

Senate Amendments and Legislative Outcomes in Australia, 1996–2007

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There has been a recurring argument in Australia about how the Senate should exercise its constitutional power to amend government legislation that it receives from the House of Representatives. Much less attention has been paid to how the Senate has exercised this power, and how often Senate amendments have resulted in legislative changes that governments otherwise would not have made. This article explores the legislative record and finds that, during the Howard ministry, Senate amendments did not often provoke negotiations leading to bicameral compromise. Most often, the House either agreed to the Senate's amendments, many of which were government proposals, or disagreed to them. In the latter cases, the Senate most often gave way, instead of insisting on the legislative changes it already had approved.

Introduction

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

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

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

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

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

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

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

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

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

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

Amendments Made in the Senate

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁸Bach (2003, 218) and accompanying notes.

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

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

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

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

Senate Amendments in the House of Representatives

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

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

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

¹²Bach (2003, 228) and accompanying notes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁸*Business of the Senate* (2001, 85).

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

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

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

Bill passed both Houses.

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

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

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

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

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

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

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

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

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

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

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

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

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

Do the Two Houses Disagree?

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

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

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

been gathered for the 12-year period from the beginning of the Howard ministry in 1996 through to the end of 2007, a period that includes 2.5 years after the government gained control of the Senate in mid-2005.²⁵

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

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

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

Table 1. Senate passage of House bills, 1996–2007^a

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

^aIncludes the few bills passed by both houses but not enacted. Also includes bills that the Senate returned to the House of Representatives with requests for amendments before third reading of the bills in the Senate.

^bIncludes only Senate amendments and requests that were adopted during the Senate's initial consideration of House bills on which the Senate completed action.

^cIncludes schedules, items, clauses, and parts that were negotiated.

^d180 of the amendments were to the Workplace Relations and Other Legislation Amendment Bill 1996.

^eAmendments to three bills accounted for 45.6% of the total.

^f222 of the amendments were to what became the Native Title Amendment Act 1998.

^gAmendments to four bills accounted for 51.6% of the total.

^hAmendments to two bills accounted for 43.5% of the total.

ⁱAmendments to four bills accounted for 42.8% of the total.

^j56.0% of the amendments were to the Workplace Relations Amendment (Work Choices) Bill 2005.

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

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

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

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

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

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

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