has a mandate to repeal the tax?

IV PROSPECTS FOR THE 44TH PARLIAMENT

The Coalition Government that was elected at the 2013 election campaigned on repeal of the carbon tax and the Mineral Rent Resources Tax (MRRT). It also instituted a Committee of Audit to review government expenditure, and has promised a tax review during the first term of government.

The *Minerals Rent Resources Tax Repeal and Other Measures Bill 2013* included the repeal of the associated spending measures, some of which were targeted to assist specific groups of recipients. The repeal bills came before the Senate before the changeover on 1 July 2014, and the ALP and Greens voted together to defeat the bills. Accordingly the government reintroduced the Bills and presented them to the Senate in the first sitting week of the new Senate.

The 2013 election was distinguished by the number of political parties that contested the senate election. Many of the 51 parties that contested the election campaigned on a single policy and made no statements regarding tax policy however 32.2 per cent of the vote was not directed to the ALP or the Coalition. Some of these micro-parties appear to have been formed in order to harvest preferences to be distributed to other parties, leading to commentary⁸⁰ that the system of voting in the Senate needs to be reformed.

⁷⁹ Antony Green, *The Greens versus Labor — Geographic and Educational Dimensions* (10/09/2012) ABC <<http://blogs.abc.net.au/antonygreen/>>.

⁸⁰ Lenore Taylor, 'Liberal Party Director Flags Reform of Senate Voting After Rise of Micro Parties' (23 October 2013) <The Guardian <http://www.theguardian.com/world/2013/oct/23/liberal-party-director-flags-reform-of-senate>>.

The Senate election needed to be run again in WA⁸¹, and following that ballot the Senate is the most fragmented in Australian parliamentary history. The Greens are the largest voting group after the opposition, with ten senators, and as the Coalition does not have an absolute majority in the Senate, with 33 votes, the Greens have the balance of power to pass government legislation. If neither the Greens nor the ALP support government legislation, the government needs the support of at least six of the remaining eight senators. Of these, four have had no previous parliamentary experience, including the three new senators from the Palmer United Party (PUP). The Liberal Democratic Party (LDP) supports lower taxes, so could be assumed to be amenable to the government agenda — but the Democratic Labor Party's Senator John Madigan (DLP) has said that he will not support the removal of benefits to families and businesses.⁸² The Australian Motoring Enthusiast Party, with one senator elected from Victoria, has entered an alliance with PUP, agreeing to work together where practical but reserving the right not 'to vote for legislation that is against his or her party's policies and principles, or against their conscience',⁸³ thus the position of the PUP with four votes will be critical but does not give PUP the sole balance of power to either block or pass legislation.

The PUP tax policy, as taken to the election, supported the repeal of the carbon tax and the MRRT. Other tax policies that PUP advocate include the abolition of quarterly PAYG instalments by companies, and tax deductibility for interest on home loans. It is difficult to see how these policies can be accommodated in future budget negotiations.

The *Clean Energy Legislation (Carbon Tax Repeal) Act 2014* was passed on the 17th July 2014, but the PUP support for the repeal of the MRRT was not unconditional. Although the party supported the repeal of the tax, it did not support the removal of three of the associated measures included in the repeal bill: the Low Income Superannuation Contribution, the income support bonus and the schoolkids bonus, each of which assists low income earners. The Senate amended the MRRT Repeal Bill on 17th July to excise these measures, and returned the Bill to the House of Representatives.

At this stage it is not clear whether the PUP will apply a coherent policy framework across the legislative program, or whether it will adopt a populist agenda, responding to legislation on an ad hoc basis, based on public opinion.⁸⁴ Accordingly the government is facing difficulties in negotiating legislation through the Senate in the 44th Parliament. If it cannot obtain the support of the opposition it will need to negotiate with the Greens, who apply a policy framework that is frequently unsympathetic to the government; PUP who have not yet demonstrated whether they can reach an agreement and whether it

⁸¹ Due to the loss of 1370 votes between the original count and a recount, the Court of Disputed Returns ordered that a new election should be held. That election was held on 5 April 2014.

⁸² Phillip Coorey, 'Senators wary of cuts tied to mining tax repeal' (26/10/2013) *The Australian Financial Review*
<http://www.afr.com/p/national/senators_wary_of_cuts_tied_to_mining_nxE3nngYqHwQsd3tr2M
PI>.

⁸³ Palmer United Party, 'Memorandum of Understanding between the Australian Motoring Enthusiast Party and the Palmer United Party' (6 October 2013)
<http://australianpolitics.com/downloads/palmer-united-party/2013/13-12-30_mou-pup-amep.pdf (accessed 30/3/2014)>.

⁸⁴ David Denmark and Shaun Bowler, 'Minor parties and protest votes in Australia and New Zealand: locating populist politics' (2002) 21(1) *Electoral Studies* 47.

will be based on policy ideals or pragmatism; and individual senators who may have different demands based on disparate policy goals.

V CONCLUSIONS

The role of the minor parties on tax legislation can be separated into two types of influence: process and policy. In the first two case studies their influence was on the design and constitutional validity of the legislation as well as the underlying policy principles, consistent with the development of the Senate as a house of review over the two decades following the dismissal of the Whitlam Government. The 1975 constitutional crisis provoked a rethink of the role of the Senate in relation to legislative review, particularly the limitations on supply bills. In 1981 the form of the legislation could have caused the supply bills to be invalid, but the question was not resolved until the 1993 budget when the Legal and Constitutional Affairs Committee requested that the Bills be split to avoid constitutional concerns.⁸⁵ Although the High Court was not asked to rule on the matter, tax legislation since 1993 has been drafted in accordance with the opinion expressed by the Committee.

In all four cases examined here, the minor parties have acted from an ideological basis in seeking modifications that were in accordance with their policy manifesto. In the first three cases, which dealt directly with tax legislation, the goal was to seek a fairer distribution of the tax burden. The minor parties were concerned over the equity of consumption taxes and the debate can be seen as one of trade-offs between efficiency and equity. The final case study did not deal with purely fiscal legislation, but the use of taxes and markets to mitigate a negative externality — carbon emissions — and can be seen as an example of negotiations between stakeholders that have different policy mandates.

In Australia it appears that the electorate now accepts that parties elected to the Senate can have a specific mandate on particular issues, and that mandate extends beyond the review function. The first significant negotiation between the government and the minor parties on tax legislation was in 1993: in 1981 the failure to negotiate resulted in the legislation failing. It is at this point that the trade-off between ideals and pragmatism becomes electorally risky for the minor parties. As long as minor parties are negotiation within the terms of their mandate, and can communicate this to voters, they can maintain their influence in the Senate through the electoral process. This requires the parties to assess the point at which the political pragmatism of accepting second best, negotiated, solutions becomes unjustifiable.

Where measures are politically unpopular — as is frequently the case with tax measures- electors do not differentiate between the review function and the ability to negotiate as equal partners within their mandate. The review function restrains the government from exceeding its own mandate while the minor party pursues its own electoral mandate.

⁸⁵ Laing, above n 9 385–6.

Electoral danger to minor parties can arise when negotiating with the government as a partner in the policy process. If the outcome is seen as beyond the scope of the mandate bestowed upon it by the electorate, the senators are exposed to electoral backlash and vulnerable to political manoeuvring against them by the government and the opposition.

Arguably the Democrats crossed that line when negotiating the GST as they were unable to maintain consensus within the party, resulting in confusion in the electorate over what the party actually stood for, resulting in their electoral decline. In contrast, in 2009 the Greens maintained their stance against the flawed ETS and accepted the second-best option of the carbon tax, while the ALP was seen to be in disarray. Their vote declined in the most recent election but it is too soon to say whether this is more than a normal fluctuation in the electoral cycle and with ten senators they will remain influential for at least the next two Parliaments.

Ultimately, unless there are significant changes to the Senate electoral system it is likely that governments will continue to need the support of minor parties to pass tax legislation, ranging from Budgets to more complex policy issues that involve tax design; potentially resulting in second-best solutions that could compromise the effectiveness of the policy.

APPENDIX

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT

SECTION 53 Powers of the Houses in respect of legislation

Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate. But a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services under the proposed law.

The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the government.

The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people.

The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.

Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws.

SECTION 54 Appropriation Bills

The proposed law which appropriates revenue or moneys for the ordinary annual services of the government shall deal only with such appropriation.

SECTION 55 Tax Bill

Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect.

Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only.

SECTION 56 Recommendation of money votes

A vote, resolution, or proposed law for the appropriation of revenue or moneys shall not be passed unless the purpose of the appropriation has in the same session been recommended by message of the Governor-General to the house in which the proposal originated.

SECTION 57 Disagreement between the houses

If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time.

If after such dissolution the House of Representatives again passes the proposed law, with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may convene a joint sitting of the members of the Senate and of the House of Representatives.

The members present at the joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one house and not agreed to by the other, and any such amendments which are affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives shall be taken to have been carried, and if the proposed law, with the amendments, if any, so carried is affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives, it shall be taken to have been duly passed by both Houses of the Parliament, and shall be presented to the Governor-General for the Queen's assent.