

**WORKING TITLE: Who really makes legislation?**

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Politicians get their fair share of blame for the parlous state of policy making in Australia but they are not the only culprits. The bigger problem is that policy doesn't get made the way people think it does. It doesn't get made the way the way academics think it does, it doesn't get made the way journalists think it does and it doesn't get made the way bureaucrats think it does.

Imagine the following scenario. Imagine that during the Gillard minority Government, one of the crossbenchers in the lower house introduced a private members bill and that the rest of the crossbench and the opposition voted for it. Even if the Government of the day voted against it, the crossbench and the opposition would have the numbers to pass the bill.

Now, the successful bill goes to the senate where, again, the crossbench and the opposition vote for it, and the government tries in vain to vote against it. Had the previous parliament wanted to, it could have made laws that the government of the day voted against and that the minister who did not want the policy to succeed was nevertheless responsible for implementing it.

What would a department do if it was tasked with implementing policy that it had not designed and its minister had raged against in a second reading speech? Would it be responsible to the minister, or the law? Do bureaucrats make policy, or do ministers, or do parliaments?

While it is hard to argue with the principle that policy should be 'evidence-based', it is also hard to argue that politicians shouldn't stick to the promises they make. So when the evidence, or the circumstances change, is it acceptable for a politician to break a promise?

In our new book, *Minority Policy*, Dr Brenton Prosser and I examine the role in the policy process played by crossbench and backbench members of parliament. While recognising that much policy is made by the bureaucracy, the premise of the book is that parliament, and parliamentarians, play a central role in both the ultimate shape and passage of the laws of the land.

Food is exempt from the GST for the simple reason that that Democrats refused to support a GST at all unless their amendments were agreed to by the Howard Government. It wasn't Treasury, nor academics, nor indeed the Treasurer that desired the exemption of food. Indeed, most of the people

who wanted a GST were adamant that it should be levied on everything. But it is the parliament that has the final say, and a government that lacks the numbers in the senate lacks the capacity to dictate what will and will not be legislated.

In exchange for voting for the privatisation of Telstra, Mal Colston quit the ALP to be promoted to the Deputy Presidency of the Senate by John Howard. Peter Slipper took a similar prize from Julia Gillard. Brian Harradine was famous for holding up national legislation unless he got some lollies for Tasmania and, during the GFC, Nick Xenophon delayed the passage of the \$42 billion stimulus package until he got an extra \$900 million for the Murray River. Despite the bleating from the Prime Minister, crossbench negotiation isn't a new challenge.

History tells us that crossbench politicians don't merely amend the policy of governments, but that they propose their own. Andrew Wilkie's private member's bill on whistleblower protection and the Greens' idea of a Parliamentary Budget Office are both clear examples of policy making that happens outside of the usual 'policy cycle' of which young public servants are taught.

Of course it is not just at the federal level where crossbenchers in the upper house and minority government in the lower house are increasingly common. The ACT is in a near-permanent state of minority government. Queensland has a minority government and South Australia and Tasmania did until recently.

While this weekend's New South Wales state election has been billed as a referendum on the privatisation of electricity poles and wires, in reality it is upper house members elected to the crossbench, not Mike Baird nor Luke Foley, who will decide the ownership of NSW taxpayers' biggest [biggest? on what measure?] asset.

Minority government is not unique to Australia. The UK currently has one, as do Germany and a wide range of other European countries. New Zealand's proportional voting system virtually ensures that minority governments are formed after each election, but that has not stopped John Key from winning three elections and passing a broad suite of conservative reforms.

While proportional representation and voluntary voting can help explain the rise of minority government around the world, in Australia there is a more straightforward explanation for why voters are increasingly supporting independents and minor parties. At the last election, 21 per cent of people voted for an independent or minor party (32% in the Senate), and that excludes the five per cent who voted for the Nationals.

The rise of social media, the disengagement of young voters and the 24-hour news cycle have all been blamed for why big reforms are getting harder in Australia. But given that those same trends are present in other countries, and that other countries, including New Zealand, are not in the midst of a 'democratic crisis', they can't possibly be the cause of Australia's current woes.

While there is no doubt that there are more crossbenchers in the upper house than ever before, the Prime Minister has not even attempted to make the case for why this makes his job harder than his predecessors. Surely it is easier to be able to secure the votes of the Greens or any 6 of the 8 crossbenchers than it is to deal with a solid block of Democrats? Whereas previous government ministers had limited paths through the senate, the Coalition's current crop have many. Greg Hunt used

the senate to strengthen his direct action policy, whereas Christopher Pyne used the same chamber to humiliate his government.

Policy making and parliamentary politics are more complicated, and more interrelated, than usually described. An obstructionist senate isn't new, and it is exactly what our constitution had in mind. Perhaps the simplest explanation for the current Prime Minister's woes on the policy and parliamentary fronts is also the correct one: he simply isn't very good at the persuading part of politics.

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