Papers on Parliament No. 35

June 2000

Australia and Parliamentary Orthodoxy

and Other Lectures in the Senate Occasional Lecture Series, 1999

Published and printed by the Department of the Senate,
Parliament House, Canberra
ISSN 1031-976X

Published by the Department of the Senate, 2000

Papers on Parliament is edited and managed by the Research Section, Department of the Senate.

Editor of this issue: Kay Walsh.

All inquiries should be made to:

The Director of Research
Procedure Office
Department of the Senate
Parliament House
CANBERRA ACT 2600

Telephone: (02) 6277 3078

ISSN 1031–976X

Contents

Contributors

Howard Wilson was appointed as the first Ethics Counsellor to the Canadian government in June 1994.

Professor Emeritus **Geoffrey Walker** is a former Dean and Head of the T C Beirne School of Law at the University of Queensland who has returned to practice at the Bar.

Ian Marsh is Associate Professor in the Graduate School of Management, University of New South Wales.

Alan Ward, Professor of Government at the College of William and Mary in Virginia, was an Australian Senate Fellow in June 1999.

Meredith Burgmann is President of the Legislative Council of New South Wales.

John Uhr is Reader in the Graduate Program in Public Policy, Asia Pacific School of Economics and Management, the Australian National University.

Rodney Tiffen is Associate Professor of Government at the University of Sydney.

Kay Walsh is a Senior Research Officer in the Department of the Senate.

Ethics and Government: the Canadian Experience*

Howard R. Wilson

I want to begin my remarks by thanking Harry Evans, the Clerk of the Senate, for inviting me to speak today. During my past week in Australia, I have enjoyed meeting many people who share the same interests in ethics and governance as I do. It has been rewarding to debate the questions that challenge us as we move forward on these issues.

In fact, I think that we are part of a growing international movement. Many trends have come together in the push for stronger ethics structures in governments. It is part of the interest in good governance in countries around the world. The introduction and enforcement of higher ethical standards is linked to strengthening democratic institutions—and ultimately expanded human rights. Ethical systems mean a more level playing field for businesses in their dealing with governments. They mean better services and wiser public spending for citizens.

When I speak about my role and the larger issues of ethics and governance, I often address them in fairly broad, even theoretical terms. However, I don't think this audience needs to be convinced of the value of ethical behaviour in government.

The real challenge is how best to proceed. There are different models for setting and monitoring ethics in government. I happen to have a strong preference for the system that we have built within the government of Canada. I don't say that we have gotten it entirely right and more remains to be done.

* This paper was presented as a lecture on the Senate Occasional Lecture series at Parliament House on 19 February 1999.

For example, we are not as advanced as Australia in introducing strong ethical systems into the public service. And our Parliament has yet to introduce a conflict of interest regime applying to backbench MPs and senators—but we have done well so far.

So, today, after introducing the topic with some comments on how ethics came to be a priority of the government of Canada, I will spend most of my time describing how our system of preventing and addressing possible conflicts of interest works in practice. That should provide plenty of grist for the question mill that will follow my remarks.

Along the way, I want to address a couple of common questions about our system, perhaps anticipating some that you may have. One is why we have a system that focuses relatively more on what I call the integrity end of the spectrum, as opposed to the compliance and enforcement end. Another is the reporting structure that we have, namely why I report to the Prime Minister and not to Parliament. Finally, I want to talk about the issue of the minister's role as a constituency representative.

Overall, I hope to leave you with the sense that we have constructed a system that works. Works from the point of view of Canadians. Works from the point of view of the people in political life and in the public service whom the system covers. Works from the point of view of enhancing integrity and ethics in government.

First, let me describe our system and the context in which it came into being.

The call for a higher standard of ethics

In most advanced democracies, the past couple of decades saw a general decline in citizens' trust of governments. Analysts have suggested many, many reasons for this turn of events. One was most certainly the gap between the ethical standards that citizens expected of people in public life, and what those citizens believed they saw in practice.

It wasn't that we lacked for laws. Canada has a full complement of laws to remedy corrupt practices related to government. For example, bribery and influence peddling have been illegal under our criminal code for a very long time.

Moreover, Canada is updating its law on the bribery of public officials even further. In December, our Parliament passed a bill that would make it illegal for Canadians and Canadian businesses to bribe public officials in foreign countries. That was part of Canada's commitment to sign and ratify the OECD Convention on Bribery.

But, despite those laws and whether justified or not, the public malaise reflected more than law alone could ever address.

For example, there was a growing sense among Canadians that private interests were crowding out the public interest in decision-making. There was a sense that a new generation of lobbyists, and the people who could afford their services, had become far too influential in the halls of government.

The role of the Ethics Counsellor

That climate encouraged the current government in Canada to include a number of ethics commitments in its platform for the 1993 election. Once in office, it began to

implement them. In June 1994, the Prime Minister created the position of Ethics Counsellor and appointed me, a public servant, to that role.

My office deals with potential conflicts of interest and other ethical issues for the people most likely to be able to influence critical decisions in our federal government. My office is also responsible for the *Lobbyists Registration Act* and the *Lobbyists' Code of Conduct.* Those are designed to bring a level of openness to lobbying activities and to the people involved in that work. While I do not have the time to discuss lobbying issues in my presentation, I would be happy to take your questions on them later.

I should point out that my office does not replace the role of the police, crown attorneys and judges when it comes to suspected breaches of the criminal code. I do not address bribery or influence peddling cases that are properly dealt with by the police and judicial process.

Rather, I deal with the grey areas of potential or real conflict of interest. In practice, these are issues that may seem broadly wrong in the eyes of citizens, without ever actually being illegal.

How our system works

Having set out the areas that I cover in my work, I want to describe how our system of avoiding conflict of interest issues works in some detail.

The Conflict of Interest Code covers all members of the federal Cabinet, including the Prime Minister. It covers their spouses and dependent children. It covers members of those ministers' political staff. And, unlike the case in many other jurisdictions, it also covers senior officials in the federal public service, about 1200 to 1300 individuals.

We arrived at the basis of our Code of Conduct after some serious consideration. There are two broad views on how to pursue higher ethical standards. One school holds that you need an exacting set of rules, up to the point of legislation. You need to support that with a strong enforcement mechanism.

The other school holds that you can inspire integrity, rather than force compliance to it. You can encourage people to be ethical. You can get them to make morally sound judgements and to take intelligent steps to avoid the potential for conflict—real or imagined.

There is a continuum between both schools, and in Canada we have chosen to build our system at the integrity, rather than the compliance, end of the scale. I will come back to this debate, and our perspective on it, a little later.

But the point I want to make is that the government of Canada's approach to an ethics structure centres on avoiding possibilities for conflict of interest well before they even become possible. It is based on a clear set of principles. In turn, those principles are the basis for a select few rules and procedures.

Together these principles, rules and procedures clearly spell out reasonable expectations of people in public life. They offer those people the guidance they need to make intelligent decisions on organizing both their personal and public lives.

The principles of the Code

Our first principle states that:

> 'public office holders shall act with honesty and uphold the highest ethical standards so that public confidence and trust in the integrity, objectivity and impartiality of government are conserved and enhanced.'

The second principle expands on the first. It states that:

> 'public office holders have an obligation to perform their official duties and arrange their private affairs in a manner that will bear the closest public scrutiny, an obligation that is not fully discharged by simply acting within the law.'

A third principle says that:

> 'on appointment to office, and thereafter, public office holders shall arrange their private affairs in a manner that will prevent real, potential or apparent conflicts of interest from arising but if such a conflict does arise between the private interest of a public office holder and the official duties and responsibilities of that public office holder, the conflict shall be resolved in favour of the public interest.'

There are a few other principles that the Code sets out but you can clearly see that we have anchored the Code on the basis of integrity. People in public life know that they are expected to take action with ethics in mind at all times.

The rules and procedures

To make these general prescriptions more concrete and consistent in application, we have a limited set of rules and procedures.

Some cover the disclosure and management of assets, liabilities and outside interests. In general, this information is kept confidential, but some of it is available to the public.

When a public office holder who is covered by the Code is appointed, he or she has to provide a report to my office. The report lists assets, liabilities and outside activities, for himself or herself, for his or her spouse and for dependent children. I review that information and recommend what the office holder, spouse or children should do to comply with the Code.

In the case of activities, the rules are straightforward. The Code prohibits ministers from engaging in a profession, actively managing or operating a business or serving as a corporate director. The Code also rules out holding office in a union or professional association, or acting as a paid consultant.

In the case of assets, those can fall into one of three groups under our Code. Each group is treated differently, because each offers a different potential for conflict.

The first group, 'exempt assets' do not normally trigger further controls because they do not realistically present a possibility for future conflict of interest. Most personal assets,

including homes, vacation properties, bank accounts and fixed income investments fall into this category. Mutual funds are also included in this category because the actual content of them is not under the office holder's control.

A second group are what we call 'declarable assets'. These have to be declared publicly, but the office holder is still free to deal with them. Examples of declarable assets are ownership of family or local businesses. Other declarable assets are land-oriented. They include farms under commercial operation, rental properties, vacant land and, in one recent case involving the Prime Minister, ownership interests in a golf course. Since our federal government has no significant constitutional or regulatory authority over land use, these kinds of land ownership are unlikely to present a possibility of conflict. However, by putting that ownership on the public record, whatever chance of conflict might exist is reduced even further.

The third and final group are called 'controlled assets'. These are assets that could be directly or indirectly affected by government decisions or policies. The most common example of these assets is publicly traded securities, such as shares on a stock exchange. The policy on these is simple. In a nutshell, you can be a personally active investor or you can be a Cabinet minister. You cannot be both. Our Code says that office holders have to divest themselves of these controlled assets.

They have three basic options when it comes to the required divestment. The first is simply to sell those assets at arm's length.

The second is to shift them into a blind trust. This works well with a stock portfolio, where the trustees have the full authority to do whatever they deem appropriate with those assets. The office holder is permitted to get periodic information on the overall value of the holdings and enough information for income tax purposes. However, that office holder cannot have information on the actual composition of the trust.

The third choice is to create a blind management agreement. This would usually apply to a case where the assets are illiquid or not publicly traded, such as shares in a private company that might do business with the federal government. The office holder is prevented from making any decisions on the management of these assets. Those decisions rest with the supervisors of the agreement.

In the case of an office holder's interests in a private company, it may not be sufficient just to place it in a blind management agreement. After all, the company may have dealings with the government. It may be directly affected by government policies that apply to a specific sector of the economy. In response, we have differentiated between policies that generally apply to all companies, and those that are of particular interest to the companies covered by the blind management agreement.

For example, let me talk about the situation of Canada's Minister of Finance. He came into Cabinet after a successful career in business. He is the controlling shareholder in a private company that, in turn, owns shipping, bus and other companies. What did he do on his appointment?

First, he put those shares into a blind management agreement. Second, he instructed his deputy minister and his staff to isolate him from any direct dealings between his

company and his department. Third, he does not participate in any policy discussions or Cabinet decisions which directly affect his private interests. That would include discussions on marine transportation policy or shipbuilding.

Still, someone has to take responsibility for the department in those cases. And so, those dealings or issues are directed to another minister, most commonly the Secretary of State for Financial Institutions, the junior minister in the portfolio. The Secretary of State handles the interests of the department in those cases, as if he were the minister.

That was one case. There are others and what we do differs from case to case, simply because the circumstances differ too. Our goal is quite simple and consistent in all cases. That is to remain faithful to principles of integrity that the Code embodies.

We are often asked why our rules on shares are so sweeping. Why can't a minister invest personally in the shares of companies which are not affected by the activities of his or her department? There are two reasons. First, there is bound to be a disagreement about whether or not a particular company is affected. Further, in large departments, it is always possible that some part of the department is busy dealing with a company without the Minister being aware. In my view this is an accident waiting to happen.

But second, in Canada, as in Australia, the Cabinet takes decisions collectively. Thus a minister responsible for, say, cultural policy will know about and participate in decisions to privatise the state airline or railroad company, both of which happened several years ago in Canada.

Even with those rules and processes, in practice, we operate in an area of 'what ifs'. Each office holder's financial affairs are different. So there are regular and substantial amounts of contact between my office and people covered by the Code. They routinely come to us with questions about how a given asset or interest should be treated and we offer advice. They have a deep and abiding interest in being on the right side of these decisions and we find them most cooperative.

I should point out that all this is the pro-active side of our work. That is by far the bulk of our activity, but I should also point out that the Prime Minister also asks me to investigate and comment on specific issues that arise from time to time.

Now, having outlined the principles, procedures and processes that are part of our Conflict of Interest Code, let me move on to discuss some specific issues that often arise in forums like this one.

Compliance or integrity

The first is the balance between the two poles on an ethics continuum that I referred to a few minutes ago.

As I said, there are broadly two major approaches. The first consists of rigidly codifying ethical behaviour, usually through a series of 'Thou Shalt Nots.' This approach began to take hold in the 1970s, particularly in the United States.

I could go on at length about its pros and cons. But let me simply ask this question: does that legalistic model produce results?

Just as people seldom feel like calling the police to ask if something is illegal or not, I don't think people in public life would be comfortable baring their personal financial information to someone who could easily use it to punish them. More than that, too many rules and too legalistic an approach seem to make people look for loopholes rather than apply basic ethical principles and make sound judgements. It begins to follow the law of unintended consequences, where you get outcomes that you did not expect or want.

Our goal is to promote an attitude of integrity and compliance, not beat that cooperation out of people. Our experience says that goal is achievable. Over the past five years, we have seen that if you set a high, principled standard that seeks to prevent even the possibility for conflict, office holders do rise to it. People come forward with questions because they know they will get advice that should keep them out of trouble.

Above all, an integrity-based approach responds to a basic reality of political life. These people know that appearances count. They know that the media and their constituents will judge them by the old saying, 'Where there's smoke, there's fire.' That is an occupational hazard of political life and more so in times like these.

And so, I have found that they recognize a sound ethics approach to be both fire insurance and smoke insurance. They recognize that this is a very small price to pay for the privilege of being a minister, a privilege that, on most days, they enjoy deeply.

Why report to the Prime Minister?

The next issue I want to raise is linked to the previous one. I report to the Prime Minister, not to Parliament. Some have asked why, especially academics, some journalists and the opposition parties.

There are two main reasons. The first, and most important, is constitutional. In Westminster democracies, the Prime Minister is responsible to Parliament for the performance of his ministers and the government. He can appoint, shuffle and fire them at will.

Since we are dealing with a set of issues that concern the integrity of ministers, the Prime Minister decided that he wanted consistent help in dealing with an issue that has created serious problems in the past. And he decided that was best provided by delegating the responsibility to an independent voice reporting to him—as is his constitutional prerogative.

The second reason is based on a contrast between my role and that of the offices who do report to Parliament. I am thinking of people such as our Auditor General and the Commissioners of Information, of Privacy and of Official Languages.

The role of the Auditor General is clear and traditional; to ensure that government expenditures are legal and effective. But in ethics we are dealing with many grey areas. We are dealing with the appearance of conflict. We are dealing with issues that go beyond what the law requires. What would be the result of having a non-elected official, with full investigatory powers, responsible only to Parliament?

Let me simply reply with a two word answer: Ken Starr.

In my experience, I think our reporting system has worked well in practice. It has helped office holders make decisions that have removed any real possibility of conflict. It has helped them clarify matters rapidly and factually when allegations have been made. Since our system was created, no Minister has had to resign because of a conflict between his or her personal interests and his or her ministerial responsibilities. I think that says a lot right there.

The Minister as a constituency representative

That is not to say that we have had no resignations, and that brings me to my next point—the role of a minister as a representative of his constituents.

As a general rule in Canada's federal government, almost all ministers are Members of the House of Commons. The only exception is the Leader of the Government in the Senate, which in Canada is an unelected chamber.

As MPs, ministers each have ridings with upwards of 80 to 100,000 constituents. They face the normal range of requests from constituents for help with various issues. Among those issues can easily be matters that are before one of our many quasi-judicial tribunals.

For example, a constituent with a refugee claim will be heard by the Immigration and Refugee Board. A constituent with a dispute about Canada Pension Plan benefits can take it to the Pension Appeals Board. A constituent who owns an interprovincial trucking company may deal with the Canada Labour Relations Board.

Then there are the boards that authorize specific licenses. If someone wants a license for a 50 watt community radio station, they have to apply to the Canada Radio-Television and Telecommunications Commission.

Constituents expect their MPs to help them deal with these agencies. As they should. But what about ministers?

Initially the Prime Minister had his own guidelines on these issues but a specific case about a year into his first mandate showed that these were not clear enough to be workable. So, he asked me to set up rules on dealings between ministers and these quasi-judicial tribunals.

Ultimately, the question was, 'To what extent can a minister also carry out the normal work of a Member of Parliament in making representations on behalf of constituents before these tribunals?' We have arrived at a simple answer that has removed all doubt on these cases. In one word, that answer is 'never'. Just as ministers cannot attempt to communicate with judges about cases, they cannot do so with quasi-judicial tribunals either.

The basic principle now is:

> Ministers shall not intervene, or appear to intervene, on behalf of any person or entity, with federal quasi-judicial tribunals on any matter before them that

> requires a decision in their quasi-judicial capacity, unless otherwise authorized by law.

My office makes that clear in our regular dealings with ministers and their staffs. In fact, we provide an annual seminar for staff in the riding offices of ministers to reinforce this position. The seminar also gives those people a chance to ask questions about real or potential examples.

They know the price of error on this. It can mean resignation.

The reasons for this policy are quite simple. The first comes back to public perception. Cabinet ministers cannot magically transform themselves into humble backbench MPs, at least not in the eyes of citizens. So, their interventions before tribunals have a ministerial aura to them, with all that entails.

And legally, as with courts, the government has created a series of bodies that make decisions at arms-length from it. Ministers have to let the processes unfold.

Courts in Canada and elsewhere have routinely overturned the decisions of tribunals under administrative law if they found an apprehension of bias on the part of a tribunal member. Recent Canadian jurisprudence extended this scrutiny to ministers.

In August 1996, the Court of Appeal of our province of New Brunswick unanimously rejected a decision of the Appeals Tribunal of the Workplace Health, Safety and Compensation Commission. The reason? The province's Minister of Agriculture and Rural Development represented a constituent before that tribunal.

The court recognized that the provincial Cabinet had the power to appoint or reappoint tribunal members and the power to set their pay. Given all that, it found that a fair hearing was not guaranteed when a minister represented a party before the tribunal. An apprehension of bias existed.

But perhaps more fundamentally, this view is also backed up by a basic convention of Cabinet government. Ministers are not to become involved in the affairs of another department unless they have the agreement of the responsible minister.

Since public servants are accountable to their ministers, a minister in one department cannot direct officials in another department without presenting those public servants with an impossible conflict of interest.

Conclusion

Let me sum up my remarks by saying that as that last issue shows, this business of ethics is evolving rapidly. Our citizens expect the highest standards. And their expectations are growing, not shrinking. Our media and the opposition parties in Parliament are poised to make the most of cases where those standards might not have been met. They play an important role.

This rising standard of ethics is part of a sea change in governance, a sea change that I have witnessed around the world. Fifty years ago, Canada had a senior minister who

was well-known for spending part of his Fridays reviewing his stock portfolio. He assessed his holdings on the basis of the week's decisions in Ottawa. In those days, no one ever thought that he would ever take a decision, as Minister, that was not in the public interest. In these days, no one in Canada would be quite so charitable. Back then, as long as there was no out and out corrupt behaviour, that was business as usual. Today, it would be unthinkable. Public standards have moved that quickly and decisively.

Our job has been to reflect those standards in a way that works for everyone involved. I feel very strongly that we have done that. We have achieved the results we wanted through a system that focuses on prevention and avoidance. It is a system based on encouraging people to think and take actions based on integrity.

We have avoided the negative fallout of systems that obsess on compliance with rigid rules that never seem to encompass all possible problems; systems that assume that all public office holders are either crooks or are too dumb to know what is proper, no matter how senior they are, or how much money they make.

We have created a system that enables us to address the appearance as well as the reality of a conflict.

Everyone benefits when we attain those standards and when we do so through an integrity-based system. People in public life gain a greater degree of public approval. Citizens gain an enhanced sense that their public officials are making decisions that stand up to ethical scrutiny. They may not agree with the decisions, but at least they can feel assured that the decisions were not tinged with the scent of private gain.

But we are not done. As I suggested, issues keep evolving and so do public expectations. There is much we can work on, and an increasingly broad network of people around the globe are doing just that.

Question — I think your approach is very interesting, particularly as it seems to encourage avoidance of loopholes and unintended consequences, which is very difficult in any review process. One thing that does interest me is your reporting to the Prime Minister. Does this allow a loophole, if by some unusual circumstance there's an unethical prime minister?

Howard Wilson — Then Canada's got a very serious problem, which would not just be in this area. There is no doubt that this system only works if it has the strong, unequivocal support of the Prime Minister. It has to have that support. When it was indicated that there was to be a Code of Conduct and an Ethics Counsellor would be applying and administering it, the Prime Minister in effect said that he didn't want to hear from his ministers if they were disagreeing with recommendations that I was making. That certainly helped at the beginning, in fact it was absolutely essential. If

there was any hesitation on the part of ministers at the beginning, they didn't reveal that to me, again because of the importance that the Prime Minister had placed on this.

I think now, with almost five years' experience, the argument would be that indeed it does work well, and it is in the ministers' and Prime Minister's interests to support it. It's not in the interests of a government for very competent ministers to have to resign because they're not in compliance with a particular code that's been established. In the Canadian experience, it has moved debate to the area of differences in public policies, differences of view on policy issues between ministers, differences of view as to whether a minister is a competent minister—are they in fact running their department with any degree of skill. These, while not ethical issues, are very, very important.

One of the consequences of this has been that if a minister has taken my advice (and they all have) and if allegations are made that the minister's interests are constituting a conflict, then it is expected that I would stand publicly and explain and defend the decision. Ministers are very hard-pressed in a real world to defend themselves; you can't be a judge in your own case. Our Prime Minister would find it difficult to have to delve into the details of the private affairs of his ministers, and then have to stand himself and defend them. The system has evolved so that I would be expected to publicly defend them. I have had to do so. Often it is by way of interviews with the press, or appearing before a parliamentary committee, and I have discovered since I arrived here that I have to appear before a parliamentary committee on my return, to explain the Prime Minister's interests in a golf course. He has an avid interest in playing golf, and his past interest in the golf course creates no difficulties with our code, but the Opposition wanted a clear explanation in a public forum, and that's what I will have to do on return.

Question — In view of the fact that ministers and other people in high public office are party to confidential information and information at a very high level, is there anything in your code of ethics which might place a constraint on them actually using that information to their own benefit within a certain period of time of leaving office, or to prevent the phenomenon of double-dipping or insider trading, as you might call it?

Howard Wilson — As long as they are in public life, the fact that they cannot trade directly on shares on the stock exchange deals with the issue of insider trading. We do have post-employment rules. The rules that we apply say that you cannot take a job or a contract with any organisation with which you had direct and significant official dealings in your last year in office. Nor can you be appointed to the board of directors of such an organisation. The cooling-off period is one year for most public officials and two years for ministers. There are also restrictions placed on making representations back, that is, lobbying their old agencies. You can't make representations back on behalf of a third person to your old department, or your Cabinet colleagues, for a period of time after leaving office. The cooling off period, again, is one year for most officials, two years for ministers.

With respect to insider information, we have said that you cannot provide advice to third parties on information that is not in the public domain. All members of Cabinet are Privy Councillors—I think your expression here is Executive Councillor—and they are bound by the oath of office to respect the Cabinet secrecy. I have not had any suggestion that that has not been respected. In interpreting what is 'in the public

domain' I have said that this is not merely information a government department has published, but also what a person in the private sector knows about the activities of the department. We don't want to prevent people who have come into public life from being able to use their experience in their subsequent life. I could give an example which comes up frequently regarding former members of our Immigration and Refugee Board. They have been dealing with adjudicating on refugee claims. They are often appointed because that happens to be the area in which they worked. Now what are they going to do after their appointment of say five years is up? Well, they can't make representations for a year back to that Board. They can't deal with people who have appeared before them. But they can provide advice, and that advice should be no different than the advice that a private practitioner in this field would be offering to their clients. So it provides a fairly reasonable scope, and I think it does protect the public interest. If you make it impossible for people to come into public life and then subsequently use experience gained, then it just makes public life less attractive.

There is a high degree of sensitivity, particularly for ministers who have formerly been in government, who often don't organise their departures quite as professionally as senior public servants. Public servants organise their retirements, whereas often ministers finds themselves retired quite unexpectedly, as part of political life. In the last election a very senior minister was defeated, and within twenty-four hours he called me, and forty-eight hours after the election he was in my office. We sat down and went through all of the restrictions. He was intending to continue to work in Ottawa, and was very conscious of the fact that he would be exposed to intense scrutiny and wanted to ensure that his subsequent activities fully met his obligations under the Code.

Question — It's all very well for somebody who owns a fairly considerable share portfolio to pass it over to a blind trust, but in most cases that share portfolio is not going to track the stock exchange directly, it's going to be stronger in certain areas than others. And unless the trust immediately sets about reshuffling the total shareholding, the minister—or public servant for that matter—is going to have a pretty fair idea of what is in the blind trust. Another thing is, in the Australian case (and I presume this is the situation in Canada, too) we do have a capital gains tax, and immediately shares are sold they become subject to capital gains. It may not be desirable that they be sold and subject to capital gains, because they may be required later on for income purposes. So I'd like to hear your views on the blind trust situation.

Howard Wilson — Those are very key questions. We were trying to create a system in which people who chose to continue to be active in the stock market would not be prevented from doing so. I think, from discussing it, that who they have as their investment adviser or broker then becomes very important. The reality is, that if your holdings tend to be fairly small, most people think that setting all of these things up doesn't really make a great deal of sense and so they generally have been happy just to put those affairs into mutual funds. But what we have argued is that if you do have a broker or an investment adviser—truly at arm's length—and you set up these legal requirements, and an individual is empowered to seek your best investment interests within the framework of the risks that you are prepared to undertake, there will, over time, be sufficient trades to go on, to start to distance the minister or other public official from precise knowledge of where those interests lie.

If, at the time of coming into compliance with the Code, there were particular shares that were directly connected with the minister's interests, then we would require that those be divested, generally by sale. The reason for this is that the minister would then be prevented, in fact, from carrying out his or her responsibilities. It is a question of how one manages it at the beginning, when we would make a judgment whether there was anything in the individual's particular holdings at this moment that would create a problem under the Code. If there is, then we ask that they be divested. This is why it becomes quite labour-intensive, because the issues that you raise are in fact important and the financial press in Canada, other members of the media and the Opposition parties are quite intensely interested in that point. What we're trying to do is to say that if you are interested in the market, we can find an accommodation for that, but we don't want it to be used as the basis for allegations that the minister has shares affected by his or her portfolio and, if of any value, he or she may well be influenced by them. It is a question of quite intense management, but Canadians have been willing to believe and accept that the system is safe enough to allow these kinds of investments to take place.

Question — How do you select the blind trustee? For example, is he likely to be the broker who has traditionally handled the minister's affairs in the past?

Howard Wilson — That is often the case. What we are concerned about is when the relationship is less than an arm's length relationship. I think that a person in a large investment company, a broker, would meet our test, provided that the particular relationship has not become so close as to raise questions as to that distancing. The normal thing—at least in Canada—is that if you have an investment adviser, that person is continually making suggestions as to how your portfolio should be reorganised in order for you to get a better return. And most of these brokers actually welcome the opportunity to no longer have to have these negotiations with these individuals.

Question — My question is about jurisdiction. How far does your work extend to the holdings of immediate family members, such as spouses, children and parents of ministers?

Howard Wilson — Within the scope of the Code would fall the spouse and dependant children—that is, in terms of the disclosure of interests requirements. The notion of other family members gets caught up a bit in terms of the transference of assets and the question of employment issues. In other words, for the family members of ministers there are restrictions on the kind of contracts or employment that they can have with the government of Canada, to ensure that there's not a ministerial involvement in it. They would be prevented—this is the family cast widely—from having a contract or employment with a government department over which the minister *is* minister. But they are not prevented from having contracts or employment with any other government department, provided that a minister was not involved in that selection process—which is the normal way in Canada. Most employment decisions—and all employment decisions in the public service—but also most contracts, are not ones that engage ministers. We don't permit the transference of assets to family members to avoid the obligations of the Code, and again, that's cast fairly widely. For disclosure requirements, it's the immediate family—that is, spouse and dependant children—but other aspects of the code tend to look at such issues as arm's length relationships.

Question — My question relates to the terms of your role and where it fits into public policy type issues. For example, I read that there's a reasonably high degree of concern about the privatisation of public assets. In the sense that you're seen to be objective, I wonder if you could identify the source of people's cynicism and then perhaps have an input into public policy, for example where privatisation fits in, or commenting on ethical issues in a broad public policy role. Could it be, or is it, part of your role?

Howard Wilson — That particular issue has not arisen, but my office is heavily engaged in working with the development of codes of conduct, for example, that may apply to particular tribunals and providing advice more broadly on a range of issues. Privatisation is not the sort of thing which has raised any particular political concern at this time. It's largely all done; there are hardly any crown corporations around any longer.

Question — Who appoints the Ethics Counsellor?

Howard Wilson — The Prime Minister. My career had been cast in trade policy—I was in the foreign service—and I was between assignments when the Cabinet Secretary, who is a permanent public servant, asked me if I would do the Cabinet Office a favour by taking over the position for one year. I didn't feel like telling the head of the public service that I was not prepared to do him a favour, and it was only for a year. This was in 1993 under a previous Prime Minister, Prime Minister Mulroney. There followed a short term under his Conservative successor, and then there was the election of October 1993, won by the Liberals. In the Spring of 1994, the Prime Minister called me and asked me to be Ethics Counsellor. So I come back again to the point that I made at the beginning, that these are the Prime Minister's rules. They apply to his government, and he's chosen a mechanism which he would like to have operated on his behalf, by me. My name was actually put forward to the two Opposition leaders by the Prime Minister. Both of them agreed, but at the end it's the Prime Minister's rules that I'm administering—I'm not a person of Parliament.

Question — Do you have an educative role, or do you make a heroic assumption that all ministers are basically ethical people? And do you have an investigative role, when that assumption is shown to be flawed? Concerning the code of conduct, in the foreign service here in 1996, there were a series of allegations of child sex offences involving serving diplomats overseas. The foreign service formed an inquiry, which was held entirely in camera, which produced a code of conduct, which was then re-drafted by the foreign service department bureaucrats, to remove any reference at all to child sex offences—the prime purpose of its generation. The foreign service itself is the recipient of all complaints. It decides which should be investigated. They are all done in camera, and it audits that process itself. I note that you said you had a role in developing codes of conduct for Canadian departments, and presumably you also have a role in ensuring that they are inherently, and in reality, ethical?

Howard Wilson — On the question of investigations, I tend not to use the word 'investigation' which conjures up, at least in the Canadian mind, subpoena powers and so on. I do have these powers relative to the code of conduct for lobbyists that I developed, and which was tabled in Parliament. If there's a breach of one of these rules then I acquire all the powers of a superior court of record, subpoena powers and so on, to deal with that matter. With respect to the Conflict of Interest Code itself, if there is

any evidence that comes to my attention that somebody is not in compliance with it, then I will look into it—using the ordinary English word 'investigate', but not with that legal sense—and come to a conclusion. If somebody were not in compliance, then it would be my responsibility to report that to the Prime Minister. These matters then tend to become quite public, and have usually been arrived at in a public process anyway, so there then has to be a public response.

The work that I have done on codes of conduct has not tended to focus on the kind of difficult issue that you were relating about the Department of Foreign Affairs here. What we have been trying to do is to set codes of conduct for a range of tribunals so that there is a sense of public confidence that individuals within those tribunals are going to be able to have a framework by which they can come to the proper conclusions. I don't think I can go any further than that, but these kinds of codes do have value, and they answer a lot of concerns that people have, not just at the political level, but also at the organisational level.

Question — Are you sacked when the general election is called, and do you have to finish up all your inquiries before the general election?

Howard Wilson — I was in office in the sense that I was operating the Conflict of Interest Code when the current Liberal government came in, and had been working with the Conservatives, and obviously applying post-employment rules to their ministers who were no longer there. I expect that if there were to be another election right now—and there isn't one due to take place until 2001—the tendency would be, because I am a public servant, that I would certainly be kept in at least for an initial period. Whether I would want to stay, or whether the Prime Minister would want me there, is an issue that could always be addressed at that point in time. But it's kind of hypothetical, and in the distance.

I think the important thing here is that everyone would recognise that the system has been working reasonably well, that there have been explanations, that I have had to appear publicly before parliamentary committees, and that has been an improvement on the process. It introduces a degree of transparency. But these things evolve, and there are perhaps better ways of doing it. I don't think, however, that any government would ever think of appointing a partisan supporter to the position, because they would instantly lose any public credibility that the job has.

Rediscovering the Advantages of Federalism*

Geoffrey de Q. Walker

The new 'age of federalism'

Worldwide interest in federalism is probably stronger today than at any other time in human history.[1] The old attitude of benign contempt toward it has been replaced by a growing conviction that it enables a country to have the best of both worlds—those of shared rule and self-rule, coordinated national government and diversity, creative experiment and liberty. As one Canadian authority says, 'political leaders, leading intellectuals and even some journalists increasingly speak of federalism as a healthy, liberating and positive form of organisation.'[2]

With the move of South Africa toward a federal structure, all the world's physically large countries are now federations, except for China—and even that country has become a *de facto* federation by devolving more and more autonomy to the provinces. And you can see the same trend in countries that are not so big. When East Germany was released from the Soviet Union, there was never any question in the minds of its

* This paper was presented as a lecture in the Department of the Senate Occasional Lecture Series at Parliament House on 19 March 1999. An expanded version was published in the September 1999 issue of the *Australian Law Journal*, vol. 73, no. 9, pp. 634-58, entitled 'Ten advantages of a federal constitution'.

[1] S. Calabresi, 'A government of limited and enumerated powers: in defence of United States v Lopez' *Michigan Law Review*, vol. 94, 1995, pp. 752, 756; R. Watts, 'Contemporary views on federalism', in B. de Villiers (ed.), *Evaluating Federal Systems*, Juta & Co., Dordrecht, South Africa, 1994, pp. 1, 5. See generally D. Shapiro, *Federalism: a Dialogue*, Northwestern University Press, New York, 1995.

[2] Watts, op. cit., p. 4.

people that they would rejoin the nation as the five federal states that had been suppressed by Hitler and later by the Communists. Belgium became a federation in 1993 and Poland is heading in the same direction.

The few remaining highly centralised unitary nations—such as the United Kingdom, France, Spain, Indonesia, Sri Lanka and Italy—have all faced major crises of secession or separatism. In fact, the United Kingdom has been slowly disintegrating for over a century, with the struggle for home rule in the 1880s, the independence of Ireland in 1921, followed by Scottish and Welsh nationalism, and 30 years of civil war in Northern Ireland. The Blair government has taken hesitant steps towards a kind of federal structure, but there are some well-informed British people who think that an independent Scotland is a real possibility in the next decade.

Indonesia is devolving, and is looking at the Australian federal model (among others) as a way of doing it. Sri Lanka's unitary structure has had catastrophic results, which might have been avoided if the various regions had possessed some degree of self-government under a federal arrangement. So whereas in 1939 Harold Laski, the political scientist, could say that 'the epoch of federalism is over', today it would be truer to say that, as the millennium approaches, we are in fact entering a new 'age of federalism'.[3]

One reason for this favourable re-assessment is the ending of the great confrontation between democracy and tyranny that lasted from 1914 until the fall of the Berlin wall in 1989. Democracy's success in that struggle removed one of the main justifications—or perceived justifications—for centralised government: the need to maintain an economy that could be mobilised. Again, the fall of the Soviet Union and its empire has undermined the appeal of all authoritarian, centralising ideologies, while the spread of human rights values has called in question all forms of elite governance, and created more and more pressure towards genuine citizen self-government. The general wariness towards Utopian ideologies has helped too, because federalism is not an ideology, it's a pragmatic and prudential compromise combining shared rule on some matters with self-rule on others.[4]

Economic and technical change has helped too, but one very important reason has been the obvious stability, success and longevity of the four main largest democratic federations. It is not generally realised that, among the 180 countries of the world, only six have passed through the furnace of the twentieth century more or less intact. Of those six, four are federations—the United States, Canada, Australia and Switzerland. The other two are Sweden and New Zealand. The United Kingdom doesn't qualify because of the secession of Ireland. While Sweden and New Zealand, of course, are unitary states, not federations, they account even today for only twelve million people between them. It is also worth noting that no federation has ever changed to a unitary system except as the result of a totalitarian takeover.

---

[3] Calabresi, op. cit., p. 757. See A. Marr, *Ruling Britannia: the Failure and Future of British Democracy*, Michael Joseph, London, 1995.

[4] Watts, op. cit., pp. 5, 7–8, G. Walker, *Initiative and Referendum: the People's Law*, Centre for Independent Studies, St Leonards, NSW, 1987, ch. 1.

All over the world we are seeing centres for the study of federalism being set up in universities, and conferences and seminars being put together. In Australia very valuable work has been done by a number of scholars and think tanks. However these arguments have not really entered the mainstream of political debate. Within the ruling political-intellectual clerisy, as one might call it, attitudes to federalism still range from viewing it as a necessary evil to, as one recent work put it, 'waiting for an appropriate time in which to abolish our spent state legislatures.'[5] There is a kind of pseudo-pragmatism expressed in casual one-liners about the costs of a federal division of power, but these one-liners overlook both the costs of the alternative and—more importantly for our purposes today—take no account of the positive benefits of the federal model.

Advantages of a federal system

To the extent that the one-sided nature of the debate in Australia is the result of unavailability or lack of information about the proper working of a federal system, it may be useful to look at some of the main benefits of a federal system. I am going to put ten of these before you—no doubt there are more than ten, but ten will do for a start.

The right of choice and exit

When we think of political rights in a democracy, the ones we normally think about immediately are the right to vote and the right of free speech. They are very important, but there is a more long-standing political right, which is the liberty to decide whether or not to live under a particular system of government, the right to 'vote with one's feet' by moving to a different state or country.

This has been recognised as a political right since at least the days of Plato. A modern illustration of how it works can be seen in the events leading up to the fall of the Soviet Union, because the communist governments were the only regimes in human history that almost completely suppressed the right of exit. The Soviet authorities knew very well that if their subjects should ever seize or be granted that right, the communist system would collapse instantly—and, of course, that's what happened.

A federal structure allows people to compare different political systems operating in the same country and to act on those comparisons by voting with their feet. This process of comparison, choice and exit has occurred on a massive scale in Australia, especially in the eighties and early nineties. During those years Australians moved in huge numbers from the then heavily governed southern states to the then wide-open spaces of Queensland. So a federal constitution operates as a check on the ability of state and territory governments to exploit or oppress their citizens, and the special merit of the right of exit is that it is a self-help remedy—simple, cheap and effective.[6]

So when centralists give to federalism the disparaging label of 'states' rights', they're really obscuring the fact that it's the *people's* right to vote with their feet that is protected by the constitutional division of sovereignty in a federal system.

[5] G. Maddox, T. Moore, 'In defence of parliamentary sovereignty', in M. Coper, G. Williams (eds), *Power, Parliament and the People*, Federation Press, Annandale, NSW, 1997, pp. 67, 82.

[6] R. Epstein, 'Exit rights under federalism', *Law and Contemporary Problems*, vol. 55, 1992, p. 165.

The possibility of experiment

The second advantage one could call the possibility of experiment.

In 1888 the British constitutional scholar James Bryce, later Viscount Bryce, published a monumental study of the United States political system, and that book, *The American Commonwealth*, became the standard reference work at Australia's federal conventions.[7] We know from the historical record that a copy of it was kept on the table during all the debates, and it was continually referred to and assiduously studied by most of the delegates. So it is a valuable guide to the understanding and intentions of Australia's founders.

In his appraisal of the American system, Bryce identified among the main benefits of federalism 'the opportunities it affords for trying easily and safely, experiments which ought to be tried in legislation and administration',[8] and other commentators over the years have made the same point.

In other words, the autonomy of the states allows the nearest thing to a controlled experiment that you can have in the sphere of law making. And being closer to the workface, state governments are in a better position than a national government to assess the costs as well as the benefits of particular policies, as revealed in that way. Not only that, but the possibility of competition among the states creates incentives for each one to experiment with ways of providing the best combination of public goods that will possibly attract people and resources from other states.[9]

All this is particularly important in times of rapid social change, because, as the philosopher Karl Mannheim said, 'every major phase of social change constitutes a choice between alternatives.'[10] In making that choice—as legislators have to every day—there is no way to know in advance which course of action is going to work best in dealing with new social problems or issues. Take for example the question of de facto relationships. They have recently attracted the attention of lawmakers because they exist today on a scale that is unprecedented in our history. So which is the better policy—the interventionist approach of the New South Wales De Facto Relationships Act, or the common law approach of Queensland and Western Australia? Well, the only way to know is to see what happens in practice and compare the results.

Besides making this kind of experiment possible, a federal system makes it harder for governments to dismiss evidence that undermines their favoured approach, because the results of experience in one's own country are much harder to ignore than evidence from foreign lands.

---

[7] J. La Nauze, *The Making of the Australian Constitution*, Melbourne University Press, Carlton, Vic., 1972, pp. 19 and 273.

[8] J. Bryce, *The American Commonwealth*, Liberty Fund, Indianapolis, 1995 (first published London, 1888), vol. 1, p. 315.

[9] Calabresi, op. cit., p. 777; G. Tullock, *The New Federalist*, Fraser Institute, Vancouver, c.1994, n. 17, p. 122.

[10] K. Mannheim, *Essays on the Sociology of Culture*, Routledge and Kegan Paul, London, 1956, p. 169.

And that's one reason why lobby groups and ideologues and activists of all stripes tend to be rather hostile to federalism. Hardly a week passes without some lobby group lamenting the different approaches taken by state laws to current social or economic issues, and calling for uniform national legislation to deal with the problem. Well, behind these calls for uniformity, one can usually find a desire to impose one solution on the whole country, precisely so that evidence about the effectiveness of other approaches in Australian conditions will not become available, because unless experimentation can be suppressed, the lobbyists cannot isolate their theory from confrontation with conflicting evidence.[11]

In any event, when you look more closely at a lot of proposals for uniform legislation, the uniformity itself turns out to be an illusion. An example is the Federal Evidence Act of 1995, which was meant to be re-enacted by all the states. It was promoted with the claim that uniform legislation was needed to put an end to 'the differences in the laws of evidence capable of affecting the outcome of litigation according to the State or Territory which is the venue of the trial.'[12] The Act of 1995 certainly does away with some differences, but how does it do it? It does it by giving the trial judge a complete discretion as to whether to admit the evidence or not. Justice Einstein of the New South Wales Court of Appeal says that the exercise of these discretions is not normally reviewable on appeal. In other words, what the trial judge says, goes. So what you get is a substantial extension of the powers of individual trial judges in this fundamental question of admissibility, which often decides the outcome of a case.[13]

So instead of six different state laws and two territory laws capable of affecting the outcome of a case, we now in effect have as many different evidence laws as we have trial judges.

Of course, neither uniformity nor diversity is an advantage in itself. Sometimes the gains from nationwide uniformity will clearly outweigh the benefits of independent experimentation. That will usually be the case where there is long experience to draw on, for example in defence arrangements, the official language, railway gauges, currency, bills of exchange, weights and measures, and that sort of thing. But experimentation has special advantages in dealing with new problems presented in a rapidly changing society, or in developing new solutions when the old ones are no longer working.

Accommodating regional preferences and diversity

The third advantage is the accommodation of regional preferences and diversity. A federal constitution gives a country the flexibility to accommodate variations in economic bases, social tastes and attitudes. These characteristics correlate substantially with geography, and state laws in a federation can be adapted to local conditions in a way that is rather hard to do in a national unitary system. In that way, one can maximise

[11] T. Sowell, *A Conflict of Visions: Ideological Origins of Political Struggles*, W. Morrow, New York, 1987, pp. 208–210.

[12] Australian Law Reform Commission, *Interim Report No. 26*, Canberra, 1985, para. 211.

[13] C. Einstein, ''Reining in the judges?' An examination of the discretions conferred by the Evidence Acts 1995', NSW Bar Association, October 1995, p. 19. The paper was delivered shortly before Justice Einstein's appointment to the bench.

overall satisfaction with government, and diminish to some extent the 'winner take all' problem inherent in raw democracy.

In Europe they call this principle 'subsidiarity', and it is enshrined in the 1992 Maastricht Treaty (although some critics say that it has just been 'unenshrined' by the Amsterdam Treaty of 1997, but that's a different question). This enables government to become more in harmony with the people's wishes. Professor Campbell Sharman of the University of Western Australia puts it this way: 'federalism enhances the range of governmental solutions to any given problem and consequently makes the system as a whole more responsive to the preferences of groups and individuals.'[14]

In addition, this outlet for minority or local views has the effect of strengthening overall national unity. When Wayne Goss was premier of Queensland he was making this point when he warned that abolishing the states, even de facto, could tear the country apart.[15] Conversely, it is not at all impossible that if Britain had adopted a federal structure, as many reformers in the last century wanted it to, the Irish might have preferred to stay in the United Kingdom (which might then have been called the Federated Kingdom) and a century of strife would have been avoided.

Even in Australia there are cultural and attitudinal differences between the states. If you doubt that, just look at the way in which the national media characterise Queenslanders or Western Australians, or the condescension you sometimes see in their references to Tasmanians. Some critics of federalism might acknowledge these differences, but they say that really the only possible justification for a federal system is social or cultural differences, and in Australia they are not marked enough to justify it, and that the state borders are purely arbitrary lines lacking a real social basis.

Professor Sharman says that those propositions are unfounded, and he gives these reasons:

> To begin with, a sense of political community can exist quite independently of social differences between communities. Geographical contiguity, social interaction and a sharing of common problems all tend to create a feeling of community, whether it is a street, a neighbourhood or a state. The chestnut about the arbitrary nature of state boundaries is not only wrong as a geographical observation for many state borders—deserts, Bass Strait and the Murray River are hardly arbitrary lines—but fundamentally misconceives the nature and consequences of boundaries. Drawing political borders on a featureless plain is an arbitrary act, but once drawn, those lines rapidly acquire social reality.[16]

---

[14] C. Sharman, 'Governing federations', in M. Wood, C. Williams, C. Sharman (eds), *Governing Federations: Constitution, Politics, Resources*, Hale and Ironmonger, Sydney, 1989, pp. 1, 4.

[15] 'Abolition of states a danger to unity: Goss', *Weekend Australian,* 22-23 October 1994, p. 5; 'Define state powers or risk their loss', *Australian*, 21 September 1994, p. 15.

[16] Sharman, op. cit., p.6.

To his list of natural boundaries in Australia, one could add the Queensland border ranges, which mark off the eastern tropical and sub-tropical regions. Also, one could point to the simple factor of the huge distances between the main urban settled areas in Australia, which is probably more marked here than in any other country. Despite the wonders of modern communication, if people are really going to empathise and understand one another they still need to get together and talk face to face.

The argument that Australia is too uniform, too homogeneous, to be a federation also runs into the problem that federalism quite clearly works best when differences between states are not *too* marked and not *too* geographically delineated. Multi-ethnic federations are definitely the hardest ones to sustain.[17] The United States has had no serious secessionist movement since 1865 because, although it is a land of unbelievable diversity, the areas occupied by the competing minorities don't correspond closely with political boundaries. For example, there is no state, or group of states, that is overwhelmingly black, or American Indian, or Jewish, or Catholic, or Asian or what have you. Then you contrast that with Canada, where most of the French-speaking population is concentrated in Quebec, which itself is overwhelmingly French-speaking, and the results are obvious. Similar tensions caused Singapore, which is overwhelmingly Chinese, to secede from the Malaysian federation.

So in that light, Australia's relative uniformity from a social and cultural point of view is an argument for, and not against, a federal structure.

Participation in government and the countering of elitism

The fourth advantage is the greater ability to participate in government and the potential for countering elitism.

A federation is inherently more democratic than a unitary system, simply because there are more levels of government for popular opinion to affect.[18] The great historian Lord Acton went further; he said that in any country of significant size, popular government could only be preserved through a federal structure. Otherwise the result would be elite rule by a single city, such as London or Paris.[19]

This characteristic of decentralised government makes people in a federation more like active participants than passive recipients. It produces men and women who are citizens, rather than subjects, and gives governments a greater degree of legitimacy.

This more democratic aspect of federalism is especially important at a time when elitist theories of government, although dressed up in democratic garb, are once again in vogue. The struggle between government by the people and government by an elite is as a struggle as old as the western political tradition itself. In fact, political science was founded on that dichotomy, on that struggle, because Plato's *The Republic* was largely

[17] Watts, op. cit., p. 10.

[18] J. Bell, *Populism and Elitism: Politics in the Age of Equality*, Regnery Gateway, Washington, 1992, p. 78; see John Wheeldon, 'Federalism: one of democracy's best friends', in *Upholding the Australian Constitution,* vol. 8, 1997, p. 189.

[19] Acton, *Nationality*, Centre for Independent Studies, St. Leonards, NSW, 1997 (first published London, 1862), pp. 3–4.

his criticism of democracy as it operated at Athens. In its latest manifestation, the conflict between elitism and democracy has been said to explain modern politics more satisfactorily than the traditional division between left and right.[20] I would suggest this is the case, especially today when there are not great differences in actual policies between major parties, but major differences in how they would like to see the country run, and how they would like to see the democratic system work.

Elitism has of course been dominant through most of history. The democracy that we know is only two centuries old, a product of the French and American revolutions. When united with the English traditions of liberty and the rule of law, it has produced not only an unprecedented measure of individual freedom, but also a huge and unsurpassed increase in the material well-being of the people.

Still, elitism has never conceded defeat, and in the 1960s we started to see the sprouting of a hybrid of the old Platonic plant, and it is now in a position of dominance among the political class. This is a model that lies somewhere between the poles of democracy and elitism, a model in which the power of an enlightened minority is thought to be necessary to help a democracy to survive and progress. The variations on this theme have been called the 'theories of democratic elitism'. The late Christopher Lasch, a prominent political scientist, deplored what he called 'this paltry view of democracy that has come to prevail in our time', as reduced to nothing more than a system for recruiting leaders, replacing the Jeffersonian ideal community of self-reliant, self-governing citizens with a mechanism for merely ensuring the circulation of elites.[21] So in this model the people become a sort of walk-on crowd who acclaim the rise or fall of the latest ruling group.

This new wave of elitism has gained momentum from the trend towards globalisation. The growth of a global consciousness is no doubt a good thing in a lot ways, but the other side of the coin is that it has opened the way for undemocratic bodies, such as the United Nations and some of its agencies, to implement an elitist agenda under the guise of promulgating 'international norms'.[22] Some of you may remember that in the 1980s UNESCO (a United Nations agency) was promoting the idea of licensing of foreign journalists and television crews by the host country, which would have given governments the power to control what was said about them in the international media. Incredibly, Australia supported that initiative at the time, but it ran into the sand eventually, becoming an obsolete proposal with the growth of the Internet and the fax and so on. UNESCO is once again, I notice, looking for other ways to revive that idea, particularly by finding ways of controlling or censoring the Internet.

---

[20] Bell, op. cit., p. 3.

[21] C. Lasch, *The Revolt of the Elites and the Betrayal of Democracy*, W.W. Norton, New York, 1995, p. 76.

[22] See B. Robertson, *Economic, Social and Cultural Rights: Time for a Reappraisal*, The Roundtable, Wellington, NZ, 1997, pp. 51, 60-61; R. Kemp, 'International tribunals and the attack on Australian democracy', in *Upholding the Australian Constitution*, vol. 4, 1994, p. 119; Senate Legal and Constitutional References Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, Canberra, 1995.

This is quite an interesting example. Wherever you see these dismissive references to public debate and these attempts to channel or guide or control political comment in the media, you know for sure that you are in the presence of elitism. It is a sure guide, a favourite—so are identity cards, incidentally, which is something else we had experience of in this country a few years ago. Control of the media is a sure litmus test of elitism.

It is interesting, because we have seen it promoted in Australia in recent years from the 1970s onwards. Elitist politicians since then have repeatedly attempted to instil an elitist version of the doctrine of free speech, under which the government would influence which political issues were debated, and who would debate them. In August-September 1975, the Whitlam government proposed a scheme whereby newspapers would be granted a licence to publish, and this licence would be granted or cancelled by a government body.[23] This idea was shelved as a result of strong public protest. The wave of fear that it generated was a material factor in the constitutional crisis of 1975, although you never hear it referred to in media accounts of those events.

The idea was shelved in 1975, but it was taken off the shelf again in 1991 with the Political Broadcasts and Political Disclosures Act, which prohibited all political advertising—paid or unpaid—on radio or television in the period leading up to an election. Blocks of free airtime were to be allocated to approved parties, again by a government body. The Act was overturned by the High Court,[24] but supporters of the idea are again looking for other ways of the government influencing and channelling political debate. These ideas, if they succeed, would be very detrimental to Australian democracy.

The philosopher William James and many after him have pointed out that in our search for reliable information we are guided by the questions that arise during argument about a given course of action. It is only through the test of debate that we come to understand what we know and what we still need to learn.[25] If you exclude, or sideline and marginalise the people from political debate, you deny them the incentive to become well informed.

This participatory character of federalism does lead to more abundant political debate at all levels, but critics of federalism don't like that. They speak very negatively about it, and in fact are always criticising what they call 'bickering' between state leaders and federal leaders and people at all levels of government. Actually, this so-called 'bickering' is actually an advantage, because so long as people are free, they will disagree. In that sense, debate and conflict are an inescapable part of civilised life.

As Campbell Sharman points out, federalism's more open structure will produce more overt political conflict, but it does this only as a reflection of the increased opportunity for individual and group access to the government process. Such conflict is clearly highly desirable. Federalism, he explains:

---

[23] *Sydney Morning Herald*, 9, 11–16, 19, 21 and 22 August 1975.

[24] Australian Capital Television Pty. Ltd. v Commonwealth (1992) 177 CLR 106.

[25] Lasch, op. cit., p. 170

> simply makes visible and public differences which would occur under any system of government. It is nonsense to think that problems would disappear if Australia became a unitary state and there would be few who would argue that the politics of bureaucratic intrigue are preferable to the open cut and thrust of competitive politics in the variety of forums provided by a federal structure.[26]

The federal division of powers protects liberty

The fifth advantage I want to put before you is that federalism is a protection of liberty. I mentioned earlier that a federal structure protects citizens from oppression or exploitation on the part of state governments, through the right of exit. But federalism is also a shield against arbitrary central government. Thomas Jefferson was very emphatic about that, so was Lord Bryce, who said that 'federalism prevents the rise of a despotic central government, absorbing other powers, and menacing the private liberties of the citizen.'[27]

The late Geoffrey Sawer of the Australian National University in Canberra was a very distinguished constitutional lawyer. Although he was definitely no friend of federalism, he did have to admit that federalism was, in itself, a protection of individual liberty.

Even in its rather battered condition, Australian federalism has proved its worth in this respect. For example, it was the premiers and other state political leaders who led the struggle against the 1991 political broadcasts ban. In fact, the New South Wales government was a plaintiff in the successful High Court challenge to that legislation, and that decision, I would suggest, was the perhaps the greatest advance in Australian political liberty since federation.

Better supervision of government

The sixth advantage is better supervision of government. Decentralised governments make better decisions than centralised ones, for a number of reasons.

Lord Bryce said that in the United States the growth of polity had been aided by the fact that state governments were watched more closely by the people than Congress was.[28] He said, by way of analogue, that Britain adopted the same policy in its management and government of its self-governing colonies. In other words, the British system of colonial self-government, which we had here after 1855—and, in various forms, a little earlier—was to grant the colonies complete self-government in relation to domestic issues, subject to certain exceptions.

That may seem obvious, because we accept that that's the way it happened in Australia and we think that's the only way it could happen. But you should contrast that with the French approach to colonial self-government, which was—and still is—to allow the residents of the colonies to elect members of the National Parliament in Paris, whereas

---

[26] Sharman, op. cit., p. 6.

[27] Bryce, op. cit., p. 311.

[28] Bryce, op. cit., p. 314.

the colonies themselves are governed simply as overseas departments of France itself. So this idea of local self-government as promoting better supervision is one which has been implemented even by Britain itself.

This closer supervision is a function of lower monitoring costs. There are fewer programs and employees at state levels, and the amounts of tax revenues are smaller. Citizens can exercise more effective control when everything is on a smaller scale.[29] Large governments encourage wasteful lobbying by interest groups engaged in what economists call 'rent-seeking', the pursuit of special group benefits or privileges. Rent-seeking is easier in large than in small governments, because it is harder for ordinary citizens to see who is preying on them.

In that case, you might say, well hold on—how do you account for the financial disasters in Victoria, South Australia and Western Australia during the late 1980s? Here, it seems, the supervisory mechanism failed as a result of media behaviour. There was information about the looming disasters, but—largely because of the preferences of reporters and editors—it was never placed before the public. You might remember that when Paul Keating was Treasurer, he attacked the Melbourne *Age* and the ABC in Melbourne for, as he put it, 'covering up' the Victorian government's evolving financial debacles,[30] and similar charges have been against the media in the other three affected states.

The greater ease of supervising state government is partly a function of the proposition that a physically large country is ungovernable unless you have a federal system. Jefferson was emphatic that the United States, which in his day was only a fraction of its present size, was 'too large to have all its affairs directed by a single government'.[31] In our time even a centralist like Geoffrey Sawer had to admit that, in Australia, geographical factors made a great degree of local self-government inevitable.[32]

Stability

The seventh advantage is stability. Stability is a cardinal virtue in government. Stable government enables individuals and groups to plan their activities with some confidence, and so makes innovation and lasting progress possible.

Political stability is much valued by ordinary people, because they are the ones most likely to suffer from sudden shocks or changes in direction in the government of the country. So in that sense a stable government is more democratic than an unstable one, other things being equal.

Stability is obviously a very high priority with the Australian people, as you can see from the tendency of people to vote for different political parties in the two houses of

---

[29] Calabresi, op. cit., p. 778.

[30] *Australian*, 29 August 1990.

[31] Letter to Gideon Granger, *Thomas Jefferson: Writings*, Library of America, New York, 1984, p. 1078.

[32] G. Sawer, *Modern Federalism*, 2nd edn, Pitman Australia, Sydney, 1976, p. 112.

parliament. This is a practice designed to reduce the de-stabilising potential of transient majorities in the lower house.

Professor Brian Galligan of Melbourne University supports this assessment, with his observation that the traditional literature on Australian politics has exaggerated the radical character of the national ethos, while at the same time overlooking the stabilising effect of the Constitution.[33]

Why is it more stable? The federal compact, Galligan says, deals in an ingenious way with the problem of the multiplicity of competing answers and the lack of obvious solutions, by setting government institutions against one another, by breaking up national majorities and pitting institutions against one another.[34] And the people obviously prefer that, as we can see from their votes in constitutional referendums.

This means that, in a federation, sweeping reforms are more difficult. But, at the same time, it also means that sweeping reforms are less likely to be needed. Successive Australian federal governments have encountered more frustrations in their efforts to restructure the economy than their counterparts in Britain or New Zealand. But, at the same time, the Australian economy was not in such dire need of restructuring, because the federal system had effectively prevented earlier governments from matching the excesses of collectivism attained in pre-Thatcher Britain,[35] or the bureaucratic wilderness of 'Muldoonery' in New Zealand. Opinion polls in those two countries show that most people consider the reforms made by the Thatcher and Lange governments to have been beneficial, but the process was a stressful one, and a destabilising one. In New Zealand it led to public pressures that resulted in substantial changes, not necessarily for the better, in the whole system of parliamentary representation.

Fail-safe design

The eighth advantage could be called 'fail-safe design'. Besides acting as a brake on extreme or impetuous federal government activity, federalism cushions the nation as a whole from the full impact of government errors or other reverses. Lord Bryce likened a federal nation to a ship built with watertight compartments.[36] Professor Watts in Canada uses the more modern fail-safe analogy. He says:

> The redundancies within federations provide fail-safe mechanisms and safety valves enabling one subsystem within a federation to respond to needs when another fails to. In this sense, *the very inefficiencies about which there are complaints may be the source of a longer-run basic effectiveness*.[37]

---

[33] B. Galligan, *Politics of the High Court*, University of Queensland Press, St. Lucia, Qld, 1987, pp. 12, 15.

[34] ibid., pp. 25, 251

[35] Britain's postwar nationalisation program went much further than Australia's, extending not only to coal mines and steel mills, but even, at one stage, to the travel agency Thomas Cook & Son and a furniture removalist, Carter Paterson & Pickford.

[36] Bryce, op. cit., p. 313.

For the same reason, damage control can bring results more quickly when the impact or a mistake or misfortune can be localised in this way. We've seen how the three affected states I mentioned have come through their tribulations, and in the process, interestingly, have adopted solutions from other Australian states to the problems which they have encountered.

When it comes to repairing the damage done by a policy area at the Commonwealth level, where the Commonwealth has a monopoly—such as monetary policy—then the process takes much longer. We had in the 1970s and 1980s in this country unprecedented inflation, on a scale unknown in history. It began with Frank Crean's budget of 1973, which has only recently been brought under control almost a generation later.

One shouldn't assume that a healthy economy requires or is even assisted by comprehensive central control. In fact economists are increasingly taking the view that the role of national government is best confined to establishing general rules that set an overall framework for market processes,[38] and that centralised fiscal control creates what they call a 'fiscal illusion', disguising the true cost of public services, making government look smaller than it is,[39] and perpetuating what they call 'a collectivist hand-out culture'.[40]

Some commentators such as P.P. McGuinness, Alan Wood and others maintain that it is quite practicable to devolve tax and fiscal policy powers to the states because, under a unified currency, it is not possible for one state to conduct an inflationary fiscal policy by running budget deficits very long. Most of the powers the Commonwealth exercises in relation to economic policy, McGuinness says, are not only unnecessary, but counter-productive: 'In fact, the need for central macro-economic policy is largely the product of over-regulation and mistaken micro-economic policies.'[41]

Competition and efficiency in government

The ninth advantage is the benefit of competition on efficiency in governments. Like all other human institutions, governments, if you give them the chance, will tend to behave like monopolists. A government that can restrict comparisons and prevent people from voting with their feet is in the position of a classic single-firm monopolist, and it can be as inefficient and oppressive as it likes. The paradigm case, of course, is the former Soviet Union.

Inefficiency in government usually takes either of two forms, sometimes both. One is high taxes, which is easy to see, and the other, which is less easy to see, is one which

---

[37] Watts, op. cit., p. 22, my emphasis.

[38] W. Kasper, 'Competitive federalism: may the best state win', in G. Walker, S. Ratnapala, W. Kasper, *Restoring the True Republic*, Centre for Independent Studies, St Leonards, NSW, 1993, pp. 55, 63.

[39] P. Grossman, *Fiscal Federalism: Constraining Governments with Competition*, Australian Institute for Public Policy, Perth, WA, 1989, pp. (vi), 14.

[40] Kasper, op. cit., p. 60.

[41] P. McGuinness, 'Federalism's hypocrites', *Australian*, 31 October 1990.

has been expounded by the economists who have developed the 'public choice' theory of government. This model is based on the proposition that government agents (meaning elected representatives and public servants) act in the same way as other people, that is from motives of rational self-interest. Consequently, they have a built-in incentive to administer programs in such a way as to minimise the proportion of the program's budget that is actually received by the intended beneficiaries, while the remainder, the surplus, is used to further the interests of the administrators.

A government that enjoys monopoly power—such as monopoly power over income tax, which ours has, in effect—is able to generate a surplus for discretionary use in this way.[42] An example with which I'm all too familiar is Australia's public university system. In the days when our universities were administered by the states, they were far from perfect, but they were very efficient, lean bodies, with the flattened management profile that is so much admired today. A dean's administrative duties seldom took up so much as one day per week, and even the vice-chancellor was usually a part-time official, who also did teaching and research. Commonwealth involvement consisted of capital grants and funding Commonwealth scholarships, which could be obtained by any student who did better than average at the final school examination, with the result that fully 70 per cent of students completed their tertiary education paying no fees at all.

The transformation began in 1974 when the Commonwealth assumed financial control of the universities, and this gave universities access to the Commonwealth monopoly over income taxation. This surplus was increasingly used to expand the bureaucracy both in the universities and the government itself. Finally, the Dawkins revolution converted higher education into a complete centralised command economy, just when the rest of the world was abandoning that model.

This created hugely increased paperwork demands and generated whole new layers of career bureaucracy in the universities. At the university with which I am most familiar the ratio of teaching academics to administrative staff sank to 0.6 to 1. In other words, there were substantially more full-time bureaucrats than teaching staff, and that was not counting full-time deans and heads of departments and so on. This is a very disturbing fact and a few of us tried to bring it up for debate in the university system, but without success. So you have this enormous growth in non-academic activity. You also have the fact that now nearly all students pay fees, and build up large debts through the HECS (Higher Education Contribution Scheme) system. Academic salaries in real terms are a little over one-third of the level they were at in the 1960s,[43] even though tenure has been all but abolished. And when the university budget has to be cut, it is invariably the teaching academics, not the administrators, who bear the weight of the retrenchments.

On top of that, the universities' secondary function, research, has been totally centralised in the Australian Research Council system and utterly politicised. At least, that was the situation when I left academic life in late 1996.

---

[42] Grossman, op. cit., p. 11.

[43] In the 1960s a senior lecturer's salary was roughly on a par with that of a District Court or County Court judge. Now it is somewhat over a third of that level, even though the judge's real salary itself fell during the inflation of the 1970s and 1980s.

Research in Australia and abroad shows that competitive federalism creates a competitive market for public goods, and provides consumer taxpayers with their preferred mix of public goods at the lowest tax price.[44]

These gains in efficiency are not affected by the smaller size of state governments, because it appears that there are actually very few economies of scale in government, except in the areas of defence and foreign relations. As Gordon Tullock, the Nobel laureate who has written on this subject points out, this is not surprising because large organisations generally are not significantly better at dealing with complex problems than smaller ones. He points out that the Cray computer is the world's most complex computer, but the Cray company is not a very big computer company. Further, he points out, many of the functions carried out by national governments are not actually complex at all—notably the distribution of health and social welfare payments (which is the largest single proportion of their work). The actual provision of health services is quite complex, he says, but that is performed by the small organisations such as medical practices and hospitals. So the part of the health/social welfare activity that is centralised is actually the simplest part.[45]

Even in centralised governments, a great many decisions have to be made at a low level,[46] which is why all Commonwealth departments of any size have offices in state capitals, where a lot of the real core work is done.

This leads to an issue that often arises in discussions on federalism, and that is the question of duplication. This can be vertical duplication (that is, overlap between federal and state systems) or horizontal (that is, duplication between states). As to the vertical type, the fact that there is a Commonwealth department of health and a state department of health doesn't necessarily mean that they're duplicating each other's work, any more than the state office of the Commonwealth Department of Social Security is necessarily duplicating the work of its own head office in Canberra. They may be looking at different aspects of the problem.

A common criticism based on vertical duplication is that, with two sets of politicians, Australia is over-governed, and that it would be better to do away with the lower tier. Well, let's look at some figures. In 1996 Australia had 576 state politicians.[47] That's not a huge number when you compare it to the 380 000 people employed in government, not counting those in education, health care or social welfare, or those working in government corporations. But it is unrealistic to suppose that abolishing the states would lead to a net saving of those 576 positions plus support staffs, because centralists themselves always suggest replacing the states with 'regions', usually between 20 and 37 in number.[48] That structure would require the appointment of regional governors,

---

[44] Calabresi, op. cit., p. 775; Grossman, op. cit., chs. 3 to 6.

[45] Tullock, op. cit., p. 95.

[46] ibid., p. 99.

[47] *Year Book Australia 1997*, p. 34.

[48] 'Could this be Australia's new constitution?' *ABM*, November 1992, describes Mr Ken Thomas's plan for 37 regions, each one under the direction of a kind of management committee.

prefects, sub-prefects, *Gauleiter* or what have you, and with support staffs. France's regions are administered by an elite prefectoral corps, *corps préfectoral*, a highly-paid class who live like diplomats in their own country, with official residences, servants and entertainment budgets. But sooner or later any centralised government of ours would have to do as France did, and create regional elected assemblies, with legislative powers, probably somewhere between 20 and 37 in number. By that time, any savings would have been dissipated.

In any event, Australia spends 38 per cent of its gross domestic product on general government expenditure, which is already lower than Britain's 44 per cent, or France's 52 per cent.[49]

A variation of this argument is that Australia's population is just too small to support six state governments. Well let's look at some comparisons. In 1788 the population of the thirteen American states was three million—quite a bit less than the population of Australia's six states in 1901. The United States didn't match Australia's current population (of about 18 million) until 1840. Switzerland, that land of supreme efficiency, has only 5.5 million people for its 26 states, or cantons. It's a more decentralised federation than Australia, with even some defence functions being performed by the cantons.

To some extent, horizontal duplication is unavoidable in a large country. As Wolfgag Kasper says, 'all competition requires some measure of duplication.'[50] If you think back to the days of the old Telecom monopoly, when the end of the monopoly was being discussed, the critics of that course of action argued that if the monopoly were taken away, call charges would rise and service would decline because of the costs of duplication. But we all know that exactly the opposite has happened, and Telstra is unrecognisable compared with the surly monster of old.

A competitive edge for the nation

The final advantage is one that even the advocates of federalism sometimes overlook, and that is its value as a means of enhancing, through competition, the international competitiveness of the country as a whole. This is a familiar principle in other areas—it's the principle on which we select international sporting teams, for example. We deliberately encourage rivalry between local, regional and state teams in order to identify the team that is going to represent us in the Olympics or whatever. Competitive federalism harnesses that principle, which Australia has used with unparalleled success in the sporting field, to the goal of earning a better standard of living for all.

In case you think that it's not a principle that would work in the economics sphere, just look at the example of China. China only became an international economic power once it became a de facto federation, by allowing the provinces more autonomy and encouraging them to compete. Professor Wolfgang Kasper in Canberra has done a lot of

---

[49] *OECD Economic Outlook* 53, June 1993, Table R15, p. 215; K. Coghill, 'Benefits may be illusory', *Australian*, 26 May, 1993, p. 10.

[50] Kasper, op. cit, p. 67.

good work on this, and he argues that federations have a real advantage in discovering the rules and devices that assist international competitiveness.[51]

Before leaving this question of efficiency, one can never debate this topic without some reference to the old problem of railway gauges, because we are always told that Australia's diversity of railway gauges is a product of federalism. Well, that can't be right, of course, because the railway networks were all completed well before federation. Maybe people mean that if we had a unitary system we would have unified the system long before now.

That argument does not hold up, because the United Kingdom, which is unitary, had all the railway gauges that we have, plus the seven foot broad gauge, which was particularly widespread in the densely populated south. Yet all their different gauges were standardised by the 1880s, with incredible speed. In 1872, 380 kilometres of double track with point work in the stations were completed within a period of fourteen days. The 700 kilometre line from London to Penzance was converted in a single weekend. In the United States in 1861 there were twenty different railway gauges. They were all converted over two decades, and in July 1881, 3 000 workmen converted the entire 900 kilometres of the Illinois central southern region by 3.00pm on a single day.[52]

Obviously, our federal structure does not explain why we have not got on very successfully with the task of standardising our railways. The answer may be, as Gary Sturgess suggests, the fact that, from the outset, Australia's railways were government-owned. In the absence of the profit motive, the most powerful motivation is the desire for the quiet life.

Conclusion

All human institutions are imperfect and they're all open to criticism. But for a government model that has been so outstandingly successful, Australia's federal system has been subjected to undue negative comment. Minor inconveniences have been given an inflated importance, and critics have never stopped to consider the costs and disadvantages of a rival system.

Australian federalism could start to realise its full potential if the three branches of Commonwealth government took into account the benefits of experimentation, of diversity and multi-level democratic participation. They must recognise that both competition and co-operation have their place in a federation.

The states will also have to adjust their thinking. They will have to stop shunting the hard problems down the freeway to Canberra. In the general population some people at first may be disconcerted by the wider range of choices available, but that has happened before. In the late 1960s when the Trade Practices Act was breaking down the old price cartels, there were some consumers who actually complained that prices were no longer uniform. Eventually these people realised that just by shopping around a bit—in other

[51] For more detail on Professor Kasper's arguments, see my article in the *Australian Law Journal*, vol. 73, no. 9, September 1999, pp. 634-58, titled 'Ten advantages of a federal constitution'.

[52] J. Simmons, *The Railway in England and Wales 1830-1914*, Leicester University Press, Leicester, Eng., 1978, p. 47; A. Vaughan, *Railwaymen, Politics and Money*, John Murray, London, 1997, pp. 191–92; J. Stover, *American Railroads*, University of Chicago Press, Chicago, 1961, pp. 154–56.

words, by taking responsibility for their own lives and their own choices—they could enjoy a substantially higher living standard than before. That same process will occur when the present governmental cartel in Australia starts to crack.

Those who contrast the veneration with which Americans view their 1788 Constitution with the alleged apathy of Australians towards theirs overlook the fact that for the first hundred years of its life, the American Constitution was intensely unpopular, in a way in which Australia's Federal Constitution has not been in its own first hundred years.[53] The tensions that emerged from the outset over central power in the United States led Chief Justice Marshall to write in 1832 that 'our Constitution cannot last'.[54] By the 1850s a lot of commentators were saying that the Union was in its 'death throes'.[55] In Australia, even the committed centralists have stopped short of such despairing assessments.

An awareness of the benefits of federalism will make our constitutional debate a more equal and a more fruitful one. This will mean recognising that in a properly working federation, government is more adaptable to the preferences of the people, more open to experiment and its rational evaluation, more resistant to shock and misadventure, and more stable. Its decentralised, participatory nature is a buttress of liberty, a counterweight to elitism, and a seedbed of social capital. It fosters the traditionally Australian, but currently atrophying, qualities of responsibility and self-reliance. Through greater ease of monitoring and the action of competition, it makes government less of a burden on the people. It is desirable in a small country and indispensable in a large one such as ours.

Question — I would like to ask you if your feeling about the quality of federalism is affected by such things the upcoming New South Wales election [April 1999]—with its enormous ballot papers and huge proliferation of minor candidates and so on. Do you have any comment about that?

Geoffrey Walker — I don't think that has anything to do with federalism, it has to do with another problem, which is, shall we say, the 'political cartelisation' of Australian life, the lack of effective choice between major blocks of different policies. What people are trying to do is to express a view on something that is near and dear to their hearts. That's why you have all these little parties being put up for the upper house. But that's a very clumsy way of doing it. It's the only way people have at the moment, it's the only way they have in the Senate, or in most unitary countries for that matter.

---

[53] P. Smith, *The Constitution: a Documentary and Narrative History*, Morrow Quill, New York, 1980, pp. 306, 471. See also pp. 17, 86.

[54] ibid., p. 394.

[55] ibid., p. 425.

A much better way would be to introduce the Swiss system of direct democracy, where people can petition for a referendum on a particular question, then you wouldn't need this proliferation of parties.

Question — With your admiration of federalism as a means for Australia for the future, can you see a reason for the reluctance to an extension of federalism by the creation of new states such as New England (part of New South Wales) and North Queensland? In reality, are we really six unitary states here, with the Commonwealth position as yet undetermined?

Geoffrey Walker — There is always the opportunity under our Constitution to create new states, and the New England case was a good example. In fact it was a very innovatory plan in a lot of ways. It had some of the Swiss institutions I've mentioned. They were building direct democracy into their system. But obviously people were happy enough with New South Wales as it was, because even a majority in New England couldn't be mustered. It's just something that might happen and it might not. In Switzerland a few years ago they created a new canton of Jura, because the people of Jura wanted it. Well, if people want it, why shouldn't they have it? We're far from having any Balkanisation in this country and if people think that the existing units are too big, well, why not?

Question — I'd like to raise with you the disparities amongst the governance of nations. Once upon a time there were kings, queens and emperors predominantly. Most of those have gone, but there are immense differences between the governance of states. For example, the Labor Government threw out the draft criminal code back in 1973-74, and we are still struggling to get a uniform model code around the rest of the country. Queanbeyan has a different criminal law to Canberra, which is ridiculous.

These immense discrepancies between the governance of states mean that it is going to be much more difficult to have states combining and being common in their approach to life and policy, so that in fact we are still left with the national differences that used to exist under kings, queens and emperors. Do you concede that there is a need for more standardisation in the way states are governed?

Geoffrey Walker — I don't regard diversity as a problem. I regard it as a basis for experimentation and a basis for people to get what they prefer. If South Australians want to experiment with making marijuana an infringement-notice offence, why shouldn't they? And if Queenslanders *don't* want to, why should they have to? I haven't looked lately at the drafts of the uniform criminal code. It might be a good idea or it might not, but it's not *automatically* a good idea, just as the legislation seeking uniformity of the laws of evidence has not turned out to be a good idea, it has just enhanced the power of the judge.

In a federal system, you should have uniformity if the benefits exceed the detriments; but you can't blame people for not accepting a uniform model if it is detrimental, as is the legislation seeking uniformity of the laws of evidence. So I don't see it as a problem—I see it as a field for creative experimentation.

Question — I would like to ask two questions. In places like India and Pakistan, which are federal nations, the chief body has power to dismiss the states, but that doesn't exist

in this country. That's one issue, and the second issue is the Commonwealth versus states issue, where in Australia there is a specific set of powers to the Commonwealth with residual power to the states. They are two different types of relationships—one has an ability to dismiss a government, and the other sort has different powers. Are they totally different forms of a relationship?

Geoffrey Walker — There is no single definition of a federal system. There's a pretty good one that Professor Watts of Queens University in Canada has come out with. It's flexible enough to accommodate the sorts of variations that you indicate. Personally, I would not like to see a federal government with a power to dismiss state governments, because that dilutes the accountability of the state government to its people. Why shouldn't it be accountable to the people who live in that area, rather than to people who don't live in that area? Still, you can have variations of all sorts.

One thing you must have, is some sort of formal division of powers. In this country we have specific powers assigned to the Commonwealth and the rest to the states, although that's been diluted by some High Court interpretations of the Constitution. In Canada you have the opposite model, but it was decentralised by the Privy Council's interpretation. So there are various models, but you do need some sort of constitution, otherwise you just have a shifting mass and nobody is clear on who's accountable to who for what.

This is the problem with the European Union. The English critics of the European Union are always saying 'we don't want a federal Europe.' Fine, but what they don't realise—because they don't understand federalism—is that what they're drifting towards in Europe is not a *federal* Europe, but a *unitary* Europe, because there is no constitution that says what the various entities can do. And you have a European court that interprets loose, rubbery language invariably so as to expand the power of the Union, without democratic consent, without consultation and without constitutional conventions. That is why many people are so resentful of it, not only in Britain, but in all the other countries, except the ones that have been subsidised most handsomely, like Ireland and Italy. But with the advent of the euro, how long will the subsidies last?

I've always favoured European integration in a lot of ways—in fact I did my Masters thesis on it—but it has to be integration with the consent of the people. It has to be a commitment to a clear charter, and not just a gradual takeover by a bureaucracy.

I understand that there is no longer such a thing as a British passport. The British found one day that, if you go and apply for a passport, it's not a British passport, it's a European Union passport. They are now citizens of the European Union. They are also citizens of the United Kingdom, but that doesn't mean much because the European Union effectively controls entry into the United Kingdom. If they want a European Union passport, fine. But to wake up one morning and have some bureaucrat tell you, without prior notice: 'Sorry, there's no Australian passport any more, it's an APEC passport'! We have to be very careful in Australia, with the APEC meeting coming up in September, that we don't slide into a similar pass. We may stand to gain from various forms of free trade in the region, but let's not fall for a supranational body with an open-ended charter that can spring surprises like that on us over the weekend.

Question — I was interested in your comment about identity cards, and you seem to equate having compulsory identity cards with being centralist elitist, versus democratic federalist. Australia, the United States and Canada don't have them, and are federal, but Germany and Switzerland do have them, and I think they come under your heading of very good federals.

Geoffrey Walker — I didn't say that it was necessarily an anti-federalist institution, I said it was an elitist one, and I still maintain that. There have been attempts to introduce it in the United States, but they've failed. They have also been attempted in the United Kingdom, unsuccessfully.

Germany has a long tradition of these things. If it were starting off again in the nineteenth century before they had them, they probably would not adopt them. But with the history that they have, where European countries were almost continually at war, identity cards were effectively a wartime institution that did not go away. Even in this country it became the rule in wartime.

What I was saying was that things like control of media and compulsory identity cards are unfailing litmus tests for elitism, other things being equal.

Question — Are you really not bringing out into the open the fact that the true argument here in Australia will develop into not *unitary* or *federal*, but what *sort* of federal? And isn't the worldwide problem—if your statement of history is to be accepted, as of course we do accept it—not that the move is towards federalism, but the question of what *sort* of federalism? Some of your own illustrations show the need for a strong central power. For example, your reference to the Trade Practices Act and the advantages it was able to pass back to states and businesses, where they could compete. But the fountainhead of that was central action.

In Australia we're affected by globalisation of industry. It's not simply a question of state and Commonwealth in competition, and citizens in competition across state borders. That is important, but you have multinational companies operating across boundaries, you have criminal gangs (so we're told) operating across international boundaries, and there is in many cases a need for equivalent strength at government level. But the problem all the time, perhaps, is to know what sort of situation calls for what sort of answer.

It may be too simple to leave here with the feeling that it is simply federation against unity. It is *what sort* of federation, *what sort* of compromise, that's still being worked out in Australia, as one sees through the High Court decisions that you referred to. Is there something you feel you ought to say about that? Are you suggesting that our form of federation be freed up; that there should be more power in Australia passing from Commonwealth to state? Is that a matter of devolution? Is it a matter of discussion and co-operation between state and Commonwealth, of which there seems to be a great deal? Is it a matter of re-writing the Constitution?

Geoffrey Walker — Of course there will always be various models of any system of government, whether unitary or federal, and of course our founders looked at the available models when they were studying the problem in 1890s, and other countries such as Indonesia are looking at a variety of models also. So there's always a range of

models to choose from, and one must always consider the need—and it is definitely a need—for central power on some matters, and the example of the Trade Practices Act is a very good one. That institution came into being as a result of the use of certain powers in the Constitution, particularly the trade and commerce power and later the corporations power. I don't think one can simply say that in Australia we're only going to be talking about different models of federalism, because there are people who want to abolish the whole thing and have a central unitary system. So I don't think one can ignore that argument. That argument is entitled to respect, and to be considered.

We will of course have debate about what sort of federation we should have, but personally I don't think the Constitution needs to be re-done in order to bring about what I would consider a more effective and more decentralised model. I think the model is there already. Problems such as what has happened in universities are the result of the Commonwealth exercising powers it doesn't have, through the use of the conditional grants power. Obviously the power is broadly worded, but the way in which it is exercised needs to be looked at again, and in fact there have been changes in emphasis in the way in which it has been exercised, not only under this government, but also, at one stage, under the previous government. So, yes, there would always be a debate about what sort of model of government we should have—there *should* be a debate. But I don't see any need for any change to the Constitution. What I do see a need for is to look again at what it does do and how it is interpreted.

Question — Can I ask what importance you would place on the constitutional recognition of local government? Because there are many, I think, who would probably see that as *the* most accountable, flexible and innovative sphere in Australia at the moment. In New South Wales we're talking about voluntary amalgamations of councils. If this is not done in the context of a review of the responsibilities between the three tiers, it's very hard to tackle it at the ground level without seeing any hope of a shuffle going on between the powers and the three tiers. Because at the moment there is more and more being dumped on local government, with less and less coming from the states or the Commonwealth to make that possible—which has certainly made us lean and mean and fast, but it's not going to work in the long term. Would the start be constitutional recognition?

Geoffrey Walker — I don't see any need for it. The Constitution gives the power over local government to the states, and the states can restructure it any way they like. It's not inconceivable, for example, that a small state—we don't have one this small, but say you had a state as small as Rhode Island or Delaware in the United States—a state like that might decide, like the Australian Capital Territory, not to have local government, just to have a state government, perhaps with direct democracy on the Swiss model. The Swiss in fact do have the three levels, even though some of their cantons are very small. But, no, I don't see any need to recognise it. It can be done already.

Question — It seems to me that you've built the whole premise of your argument on the fact that federalism equals more democracy, equals better government. It seems to me it is like the paradigm that says: we just can't get enough of democracy; you can't have too much. But I'm concerned about this. I was just wondering how far one can stretch this concept—this essentially eighteenth century concept, at least in its modern reincarnation—to make it fit twenty-first century politics, before we run into the problem that its costs, in terms of political division and political instability, start to

outweigh its benefits. And doesn't that then get us all the way back to the fragmentary effects of feudalism, which is perhaps tied into federalism, and where it all began and where this whole need to have a political power centre to which all power centres gave their legitimacy. This is where Britain started from, and doesn't this then lead us back into the full circle of where it all began.

Geoffrey Walker — I think you've highlighted a central problem in the whole question of government, which is the question of the appropriate constituency. I'm not a political scientist and I can't really develop that subject very much, but it is related to the point raised in an earlier question in relation to the voluntary amalgamation of local government areas. How small or how big is a suitable self-governing entity? Obviously some can be too big—I argue that Australia would be too big to be governed from one place—and some are too small.

You can see this in some small municipalities, which don't have an adequate cross-section of interests and people, and that adopt very parochial rules, like sealing off all the streets so that you can't drive through. Maybe that's good from one point of view, but it's a very inward looking and selfish rule adopted because it's too small a group to give an adequate interplay of different viewpoints.

So, yes, I think it does go back to a fundamental question in the whole sphere of government, which is the appropriate size of a unit of government that can be accountable to a constituency. But I don't think we face that problem in Australia; I think our problem is the other way around, and I would prefer to see more democracy. As I have indicated, direct democracy systems, especially at the state level, would do away with the need to have a ballot paper the size of this carpet.

Question — I'm currently studying under Wolfgang Kasper, and I'm looking at the idea of competitive federalism in Indonesia. Can competitive federalism be imposed on a country such as Indonesia, given its problems? What do you see as the difficulties for a country like Indonesia adopting something that is so alien to what they know?

Geoffrey Walker — It is never a good idea to make policy on the run, and even less of a good idea to make constitutions on the run. So really, they should have thought about this before, and it's unfortunate that they've waited until they've got secessionist movements in Timor, Iran and various other places, in order to start thinking about it.

But I believe the Indonesian people are perfectly capable of deciding whether they want such a system. I don't believe in imposing systems of government on anybody, but the Indonesian people on the whole are quite a well-educated people, and I don't see why they would not be capable of judging whether they want a measure of regional self-government, and, if so, what measure of it. They are already asking for it in many instances, so I can't see why they shouldn't have it. Now the problem of course is, how much time have they got to decide on such a model? It's unfortunate but the problem is brought about by the fact that they stuck with a rigid unitary system too long and didn't look at alternatives.

The Senate, Policy-Making and Community Consultation*

Ian Marsh

The debate on a goods and services tax (GST) has placed the Senate in an unfamiliar relationship with the executive. On the one hand, there are the habits and practices of governance of roughly the past eighty years. Throughout this period, the executive has enjoyed almost unchallenged power. The rituals of parliament have positioned the Opposition as an alternative government. This is implicit in the description of the system as adversarial politics. Parliament has provided the stage for this drama. It has, to use Bernard Crick's insight, provided the setting for what is in effect a continuing election campaign. As a consequence, Parliament has had virtually no substantive policy-making role.[1]

More recently, and notably in the GST debate, substantive parliamentary policy influence has been tentatively renewed. The Senate is the key institution. It has the necessary formal power and seems likely, for the foreseeable future, to lack a majority party.[2] What does this mean for the Australian political system? Does it hold in prospect destructive conflict, frustration of the electorate's will, policy gridlock,

---

* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House on 23 April 1999.

[1] Bernard Crick, *In Defence of Politics,* Penguin Books, Harmondsworth, Vic., 1964; for the three principal structures of politics in the Westminster context see Samuel H. Beer, *British Politics in the Collectivist Age*, Vintage Books, New York, 1969.

[2] On the Senate's formal powers and theoretical background see John Uhr, *Deliberative Democracy in Australia: the Changing Place of Parliament*, Cambridge University Press, Melbourne, 1998; and Marian Sawer, 'Dilemmas of representation', *Representation and Institutional Change: 50 Years of Proportional Representation in the Senate, Papers on Parliament* no. 34. December 1999, pp. 95-104.

sectional pay-offs and lowest common denominator policy compromises? Or does it offer the opportunity to strengthen the policy-making capacity of Australia's political institutions?

In what follows, a case for seeing this as an opportunity to renew necessary, but now atrophied, policy-making capacities is outlined. The argument develops through several steps. First, the central strategic, opinion framing and interest integrating contribution of party *organisations* in the classic two party system is sketched. Second, the causes of the progressive atrophy of these organisational contributions since the 1980s are explored. Third, the pluralisation of value and attitudes in the Australian community over the past twenty or so years is traced and its significance, from the perspective of interest integration and opinion framing, is evaluated. Finally, the potential to renew interest integrating and opinion framing capacities through the Senate is considered. Precedents for such a role are reviewed and some contemporary requirements explored.

The 'classic' two party system

The two party system emerged in Australia roughly in 1909. Mass parties were novel political formations. Hitherto, local action committees selected candidates who stood mostly as independents. In parliament they generally aligned behind one or other of the acknowledged faction leaders—either because of shared agendas or for promised electoral pay-offs or for some combination of these factors. The parliamentary norm of independence meant allegiance could vary on particular issues. Governments thus were frequently defeated on particular measures—but they resigned office only on specific confidence votes.[3] The contemporary reemergence of independent MPs gestures to these older patterns.

The Labor Party was the first mass party in Australia. It emerged on the parliamentary stage in the 1891 NSW state election.[4] Its electoral success precipitated the progressive consolidation of non-Labor groups. At the federal level, three parties or groups shared power—the Deakinite Liberals, the Free Traders and the Labor Party. The 1901, 1903 and 1906 elections did not award a clear majority to one party. In the period before 1909, the Deakinite Liberals and the newly emerging Labor Party had overlapping agendas for social reform and governmental action. By 1909 these produced the legislation that constituted what has since become known as the Federation settlement. But the Deakinites' opposition to nationalisation and their imperial loyalties divided them from Labor and thus, in 1909, they linked with the Free Traders to constitute what has become the modern Liberal Party. This marked the emergence of the two party system.[5]

---

[3] On independence in nineteenth century parliaments see P. Loveday and A.W. Martin, *Parliament, Factions and Parties, the First Thirty Years of Responsible Government in NSW*, Melbourne University Press, Carlton, Vic., 1966; on the emergence of the two party system see, P. Loveday, A.W. Martin and R.S. Parker (eds), *The Emergence of the Australian Party System*, Hale and Iremonger, Sydney, 1977.

[4] Bede Nairn, *Civilising Capitalism: the Beginning of the Australian Labor Party*, Melbourne University Press, Carlton, Vic., 1989.

[5] Ian Marsh, *Beyond the Two Party System: Political Representation, Economic Competitiveness and Australian Politics*, Cambridge University Press, Melbourne, 1995, especially Chapter 1, 'The Formation, Structure and Impact of the Two Party Regime', and Chapter 10, 'Governments and

A hegemony of only two (later three) parties was a remarkable achievement, which familiarity has since obscured.[6] The sources of the encompassing power of the major parties provides a perspective on current dynamics and possibilities. First, party ideologies then attracted, broadly, one or other half of Australian society. The initial fervour of activists subsequently congealed into strong party identification, in which socio-economic class and religion were also significant factors.[7] In the electoral arena, these loyalties were later theorised in the link between party identification and voting behaviour.[8]

Second, if ideologies provided the rationale for encompassing parties, the party *organisations* provided the institutional means. They provided machinery through which hitherto independent groups and activists could be integrated into political processes. In keeping with party ideologies, the Labor Party linked to the trade union movement and the non-labor parties linked to business and larger mining and rural interests. Until roughly the 1960s, the trade unions and business were the principal organised economic interests active in politics.[9]

Interest integration was one prime function of party organisations. Agenda setting was another. This is evident in the two great periods of strategic agenda development in Australian politics prior to the 1970s—1901 to 1909 and 1945 to 1950. The Labor Party, with its nationalisation and welfare agenda, was the primary party of change. Yet Sir Robert Menzies, in reconstituting the Liberal Party in the 1940s, renewed its Deakinite legacy in endorsing the post-war extension of the welfare state and managed economy.

Labor's internal processes were influential in determining the agenda for the parliamentary party. The structure of the party gave the trade unions special status and its national executive for many years exercised considerable influence over the parliamentary party. Resolutions of its biannual conference were binding. The Labor Party organisation provided a structure for integrating trade unions and its ideologies provided a rationale for broader community identification and mobilisation.[10]

Parliament'; also Alfred Deakin, *Federated Australia, Selections from Letters to the Morning Post, 1901–1910,* Melbourne University Press, Carlton, Vic., 1968.

[6] 'What makes political parties so indispensable is the aggregating and representational functions that they fulfil.' Clive Bean, 'Parties and Elections', in Brian Galligan, Ian McAllister and John Ravenhill (eds), *New Directions in Australian Politics*, Macmillan Education, Melbourne, 1997, p.102; also Peter Mair, *Party System Change: Approaches and Interpretations*, Clarendon Press, Oxford, 1997.

[7] Ian McAllister, 'Political Parties in Australia: Party Stability in a Utilitarian Culture', a paper prepared for *Political Parties and the Millennium: Emergence, Adaptation and Decline in Democratic Societies*, Brunel University, March, 1998.

[8] Ian McAllister, 'Political Behaviour', in Dennis Woodward et al., *Government, Politics and Power in Australia*, 6th Edition, Longman, Melbourne, 1997, pp. 240–268.

[9] L.F. Crisp, *The Australian Federal Labor Party 1901–1951,* Longman Green, Melbourne, 1955; Katherine West, *Power in the Liberal Party,* Cheshire, Melbourne, 1965. Other organised interests, such as returned servicemen, were also active in federal politics.

[10] Crisp, op. cit.; Dean Jaensch, *Power Politics: Australia's Party System*, 3rd Edition, Allen and Unwin, St Leonards, NSW, 1994.

For its part, the Liberal Party (in its various forms) was defender of the status quo and this was reflected in its organisational structure. States' rights was a powerful theme. Thus the state organisations preserved their relative strength and the national organisation lacked disciplinary powers. Business groups, the principal source of funds, were integrated directly through a federal committee and indirectly at the state level.[11]

Electoral dominance, organisational agenda setting roles and the integration of interest groups through party organisations was the ground for the particular division of roles between the parliament, the executive, and the bureaucracy which has since become familiar. This particular political architecture has many attractive features. From a policy-making perspective, it consolidates political power to a remarkable degree. The Cabinet, some fourteen people, constitutes the link between the bureaucratic system on one side, and the parliamentary, party and electoral arenas on the other. The parliamentary arena, where electoral considerations dominate and where the Opposition maintains significant powers to project its alternative program, is sharply separated from the arena concerned with policy-making, where the real business of government is largely conducted.[12]

But the 'classic' two party system rested on particular organisational and electoral foundations. Organisationally, it involved the mobilisation of activists and interest groups through party forums. Party conferences and committees allowed activists and interest groups to influence the formation of the strategic political agenda. Electorally, it was based on a broad division of the community into supporters of one or other of the major groups. The party label or brand provided a sufficient cue for the formation of opinion by most electors on most issues. This allowed strategic policy development to be (largely) internalised within the major parties and muted the need to seed the broader 'education' of public opinion.

Recent developments have undermined, if not destroyed, these foundational features of the two party system.

The systemic gap in interest integration and opinion framing

Major party organisational change in the past couple of decades has basically excised interest integration. Over the same period, the capacity of party labels to cue public opinion has diminished. These developments have been caused by the coincidence of at least four factors.[13]

First, economic globalisation made the Federation settlement no longer viable. Manufacturing industry could no longer be developed to serve only domestic markets.

---

[11] West, op. cit.; Jaensch, op. cit.

[12] Ian Marsh, 'Political learning disabilities of the two party regime', *Australian Journal of Political Science,* Special Issue, vol. 30, 1995, pp. 40–61.

[13] Paul Kelly, *The End of Certainty*, Allen and Unwin, Sydney, 1992; John Edwards, *Keating, the Inside Story*, Viking Books, Melbourne, 1996; Stephen Mills, *The Hawke Years: the Story from the Inside*, Viking, Melbourne, 1993; Dean Jaensch, *The Hawke–Keating Hi-Jack: the ALP in Transition,* Allen and Unwin, Sydney, 1989.

Economic globalisation, new technologies and a new role for service industries required new capacities for economic adaptation and adjustment. Needs-based, nationally determined wages were seen to introduce dysfunctional rigidities and inflexibilities. Both major parties have been obliged to progressively redefine their policy stance. This has had ideological, organisational and arguably electoral consequences. At the ideological level, differences between the major parties have progressively blurred as their approach to economic strategy has converged. After 1983, both major parties broadly adopted the neo-liberal economic agenda. Thereafter electoral considerations, not ideological dispositions, determined which parts of this agenda would be championed or resisted in public.

The jettisoning of old agendas has had different organisational consequences for the major parties. In recasting its agenda, the Labor Party parliamentary leadership has often found it expedient to bypass formal party forums. Conferences and councils have become stage managed affairs. The organisation now rarely exerts influence on policy issues. For its part, the Liberal Party has turned from being defender of the status quo to being a (the principle?) advocate of economic change.[14] In the process, it has largely jettisoned its Deakinite wing and thus weakened its encompassing capacities.[15] Perhaps the Democrats, if they have the imagination, are positioned to inherit this constituency?

Electorally, ideological convergence has arguably been one of the factors eroding the standing of the major parties. Federally, the number of electors casting a first preference vote for other than the major parties in the House of Representatives has doubled from around 10 per cent in the 1970s to around 20 per cent in 1998. Over the same period, the proportion voting for other than major parties in the Senate increased to 25 per cent in 1998.[16] Further evidence of the weakening role of the major parties is provided by trends in party identification, for so long the sheet anchor of the stability of the Australian political system. The number of Australians without a party identification has increased from roughly 2 per cent in 1967 to around 18 per cent in 1997. Further, the number acknowledging only weak identification has increased from 23 per cent in 1967 to around 37 per cent in 1997. Thus over half of the electorate have no or only weak identification with one or other of the major parties.[17] This is a particularly significant trend if party labels are relied on as a primary cue for citizen attitudes.

The second factor contributing to the excision of interest integration and the weakening of opinion framing by the major parties has been loss of their agenda setting roles. The major parties have been displaced by the social movements which

---

[14] See, for example, the (albeit unofficial) *Commission for Audit Report*, (R. Officer, Chair), Australian Government Publishing Service, Canberra, 1996.

[15] Ian Ward, 'Leaders and followers: reforming the Liberal Party', *Current Affairs Bulletin*, vol. 71, no. 3, November, 1994, pp. 4–16.

[16] Ian Marsh, 'Political Integration and the Outlook for the Australian Party System', in P. Boreham, R. Hall and G. Stokes, (eds), *The Politics of Australian Society: Political Issues for the New Century*, Addison Wellsley Longman, Melbourne, forthcoming.

[17] Ian McAllister, 'Political Parties in Australia: Party Stability in a Utilitarian Culture', op. cit., p. 9.

have emerged in the post-70s period. These have become a new source of agendas and new agents for the mobilisation of activists (their emergence will be considered later in the context of the pluralisation of Australian society). The women's, environment, gay, Aboriginal, consumer, multi-cultural, so-called 'new right', and republican movements are all organised independently of the major parties. Every significant extension of the political agenda in the past decade or so has originated with one of the social movements, not the major parties.[18]

This development is symptomatic of a significant change in the role of major party organisations. The locus of agenda development has shifted and activists are detached from especial allegiance to one or other party. Agenda development has largely ceased to be an internal process. Party forums are not the principal arenas for activists. Internal processes have not provided the medium for testing strategic acceptability and for initiating opinion formation. The initiative has moved elsewhere. Public opinion has been framed through public campaigns by activists, and through the resultant media attention. This has been used to pressure the parliamentary leadership of the major parties to adopt new agendas. The success of these campaigns has significantly widened the national political agenda, raised the importance of public opinion formation and diminished the influence of major party organisations.

Third, the major party organisations have been unable to manage interest integration. This was partly because the general proliferation of interest groups overwhelmed older patterns. Peter Drucker has described the contemporary United States as a 'society of organisations', a description that is equally applicable to Australia. Further, established organisational linkages—the trade unions with Labor and business with the Liberals—have demonstrably weakened. Finally, a disinclination to deal with groups was reinforced in the major parties by a fashionable economic ideology, public choice theory, which cast interest groups as selfish and self-serving, and disputed their representational legitimacy. This has reinforced the disengagement of interest groups from the major parties.[19]

The fourth factor contributing to the loss of opinion framing and interest integrating roles by the major parties results from change to their organisational orientation and staffing. Party managers are much less likely to be organisational loyalists. They are much more likely to be professionals in public opinion polling, and marketing and advertising techniques. Direct marketing, polling and media advertising and packaging promised to make organisational policy development activities and the associated membership base dispensable. Clever marketing, focused on the parliamentary leadership, could, it was imagined, sufficiently compensate for weakened party identifications amongst electors. Indeed conferences, large memberships and internal policy development processes came to be seen as constraints on the political leadership. Liberation from them allowed the

---

[18] Marsh, *Beyond the Two Party System*, op. cit., Chapter 3, 'Setting and Implementing the Political Agenda'.

[19] F. Gruen and M. Grattan, *Managing Government: Labor's Achievements and Failures*, Longman Cheshire, Melbourne, 1993; G. Singleton, *The Accord and the Australian Labor Movement*, Melbourne University Press, Carlton, Vic., 1990.

parliamentary leadership to reach out directly to electoral opinion. Sophisticated marketing techniques seemed capable of delivering the required outcomes in mass opinion formation.[20]

In combination, these four factors have progressively resulted in the major party organisations largely jettisoning their roles in interest integration and opinion framing. Party leaders now mostly rely on a direct reach to public opinion via elections and a direct reach to interest and cause groups. Summits express the latter strategy. Meantime there could be no stronger evidence of the strengths and weaknesses of a direct reach to public opinion than the Howard Government's approach to the GST.[21]

A direct reach to public opinion by the leadership of the major parties is clearly one viable approach to building public opinion. But this approach is suffused with constraints. It is extremely risky politically, as the last election demonstrated. The leadership of the rival party will almost certainly oppose what is proposed, irrespective of its own past policies (e.g. Labor on the GST in 1985). This creates a public debate in which one side declares black whatever the other asserts is white. This outcome, almost inevitable in our adversarial structure, is dysfunctional from the point of view of building electoral understanding about real choices and options. It is also dysfunctional from the perspective of mobilising supporting interest group coalitions.

Further, a proposal for a GST was first registered on the public agenda in 1974 through the Asprey Report. It was to be followed by three attempts to introduce this measure—a push by Treasurer Howard in 1981, the Tax Summit of 1985, and the Fightback campaign of 1993. The adequacy of the tax system was an issue at the 1983, 1984, 1987 and 1990 elections. It is hard to believe this protracted period of public exposure had no impact on public opinion.

But must we always wait decades to settle major issues? Must we accept the political hypocrisy that adversarial politics imposes on the major parties? Must we accept this as inevitable, part of the nature of things, and of no consequence from the perspective of public confidence in the political system? Is there no better way of introducing major strategic issues to the Australian people? Is there no better way of testing the scope for even partial bipartisanship, engaging interest groups and beginning the process of seeding public opinion?[22]

Think of the issues currently or potentially on the political agenda: reconfiguring the welfare system, drugs, Aboriginal reconciliation, a reorientation to Asia, euthanasia, the republic, developments in Indonesia. All of these issues raise fundamental

[20] Stephen Mills, *The New Machine Men*, Penguin Books, Ringwood, Vic., 1986.

[21] Ian Marsh, 'The GST and the Policy Making System: Is There a Gap in Strategic Capacity? How Might it be Closed?', a paper presented at a conference on *Tax Change in Australia*, Centre for Public Policy, University of Melbourne, February, 1999.

[22] John Hewson, 'Yes Minister, there's no debate', *Australian Financial Review*, 26 February, 1998; John Stone, 'Some modest proposals', *Adelaide Review*, December, 1998, p. 14.

questions.[23] All mobilise differing interests and coalitions. All engage a cadre of immediate activists, and all are opposed by other significant sectional groups. On some of these issues the groups immediately affected have been mobilised, but the system has so far demonstrably failed to institutionalise interaction between protagonists and raise the level or quality of attention in broader community forums.

The jettisoning of interest integrating and opinion framing roles by the major parties leaves a worrying gap in policy-making capacities. This gap concerns the ability of our political system to explore contested issues in a strategic phase. A strategic phase in opinion formation and interest mobilisation is critical in constituting shared interests among citizens in particular longer term outcomes.[24] The political system needs a capacity to routinely engage interest group and broader opinion in a strategic, what might be termed 'framing', phase. This constitutes a prelude to an 'operational phase' when detailed distributional issues might be settled. These phases were fused in the GST deliberations.

A strategic, framing, phase in opinion formation can lay the groundwork for subsequent action in an operational phase.[25] This phasing of policy development is recommended in relevant scholarly literatures and routinely practiced in business and voluntary organisations and institutions throughout Australia.[26] And the need for strategic capacity has been significantly enhanced by the pluralisation of Australian society. Yet in the much more important political domain where our shared aspirations are articulated, common purposes constituted and common interests realised, the capacity to focus public and interest group opinion on emerging issues has substantially diminished.

The pluralisation of Australian society

The proliferation of interest groups and social movements is arguably the single most significant change in the character of post-war domestic politics.[27] It is hard to overstate the degree to which Australia has become a group-based community. The array of organised actors on any issue is legion. These groups vary enormously in

[23] On welfare systems see Gosta Esping-Anderson, *Social Foundations of Postindustrial Economies*, Oxford University Press, Oxford, 1999.

[24] Donald Schon and Martin Rein, *Frame Reflection: Towards the Resolution of Intractable Policy Conflicts*, Basic Books, New York, 1996.

[25] D. Yankelovitch, *Coming to Public Judgement*, Syracuse University Press, New York, 1992; Robert Reich, (ed.), *The Power of Public Ideas*, Harvard University Press, Cambridge, 1990.

[26] Dennis Turner and Michael Crawford, *Change Power*, Business and Professional Publishing, Warriewood, NSW, 1998, especially Chapter 5; Doug Stace and Dexter Dunphy, *Beyond the Boundaries, Leading and Recreating the Successful Enterprise*, McGraw Hill, Sydney, 1996, especially Chapter 5; David A. Garvin, 'Building a learning organisation'*, Harvard Business Review*, July, 1993, pp. 78–91; Peter Senge, 'The leaders new work: building learning organisations', *Sloan Management Review*, Fall, 1990, pp. 7–23; John Kay, *Foundations of Corporate Success*, Oxford University Press, Oxford, 1995.

[27] Peter Drucker, *Post-Capitalist Society*, Harper Business, New York, 1993; S. Tarrow, *Power in Movement: Social Movements, Collective Action, and Politics*, Cambridge University Press, New York, 1994.

size, budgets, political skills, organisational sophistication and campaigning capacities. But the major groups are as effectively organised as the major political parties.

There are at least nine major movements in Australia: environment, ethnic, consumer, indigenous, women, gay, peace/third world, animal rights and the New Right or neo-liberal movement. All represent a concern at some level of generality below, or different from, that of socio-economic class, and they articulate new patterns of political differentiation. In each case the evidence of organisational capacity and political capability is clear.

In turn, these groups have stimulated imitators advocating new issues (e.g. euthanasia, legalised heroin, a republic) or defenders of traditional values (e.g. shooters party, monarchists, anti-abortion, anti-euthanasia groups). This approach to political engagement recalls patterns last seen in the nineteenth century—indeed, membership of social movements was then the standard mode of citizen political participation.[28] Their existence was symptomatic of the wider differentiation then evident in citizen attitudes, but in political communities where participation was more narrowly confined. With their emergence, the modern mass parties subsumed most of these organisations behind their broader agendas—or delegitimised the more narrowly focused concerns to which the movements gave expression.[29]

So the image of the contemporary Australian community as a kind of vast silent majority with a noisy fringe of pressure groups is fundamentally wrong. Talk of a 'new class' as some alien sectional minority subverting the public interest in favour of selfish and unrepresentative concerns is fundamentally wrong. And the idea that Australian society has been taken over by a 'politically correct' discourse to the exclusion of a majoritarian but muted voice also is fundamentally wrong.

Images of a silent majority, of 'political correctness' and of a new class may all be useful rhetorical ploys in the political game. But as pictures of social reality, they do not square with the facts. The pluralisation of Australian society is the fundamental fact—and the proliferation of interest groups and issue movements is its organisational expression. Unless political leaders can persuade the community to jettison some of its varied aspirations, a new level of pluralisation is here to stay.

The space between the major parties and the community is now filled with political organisations with political capacity and media skills. These organisations have a demonstrated capacity to shape opinion on particular issues. The capacity to mobilise opinion, or at least salient chunks of opinion, is the currency of political influence. Opinion influence can take many forms. Think for example of the annual Sydney Gay and Lesbian Mardi Gras or of talkback radio or of suitably crafted media events

[28] Examples of social movements in the nineteenth-century include the Suffragette, Temperance, Single Tax, Anti-Slavery, 8 Hour Day, and Anti-Corn Law League.

[29] V. Burgman, *In Our Time, Socialism and the Rise of Labour*, *1885–1905,* Allen and Unwin, Sydney, 1985.

(business tax campaign, the tent embassy, anti-logging campaigns).[30] The impact on public opinion of the parties, groups and movements creates the contested purposes that constitute the public conversation—the political dialectic—of contemporary Australian society. A reframing of the political agenda coupled with the proliferation of interest groups has transfigured the opinion forming task.

The neo-liberal economic strategy, more or less adopted by both major parties after 1983, required a reduction of the role of the state and a diminished scope for politics. While a new tacit economic consensus between the major parties has emerged, the extent to which the state might have a role in fostering a new Australian industrial structure remains in dispute. However there is no evidence that the overall neo-liberal economic agenda has contracted.

Environmental concerns, indigenous rights, the new role for women, and new protections for consumers are now all government responsibilities. This expanded agenda spawns new issues as developments in one area have consequences in others. Think, for example, of the emergence of biotechnology. Policy trade-offs are now more complex. Protagonists need to share perspectives. The grounds for supporting or opposing particular developments amongst relevant interests can be fluid. Dialogue, deliberation and interaction are all required in settings where benefits and costs can be clarified, issues redefined in more encompassing terms, and compensation strategies explored. This is the problem with summits. They can be effective as the capstone of a more embedded process, but otherwise they are too short for the necessary development of views.

In a more complex world, new issues such as the emergence of euthanasia, drugs and the republic attest to widened citizen expectations for politics. Externally, our political environment remains uncertain and our regional linkage requires a fundamental development of public attitudes and orientations. Thus the need for capacities to frame and develop public and interest group opinion has actually increased. This is the context in which the role of the Senate deserves fresh appraisal.

The Senate and community representation

The Senate was constituted as a 'strong' House by the founding fathers of Australian Federation. As is well known, the immediate stimulus was fear by the small states of domination by their larger cousins.[31] But more deeply, this particular constitution of power has deep roots in liberal traditions—majorities should rule but not heedless of collective minorities. Protections for minorities need to be entrenched in the structure of power.[32] The principal collective minorities at the time of Federation were the

[30] Larry Galbraith and Ian Marsh, 'The political impact of the Sydney Gay and Lesbian Mardi Gras', *Australian Journal of Political Science*, vol. 30, no. 2, 1995, pp. 300–320.

[31] Brian Galligan, *A Federal Republic: Australia's Constitutional System of Government*, Cambridge University Press, Melbourne, 1994; Helen Irving, *To Constitute a Nation,* Cambridge University Press, Melbourne, 1997; J.A. LaNauze, *The Making of the Australian Constitution*, Melbourne University Press, Carlton, Vic., 1972; Alfred Deakin, *The Federal Story*, Robertson and Mullens, Melbourne, 1944.

[32] Uhr, op. cit.; Campbell Sharman, 'The Senate and good government', *Papers on Parliament* no. 33, May 1999, pp. 153-170; Geoffrey Brennan, 'The unrepresentative swill feel their oats', *Policy,* Summer, 1998–99, pp. 3–9. On earlier uses of Senate power see L. Young, 'A disproportionate amount

states. State identification remained strong. Inter-colonial ambitions and anxieties remained significant.

State identity continues to be a potent force in Australian politics. But it has been joined by cross-cutting sources of sectional or minority identity. Think of the unions, small business, or the women's, gay, aboriginal, multicultural, or republican movements. These and many other organisations are the sites through which, and from which, the opinions, aspirations and interests of a newly diversified and pluralised Australian community are refracted and framed.

Australia's founders created, and intended to create, a distinctive constitutional structure, looking to Britain for ways to institutionalise 'strong' government and to the United States for ways to institutionalise collective minority rights. Strong government was necessary to realise aspirations for nation-building and equality of opportunity between citizens from vastly different initial conditions. Collective minority rights were essential as protection against illiberal majorities. This resulted in our distinctive constitutional settlement made up of two virtually co-equal federal Houses.[33] One might speculate that this arrangement institutionalises exactly the aspiration for collective fairness which is such a rich element in Australia's political culture.[34]

The potential of the Senate as a forum for minority representation was displayed in the first ten years after Federation. In this more pluralised world, no party enjoyed an absolute majority in either chamber. The main parties, Alfred Deakin's Protectionists, George Reid's Free Traders and the newly formed Labor Party, needed to reach accommodations with each other to form governments and to pass legislation. In three elections, the public awarded a clear majority to no single group. In addition, the norm of freedom of conscience for individual members of parliament was then dominant, at least on the non-Labor side. So governments could not automatically rely on the votes of their supporters on contentious issues.

A variety of hotly contested strategic issues needed to be resolved in setting the economic and social foundations of the Australian Federation. Tariffs and wages were the most divisive issues, but others such as old age pensions, nationalisation, the construction of national railways, and the establishment and role of the Post Office, were also prominent. Joint or Senate select committees were established to investigate each of these issues, to establish the options for handling them and to build awareness amongst key constituencies.[35] Findings were debated in both Houses. Since the

---

of power? Influence of minor parties in the 1993 budget process', *Legislative Studies,* vol. 13, no. 1, Spring, 1998, pp 1–17.

[33] Richard Mulgan, 'The Australian Senate as a house of review', *Australian Journal of Political Science*, vol. 31, no. 2, 1996, pp. 191–205.

[34] For an American contrast see Louis Hartz, *The Liberal Tradition in America: an Interpretation of American Political Thought Since the Revolution*, Harecourt, Brace and World, New York, 1955; on the United Kingdom see W.H. Greenleaf, *The British Political Tradition*, Methuen, London, 1983.

[35] Marsh, *Beyond the Two Party System*, op. cit., pp. 294–297.

government could not be assured of a majority, debate on particular issues was decisive.

The Senate used its powers regularly against governments in the first ten years.[36] The Senate functioned not as the poodle of the major parties, which was the role it mostly adopted up until the loss of a government majority in 1981. Then it functioned as the house of review it was intended to be. It used its committees to gather information and to build opinion amongst senators.

The Senate's committee system became the key institutional mechanism for investigating strategic issues. There were frequent disagreements between the Houses, particularly on tariff issues. Disputes between the chambers were fierce, but accommodations were ultimately reached. Indeed, these cameo dramas became an occasion for public learning. Contention was sited not in party conferences or in internal party committee processes. It was based in parliamentary committees and in debates within and between the Houses. The political drama constituted the *mise en scene* in which the educative role of political investigation and deliberation was more fully realised.

Indeed committees are the only mechanism available to express the investigative capacities of parliamentary institutions and they provide essential foundations for parliamentary deliberations.[37] They are the only mechanism through which the scope for even partial bipartisanship between the major parties might be explored.[38] In the more confined, but more plural, political world of nineteenth century Britain, and in the more democratic Australian colonies before the genesis of mass politics, legislatures and their committees were a primary means for investigating contested issues. In the process, the development of member, stakeholder and perhaps broader community views was seeded.[39] The legislature and its committees have always

---

[36] Surveyed in Geoffrey Sawer, *Australian Federal Politics and Law*, *1901–1929,* Melbourne University Press, Carlton, Vic., 1972.

[37] Writing in *The English Constitution* in 1867, Walter Bagehot identified a number of functions for the House of Commons that extended well beyond 'watching and checking ministers of the Crown.' These included 'expressive', 'teaching', 'informing', and 'elective' functions.

[38] The power of bipartisanship was clearly displayed in the 1980s. Floating the exchange rate, financial deregulation and the reduction of protection all attracted bipartisan support. By contrast party u-turns under electoral and/or interest group pressure are evident on the GST and Telstra privatisation.

[39] 'After 1820 … Select Committees were used with a regularity and purpose quite without precedent. It is difficult to overestimate the importance of this development. Through session after session, through hundreds of inquiries and the examination of many thousands of witnesses a vast mass of information and statistics was being assembled. Even where (as was uncommonly the case) the official inquiry was in the hands of unscrupulous partisans, a sort of informal adversary system usually led to the enlargement of true knowledge in the end. A session or two later the counter-partisans would secure a counter exposition of their own. All this enabled the administration to act with a confidence, a perspective and a breadth of vision which had never hitherto existed. It had also a profound secular effect on public opinion generally and upon parliamentary public opinion in particular. For the exposure of the actual state of things in particular fields was in the long run probably the most fruitful source of reform in nineteenth century England.' Oliver MacDonagh, *Early Victorian Government, 1830–1870*, Holmes and Meir, New York, 1977, p. 6.

contributed to interest group integration and to community education in the very different political system of the United States.[40]

Building a consensus about strategic issues, about the options for handling them, and building public understanding of the benefits and costs of alternative courses of action, and perhaps about how winners can compensate losers, are all the challenges we face anew in becoming a flexible and adaptable community. The GST debate points to the means for renewing interest integrating and opinion-framing capacities in a strategic phase—that is, through the Senate and its committees. It illustrates the capacity of parliamentary structures to mobilise expert, bureaucratic and interest group opinion, to attract publicity, and perhaps to contribute to the formation of a majority coalition for action. In the classic two party system, these roles were mostly located in the major party organisations.

The GST debate emerged at the, so-to-speak, operational end of the policy development process. It illustrates a mechanism whose role could be routine at the strategic end of this process. This would require a significant enhancement of the Senate committee system and a more focused appreciation of its potential contribution. I have explored these issues in detail elsewhere.[41] The structure of committees needs strengthening and they would need to intervene routinely in the policy development cycle within departments. Staff support for committees needs significant strengthening. The capacity of committees to challenge the executive may need to be refurbished. Clashes between the Senate and the executive at appropriate moments in the policy development process, far from occasioning hand-wringing, might be welcomed for their contribution to the broader development of opinion throughout the Australian community.

Of course, the risks in such developments also must be acknowledged. The combination of a strong executive and minority rights imposes distinctive behavioural norms on participants. Above all, protagonists would need to be willing to compromise, and to display qualities of moderation in the parliament or its backrooms that they might not choose to display to their more ardent supporters. But such are the familiar ways of democratic politics.[42] In the mutation envisaged here, the major parties might even occasionally combine to discredit unpalatable opinions or to make public the bipartisanship on broad strategy that is now mostly tacit.

Protagonists for majoritarian, winner-take-all conceptions of government now, as in the past, see only instability in the further development of the Senate's role.[43] On the

---

[40] Arthur Maas, *Congress and the Common Good*, Basic Books, New York, 1983.

[41] Ian Marsh, 'Parliament and Policy-Making' in *Beyond the Two Party System*, op. cit., Chapter 9.

[42] An example is the procedural norms in the US Congress.

[43] *Weekend Australian,* editorial, 'Undue power shows Senate reform needed', 28 November, 1998; *Sydney Morning Herald*, editorial, 'The Senate needs to be reformed', 8 February, 1999; *Herald-Sun*, editorial, 'The tyranny of minorities', 25 November, 1998; Helen Coonan, 'The Senate: safeguard or handbrake on democracy?' *Address to the Sydney Institute*, February, 1999. For an overview see Hugh Emy, 'The mandate and responsible government', *Australian Journal of Political Science*, vol. 32, no. 1, 1997, pp. 65–78.

contrary, I believe underlying electoral trends may progressively precipitate a significant mutation in our familiar two party system. The Senate, armed with a clear sense of its potential policy-making contribution and with appropriate capacities, is the principal potential agent of regime change in Australia. The minor Senate parties have most to gain immediately by a change in the structure of policy making.[44] But the major parties too may ultimately come to see gains in a structure that holds in prospect improved opportunities for all participants to advance their policy agendas.

Australia has a strong tradition of fairness along with a rough-and-tumble political style. As we adapt to the changed world economy and to our own changing aspirations as a people, the need to change the structure of politics may be increasingly forced upon us. These things do not happen easily or quickly—many societies require revolution and insurrection to achieve new distributions of political power. Yet in the twenty years from 1890 to 1910 the new Australian union was successfully crafted and a compact that provided the framework for its economic and social development in the subsequent eighty years was constructed.

Are we in such a phase once more? Trends in voting and weakening party identification affirm the possibility.[45] There are at least three more federal elections between now and 2010. By 2010 I think we will be well on the road to a more open and transparent political and policy-making system. There will doubtless be much turbulence, uncertainty and perhaps instability in the process—the two party system is too deeply embedded in our habits and routines, and too many able people have a stake in its preservation, for change to be simple or easy. Nor should it be. These are basic issues touching the kind of people we are and might aspire to be. I think we will ultimately be best served by a mutation of the two party system and the emergence of a more plural alternative. Liberal democracy, not economic rationalism, is after all the crowning ideal of our time.

Question — Is the GST fair, when someone earning $100,000 or more will get a reduction of $85.77 per week, but someone with $10,000 will get $5.34? Regarding pensioners, they will be given a 4 per cent increase in the pension, and then taxed at 10 per cent, which is $38.14. This is not fair. The current government will be the first in history to tax pensioners, if the Senate votes for it. Also, how will the GST stop the tax avoidance schemes and stop profits made by multinationals from going overseas. I believe the GST will do nothing to prevent this. Also, despite the elimination of the wholesale tax, the 10 per cent GST will go up and so will the cost of living.

---

[44] Ian Marsh, 'Liberal priorities, the Lib-Lab pact and the requirements for policy influence', *Parliamentary Affairs*, vol. 43, no. 2, July 1990.

[45] The development of multi-party politics in New Zealand, devolution to Scotland and Wales and possibly the English regions, the possibility of an MMP voting system in the UK, and the possibility of constitutional change in Canada all point to regime movement in the countries closest to Australia in political culture and institutions.

Ian Marsh — One of the great privileges of being a political scientist involved in institutions is that I can't parade any expertise on the precise conclusions of my economist colleagues. We are immensely enriched by having a huge volume report currently before a Senate committee that I think addresses all the issues that you raised and that represents detailed calculations on issues of fairness. We are seeing a process that is actually working through how it will be defined from a public policy perspective, and that is going to resolve the issue that you put before us. I think we must wait and see how that comes through the system.

Question — Surely the problem for interest groups having a say in the formation of parliamentary decisions is that they only know that an issue is on the table after it has passed through a binding parliamentary caucus. So in many ways the deliberations of a Senate committee come at the wrong end of the process, because by the time an issue gets to a committee and people present evidence, the discussion and the binding decision have already been made in the caucus room. If you were talking about reform to include more community participation and more perspectives being presented, how would you see these fitting into the binding caucus structure, which is obviously the major difference?

Ian Marsh — My language must have been too abstract; all those words about 'framing' and 'strategic' were about creating a role for committees at that agenda entry end of the process. Furthermore, all the references to the 1901–1909 period were about the legislature in conflict, moving the locus of squabbles out of the caucus and out of the party rooms and on to the floor of Parliament and on to the relations between the Houses. So you are really looking, in a more plural system, at the dynamics of all those activities shifting into other arenas. There's a perfect illustration of it—you can see how it would all work—if you look at the Hansard record for the 1901–1909 period. So in our history there is available, on the record, examples of how this process would work. But it would shift all those dynamics you are talking about. Many of the things that are now behind closed doors would move into a more public domain, with all the benefits that I tried to identify.

Question — A year or so ago Phillip Adams was interviewing Ian Sinclair on *Late Night Live* about the outcome of the Constitutional Convention, and they were commenting on how successful that had been, both in the processes and the quality of debate. One of the difficulties raised by Ian Sinclair—in response to a suggestion by Phillip Adams that our Parliament should operate in a similar fashion—was that governments bring their ideas forward to the Parliament in the House of Representatives in the form of fully drafted bills, and governments therefore find it hard to have the humility to back away from the fully worded and drafted proposals. They could perhaps come forward with an agenda or a set of ideas in general form, and debate those, and then go away and prepare their bills in the light of comments and discussion. You propose that the Senate be the focus for this activity, but could we avoid some of the problems generated in the House by having the House take a different approach to the way in which it deliberates ideas?

Ian Marsh — I got involved in these activities many years ago for my doctorate when I was looking at the new committee system Mrs Thatcher established in the House of Commons in 1979. One of the striking features of the committees that were set up in that House was the way in which they came to mirror the kind of policy

development process in departments, so that the typical committee each year would have a couple of inquiries on an emergent issue, which would give the committee the kind of information base to lock into the policy cycle in which ministers had been the exclusive political actors. In that way, committees can buy themselves into the agenda entry and the emergent phases of the policy process. Of course, the Commons committees in the workings of adversarial politics were totally impotent and the late Stuart Walklend, a very distinguished British political scientist, described them as a kind of new House-of-Commons-in-waiting.

When you come to Australia, the evidence suggests that there will still be two major parties, and we still need a House to allow majoritarian action, and to allow governments to play out their role. The Commons has over 600 members; our House of Representatives has only 148 members. In terms of the number of people in the House of Representatives, and the dynamics that are necessary to sustain Government and Opposition relations and to constitute an executive, I just don't see that chamber being an effective vehicle for the more plural and more strategic processes that we need to add to our political system. But we have the Senate, which is (a) elected on a difference base, so its composition is somewhat different from the House, and it more truly reflects the community; and (b) has quite distinct and separate powers. So our founders, with the wisdom of prescience, have endowed us with the basic institutional arrangement that would allow us perfectly to move into a more plural world, if that is how the electorate continues to push the system.

Question — You've touched on the importance of the electoral system to the way the Senate operates. Given that, do you think there could be an opportunity to advance the policy-making process either by skewing the numbers from the states—so, for example, there are twenty senators from NSW and five from Tasmania—or getting rid of state representation altogether? Half the Senate could be elected from right across Australia given the irrelevance of the Senate as a states' House.

Ian Marsh — I think it's better to see the Senate as a House of minorities. States were the minorities at the time the system was conceived, and now there are many more cross-cutting minorities, but state identity remains a very significant factor in this country.

There have been a lot of lectures—and I've stopped going to them now—where people talk about a referendum to abolish the states, and a referendum to change this and that. I just don't see that you'd get it through our system. If someone is willing to put in the time and energy and a charismatic figure who can galvanise the country into seeing that there is some desirability in shedding a state identity and moving to some different structure, full marks. While it could happen, it's just very hard to see how on the evidence of public opinion and public attitudes.

Of course, the major parties could gang up and change the voting system for the Senate, and that would be another way of altering the game. It's a perfectly feasible strategy, and has happened in Tasmania. Senator Faulkner is on the public record saying he will never do this, but of course there are a lot of people on the public record saying they will never do things. I do think that ultimately it is a step that might come back to bite the major parties.

If I am right in putting to you that the pluralisation of Australian society is a fundamental fact, then we will only put that genie back in the bottle at the cost of de-legitimising the system. If the major parties try to squeeze out, or put into private forums, or try to internalise the complexity and diversity of our society—in other words, if they don't allow representation to occur—then it will lead to the electors losing confidence in the system. It will produce more One Nations and events of that kind. So I can understand the strategy for changing the Senate voting system and I can understand how these developments might make life uncomfortable for ministers—the gods of the present system—but any effort to try and contain them would simply undermine the legitimacy of the whole system.

Question — Do you think that your vision for an enhanced role for committees would be better served by removing the executive from the Senate, i.e. no ministers, no question time, no Opposition, no Government, just senators?

Ian Marsh — David Hamer had a suggestion along those lines many years ago, and I have a speech of his in the bottom of a file somewhere that talks about that. I am not sufficiently familiar with the constitutional arrangements to know how that could work or would work. The Senate is still not a big House to constitute an array of committees that could mirror the constitution of Cabinet, and there's a lot to be said for liberating the sort of talent that is now absorbed into the spokesperson and ministerial positions into committee chair roles. But I have not thought my way through the issues clearly enough to say whether it is feasible or not.

Question — Regarding the role of the media and their relations with committees, there has been criticism from members and senators from time to time that they often already do a lot of the issues-based work, but the media chooses to report only those controversial issues, like the GST, when in fact there are other committees that do a lot of work. Would you like to comment on that?

Ian Marsh — That's again why it's so instructive to look at the 1901–1909 period. The media has a sure instinct for power. Politics, at one level, is about a structure of power. Why have question time? It's a charade, a ritual. Why is question time such an attractive gladiatorial struggle every day? Because the rival leadership teams, one or other of whom will hold the real strings of power in the country, are on display every single day. And as we see with the GST inquiry, there is now a real game going on between the Senate and the House and between the Government and the Senate, and it is of interest to the media. As we see in the 1901–1909 period, when the Senate really was willing to use its power against the Lower House when controversy was on, the media naturally honed in on what was happening. I have no doubt that in a reconfigured system, where the flow of power is organised differently, there would be attendant publicity. But the media recognise quite rightly at the moment the irrelevancy of many of the rituals that go off on the side. I think if the structure of power moves, public attention will also move.

Question — You mentioned in your remarks that there was probably a need for staff support for committees to be strengthened, and I was wondering if you'd care to elaborate on that?

Ian Marsh — One doesn't want to go to the extent of the US Congress, although I just point to the US Congress as an extreme of what you need. To come closer to home, the House of Commons' select committee staffs are about fourteen-strong. Our committee staffs are about one or two people, by and large.

It seems to me crazy; if an organisation like EPAC (it's now dispensed with) is going to perform any kind of bridging, mediating, intersecting role, it's crazy to do it within the executive—it ought to be doing it within the structures of Parliament. Once you do it within the executive, as soon as you let out information that's going to be ammunition for the Opposition, you're creating all the incentives in the world for the Government to squeeze you in or close you down. Whereas the Parliament's interest is quite different.

Of course, the bureaucracy is full of immensely able people. Just look at the GST debate—look at the arguments about modelling, or Warren and Harding versus the Treasury. The Treasury is an immensely able institution. If you're going to, as we need to, make much more transparent the kinds of deliberations that inform policy-making, then you have to make sure that alternative points of view, alternative expertise, and other legitimate perspectives are brought on to the stage. You can't do that with a one-and-a-half-person staff committee; there's just no way in the world. Committees, in some sense, will be dependent on the capacity of their staffs to arm their abilities, and we've got to achieve that.

In the House of Commons, where the committees are in exile, so to speak, you've still got about sixteen qualified people serving each of the major committees. I should also add that one of the remarkable absences in our Parliament is a Treasury committee. The most important committee in the British structure is the Treasury Committee, which calls the Governor of the Bank of England, the Secretary of the Treasury, and routinely takes evidence on the state of the economy. It's extraordinary that we don't have an equivalent of a Treasury committee in this country, although we have started, to some extent.

Question — I welcome your comments regarding the Senate and its potential role. I underline your comments regarding the intellectual activity that seems to have ended in 1901. We hope that it comes back. I was bit appalled by your easy way of handling the House of Representatives by saying that because the government has the power there won't be any discussion. I think there can be more discussion. I know that in a number of European, and I think the American, parliaments, parliamentarians accept a deduction of their salary to pay for a very powerful office which attracts a lot of young lawyers and economists from the universities. This office assists everybody whether in the Government party or the Opposition party, to draft legislation, to engender discussion, with a consequence that a private member's bill has a far greater chance of getting support in public because it is funded by this particular office. I knew a young lawyer in America who was involved in such an organisation, and he happened to be a German, so they bring in the intellectual elite from all over the world.

Ian Marsh — I must correct the first point. I didn't want to suggest that all intellectual life was drained from our system in 1909. Rather I wanted to suggest that it moved into the back rooms and ceased to be as prominently on the public stage.

Of course, the deal in most European Parliaments is very different because they are operating with different kinds of political systems. Many of the European systems are much more multi-party than our own political system, and the dynamics and possibilities are different in those environments. I don't know whether people noticed the other day a photo in the *Herald* of the new Reichstag in Germany. If you look at the layout of the seats in that chamber, it was a semi-circle in front of the speaker's chair—a completely different seating arrangement, expressing a completely different character of the nature of the way the institution frames political interaction.

If we change the voting system in this country for the House of Representatives and therefore turn it into a more plural House, all the possibilities of the sort that you suggested could come to pass. But again, it's one of those things that is possible, but I just don't see it as something that's on the practical horizon within the foreseeable future. I think the Lower House will remain an adversarial house and I think there are probably quite good reasons why that might be so, and therefore I see the Senate as the focus for this kind of activity. But again, if someone can persuade the major parties to change the Lower House voting system, to make it more of a multi-party house—fantastic. If we go New Zealand's route, so be it, and then of course that would come to pass.

Question — I share your optimism about the true constitutional role of the Senate in the legislative process, but are we not being a bit optimistic in claiming to see it in evidence now in the tax debate, where the Opposition appears to be opposing and refusing to propose amendments, and all amending is being done by a senator with 24,000 votes out of an electorate of 11 million?

Ian Marsh — Well, (a) I might be completely wrong; and (b) if I'm half right or three-quarters right we are in a sort of transition phase and you're going to see all kinds of weird things happening in that kind of period. The Opposition is naturally and rightly still wholly adversarial. The norms of adversarial politics totally write its scripts, and you wouldn't expect it to be otherwise. And if it wasn't Brian Harradine it would be the Democrats after 30 June, which has got a different constituency, but I think they would be playing the same sort of game. Well, they'd be playing a slightly different game—the bells and whistles would be different—but it would be in the same general direction. So these things always will happen. There could always be in a more plural world one person holding the balance of power. There is no perfection on this earth. We're going to have aberrations and absurdities, and people will make wrong decisions, and people will throw up their hands in despair at various times if we move into a different arrangement; it's just the way of the world. Politics is a reflection of our imperfection, and I don't expect it to be otherwise. So I'm not surprised that a single man from a state holds the balance of power. This is just the way our world works and it is inevitable in a period of transition. Maybe it will be the same if we do transit to wherever it is that we're transiting to. That's the system, that's the world.

Question — If you browse Hansard for say the first decade of the Commonwealth of Australia, and of the thirties and of the nineties, you cannot escape the conclusion that the nature of debate in both Houses has changed. To what extent, in your opinion, is this due to the introduction of broadcasting, and secondly, the introduction of

television? Or is it generational in our politicians, or is it generational in us? Also, you seem to be suggesting that we would get better acts if they were in some way drafted in the House. My comment is that our present Constitution was drafted, my understanding is, by three men on a yacht.

Ian Marsh — On the influence on why parliamentary debate is better, worse or indifferent, I really don't have a strong view. As you would expect me to argue, given the kind of analysis I've tried to present, the primary difference in periods of debate is in pre-1909 and post-1909, and I would see adversarial politics, the two party system, as the primary re-shaper of the character of the political debate. I've read some Senate transcripts. Some of the unnoticed debates around this place can occur at a reasonably elevated level for at least some of the time. I'm not too concerned. In a more open political environment, I do believe the quality of deliberation would rise to some degree.

As to where legislation is written, again I wasn't trying to suggest that legislation ought to be written in the House. It could be written in either chamber. I was simply suggesting that there is a very important role for committees of the Parliament at a pre-legislative stage, at an agenda entry stage, at the strategic phase of the process, which is before we decide to have legislation, but when we are trying to decide whether something ought to be recognised in the system and how the issue should be defined. These are both very important steps in the process of beginning a public conversation about the need for legislation.

Question — Would you agree that, to a very large extent, the uselessness of the House of Representatives has come about primarily because the Labor Party has always insisted on absolute unity within caucus. If you are a member of the Labor Party in the House, you may dislike certain aspects, but once caucus has decided, that's it. Consequently, because of that situation, the same thing came to happen with the other side, and that's why it's all froth and bubble and hot air essentially, in both Houses, but less so in the Senate.

Ian Marsh — One of Deakin's three big reasons for not merging with Labor (because the Deakinites and Labor both voted together quite a lot in the 1901–1909 period) was exactly that issue, that freedom of conscience was such a potent symbolic and practical thing. But I don't think it is the only reason for the froth and bubble of the lower House. And I actually don't think it's all froth and bubble, in the sense that whatever world we live in we will still need executive teams, and the job of being prime minister and minister is immensely demanding. I don't think there's any job outside Parliament that calls for the qualities of physical stamina, much less intellectual agility and being smart on your feet, like the job of prime minister or a senior minister. The lower House, if it serves no other purpose, is an immensely important testing ground, to see who is going to be able to actually get up there every day, no matter how well they slept or what time they went to bed, and to handle a question with intelligence and some apparent command of the facts.

When I was very young and first worked at Parliament House, I can remember the minister I worked for would leave the old Parliament House at 3.00 am and come back at 8.30 am and begin the day again. I would come in, I was twenty-two I think, totally ragged, feeling like death warmed up, and this guy would just begin his day as

though he had had a sound night's sleep. Those kinds of qualities are absolutely essential in our leadership and we need a chamber that has the capacity to really test people at those levels. I think the House of Representatives chamber does that, as well as exposing the two major alternative governments. In the world that I'm talking about, you would never go into the Senate if your ambition was to govern the country. You still need an executive, you still need to concentrate power and you still need that power to be challenged by an Opposition. And the House of Representatives, I think, does and would do a very good job of that very important task.

Question — While you have given a very factual summary, maybe you underestimate the importance of the individual, and this is one of the reasons why Pauline Hanson is going to upset a fine leader like Timothy Fischer and why Senator Brown and Senator Harradine are so critical at the present juncture. If you're going to reform the tax system, what are you going to do about tax evasion, what are you going to do about helping the people down at the bottom? Neither party has control of that, and the criticism is coming from individuals outside of it. Do you think there is a bigger role for the individual? Santamaria was never in Parliament, both Menzies and Evatt doted on him until the split came in the Labor Party and then they ignored him. Those personalities are known in Canberra from one decade to another, but they are not figuring publicly in the analytic discourse of the universities.

Ian Marsh — I agree with that, although in the hearings before the various inquiries, my impressionistic judgement is that they have been very successful in engaging and drawing in many perspectives and individuals from society into the process.

On the first point you make on evasion and its role in the tax system and the impact on pensions, we haven't seen whether the Government's going to get a GST out of this exercise. It is still not clear. Presumably, issues of the kind you have raised will weigh with our representatives who are charged with taking it forward. All the commentary tells us that Senator Harradine is going to make concessions on certain points and we will get a deal, but let's wait until it all happens, and see what the Democrats do. That is our political system at work.

I was listening to the debates in my car, driving around Sydney the last few days, and the kinds of issues you raise are the kinds of issues that senators have been speaking about on the floor of the House. We pay them money to balance these very large and complicated questions, and let's wait and see how they come out. It could still be that the issues you have raised will tip the scales. I don't know. I think they have been well recognised and that is one of the very important tasks you ask of a public political process, that issues that are legitimately concerning people, issues that are legitimately entitled to a standing in the process of deliberation, get ventilated and get their due weight. We may not all agree, and we won't always all agree, of course, on whether they have been weighed properly, but that they have been ventilated, that they have been recognised in the process of coming to a judgement is a very important part of our broader sense of the fairness of the system. I think that is what we are seeing work through at the moment.

Australia and Parliamentary Orthodoxy:
A Foreign Perspective on Australian Constitutional Reform[*]

Alan J. Ward

Let me start by explaining how I came to be here. For a number of years I have studied parliamentary governments in the Commonwealth and Europe, and in that process I developed an eight-part model which captured, I thought, the essence of parliamentary government. Then I came face to face with the Australian Senate, which seemed, at first glance, to play by different rules. So I had to spend some time investigating Australia, and that ultimately brought me to Canberra.

Today I want to talk about three things. First, I want to explain why I now think that Australia fits my parliamentary model. Second, I want to consider the role that upper houses play in Australian government. And third, I want to make some suggestions for constitutional reform that I expect you to find naive. I will necessarily paint with a very broad brush, given the scope of the topic, and for that I ask your forgiveness. As John Wayne once said, 'I don't do nuance.' I also recognise that Australians have been debating these subjects since at least the Federation debates of the 1890s, and very intensively during the republic debates of recent years, but I thought it might be useful to have a foreign perspective on these matters.

First, then, why do I think Australia is a relatively orthodox parliamentary state, and what does that mean anyway? When I taught in Australia in the 1960s, federal politics was dominated by Robert Menzies, who listed heavily in the direction of things British, and so did academic interpretations of Australian government. In a 1964 article, for example, Gordon Reid wrote, 'All seven units of government in Australia

[*] This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House on 18 June 1999.

are based on the Westminster model … For Australians it was the *sine que non* of internal self-government'.[1] Since the 1960s, however, Australian political scientists have often described the federal government in non-Westminster terms. In 1980, Elaine Thompson coined the term *Washminster* to describe a hybrid American and British model of government.[2] When Dean Jaensch endorsed this notion in 1991 he wrote, 'Any analysis of parliamentary democracy in Australia which starts from the premise that we applied a Westminster model is doomed to irrelevance'.[3] I think Jaensch was wrong, although I can appreciate why someone comparing Canberra and Westminster very specifically might be drawn to their dissimilarities: federalism, a formal constitution, judicial review, and the like. But if one were to focus on a generic model of parliamentary government, not the Westminster variant, British and Australian similarities would become very clear. Furthermore, as David Butler argued many years ago they illuminate each other in very useful ways.[4]

At the core of parliamentary government is the parliamentary executive, the principle that the government must have the support of a majority in Parliament. I should note at the outset that there are actually two kinds of parliamentary executive. In one, the members of the government sit as voting members of Parliament. We find this model in the Australian Commonwealth, Japan, and Germany, amongst other states. In the other model government members are not voting members of Parliament, although they may speak there. We find this model in many continental European countries, including Belgium, Austria, and the Czech Republic. I will primarily talk about the former, the internal executive model. It has eight core characteristics. Some of these are constitutional rules, and some are behaviours that follow from rules.

The first characteristic is what Walter Bagehot, in 1867, called *fusion*, the rule that members of the government sit in Parliament. Unusually for Australia, this rule is written into all Australian Constitutions, federal, state, and territory.

The second characteristic is also a rule, that the government must have the support of a majority in Parliament, or in the lower house of a bicameral Parliament, and it must resign if it loses that support. This is the essence of what colonial politicians called *responsible government*. At a minimum, as practiced in Britain, this rule requires the government to have a majority on confidence motions and major budget votes, but in many European constitutions it means much more. It can mean, for example, as in Spain, that the lower house appoints the Prime Minister, approves his choice of

[1] Gordon S. Reid, 'Australia's Commonwealth Parliament and the "Westminster Model"', in Colin Hughes (ed.), *Readings in Australian Government,* Queensland University Press, St. Lucia, Qld, 1968, p. 109.

[2] Elaine Thompson, 'The "Washminster" Mutation', in Patrick Weller and Dean Jaensch (eds), *Responsible Government in Australia,* Drummond, Richmond, Vic., 1980, pp. 32–40. Thompson makes no mention of the Washminster model in her recent book chapter, 'The Constitution', in Rodney Smith (ed.), *Politics in Australia*, Allen and Unwin, St. Leonards, NSW,1997, pp. 85–103.

[3] Dean Jaensch, *Parliament, Parties, and People: Australian Politics Today*, Longman Cheshire, Melbourne, 1991, p. 214.

[4] David Butler, *The Canberra Model*, Cheshire, Melbourne, 1973.

ministers, and approves his program before he takes office. Each decision is by a majority vote.[5]

This notion of majority rule came to the Australian colonies by order of the Colonial Office in the 1850s but it has been written into only one Australian Constitution, the *ACT Act 1988*. Nonetheless, with the notable exception of Sir John Kerr, who sacked a government with a lower house majority in 1975, it is observed everywhere in Australia as a convention.

The third characteristic is the one that gave me doubts when I first looked at Australia. It is the rule that in a bicameral parliament, one chamber has primacy. The parliamentary model rejects the proposition that a government can be responsible to two chambers, because they might be controlled by different majorities.

When I looked at what primacy means, it became clear to me that Australia satisfies this condition, at both the federal and state levels. Primacy is measured by four things, all of which are very clearly identified in a number of ways in modern parliamentary constitutions. First, the government is formed by the party or coalition which has a majority in the lower house. Second, the Prime Minister is a member of the lower house. Third, a majority of ministers sit in the lower house. And fourth, the lower house, or effectively the government that controls the lower house, possesses legislative initiative. Financial bills originate there, and most other legislation begins there too. Furthermore, legislation that originates in the upper house is most often government legislation, introduced there because of time constraints in the other house. In most parliamentary states, the upper house may only delay, not deny, legislation, but even where an upper house has the power to deny all, or certain, bills, as in the German and Indian federations, there is a presumption that the government will determine the bulk of the legislative program. This is certainly true of Australia, and I was intrigued to find that Senate Standing Orders provide for government senators to chair each of the legislation committees, even when the government is in the minority in the Senate. You certainly do not find this in Washington.

Australia, therefore, meets all four of these standards of lower house primacy, and this raises a very interesting question. The Washminster argument depends, above all, on the notion that the founders adopted an American federal Senate, and gave it American powers to reject any bill, including supply. Like its American counterpart, the Australian Senate lacks financial initiative. Unlike the American Senate, it may not amend a budget, but both senates may reject a budget. It is from this perspective that Elaine Thompson argues that the Australian Senate is not a house of review in the English sense. 'The Senate is powerful in its own right. It is a second chamber in the American sense.' She adds that this 'stand-off principle of Australian federalism is at odds with the idea that the government governs with the support of the lower house.'[6] But if the founders created a nearly co-equal upper house which is at odds, as Thompson says, with a government which is responsible only to the lower house, why does Australia satisfy the four standards of lower house primacy that I have identified?

---

[5] Spanish Constitution, Articles 99–100.

[6] Thompson, 'The "Washminster" Mutation', pp. 34, 36–7.

It is clear that the founders considered the American Senate when they were devising the federal Senate, but we tend to overlook the fact that in 1900, when the Commonwealth Constitution was adopted, the House of Lords, the Canadian Senate, the New Zealand Legislative Council, and all the colonial legislative councils had the power to reject any bill, including supply, and this fact had absolutely nothing to do with American federalism. Thompson says the Australian Senate is an American upper house, but one could as easily have said its powers are those of a colonial Legislative Council. These powers were not unusual at the time, although they were in the process of being curtailed in the parliamentary practice of the time. However, the federal justification for the powers was new to Australia and the Senate was unique in being a popularly elected upper house. It was its legitimacy, therefore, and not only its powers, that John Quick, for one, at the Sydney Convention in 1897, believed would lead the Senate to assert itself in an American way. Hence, in his view, the need for constitutional procedures to adjust disputes between the two houses.[7] What the founders found difficult to predict, however, was quite how assertive the Senate might be. In particular would it act so as to make a government responsible to the other house unworkable? Winthrop Hackett was alluding to this when he said, at the 1891 Constitutional Convention, '[E]ither responsible government will kill federation, or federation, in the form which we shall, I hope, be prepared to accept it, will kill responsible government.'[8] For those who thought responsible government would fail, the decision to entrust the executive to the Governor-General and not spell out the rules of responsible government in law meant that the Governor-General would be free to adopt a non-British style of executive—the Swiss model was mentioned—if responsible government were to fail.[9] But the majority position at the Convention was to wait and see. Perhaps Australia could muddle through.

Once the federation settled down, Australia did muddle through. The government and the Senate learned to work together pretty much as state governments learned to work with Legislative Councils. This happened because parliamentary norms prevailed over American senatorial norms, and these led to the primacy of the lower house. It seems to me, furthermore, that parliamentary norms are growing stronger over time in Australia. No upper house has rejected supply since 1952, in Victoria. The Labor and Australian Democrat parties believe supply should never be denied, and the Liberal party makes only a very theoretical defence of this power. And finally, no-one appears to relish the thought of replaying the crisis of 1975, when the Senate blocked a vote on supply.

I will return to this subject a little later, but having dallied overlong on the primacy of the lower house, let me deal quickly with the remaining five characteristics of parliamentary government.

---

[7] Australasian Federal Convention, *Debates,* Sydney, 15 September 1897, p. 552.

[8] J.A. La Nauze, *The Making of the Australian Constitution*, Melbourne University Press, Melbourne, 1972, p. 41.

[9] See Sir Samuel Griffith at the National Australasian Convention, Sydney, 1891.

The fourth characteristic is a behaviour pattern that follows a rule. If a government can only take office, and remain in office, with the approval of a majority in the lower house, there is a huge incentive to organise disciplined parliamentary parties because without them governments would come and go every week. It is party discipline, of course, that gives the government its control of the lower house, and where parties are represented in both houses they are customarily directed from the lower house because that is where government is won or lost. Parties are not conspicuous in parliamentary constitutions, but they are creeping into provisions on casual vacancies in Australia, and they are very evident in Standing Orders.

Characteristics five and six of the parliamentary model follow from everything I have said so far. The fifth is that parliamentary government is Cabinet government. The executive is a committee of the majority in the lower house. And sixth, within the Cabinet, the Prime Minister or Premier has decisive influence. Between them, the Prime Minister and Cabinet control the resources and legal authority of office. They also control a disciplined parliamentary party or parties, national party organisations, and media attention.

If effective executive power lies with the Prime Minister and Cabinet, it follows, and this is my seventh characteristic, that there is no place in the model for a strong head of state. In fact some small Pacific Island states dispense with a separate head of state altogether by combining the jobs of Prime Minister and President, which proves, perhaps, that a state does not absolutely have to have a separate head of state.

Finally, all the characteristics I have identified so far—fusion, government with majority support, the primacy of the lower house, parties, Cabinet government, the special powers of the Prime Minister, and the weakness of the head of state—lead in one direction, to the concentration of power in the hands of the Prime Minister and Cabinet, who dominate the lower house through party discipline. Indeed, a perennial complaint levelled at parliamentary government is that it creates the 'executive state', with governments that are too strong and legislatures that are too weak.

If you have followed me so far it will be obvious that I think Australia falls squarely within that group of states that one can call parliamentary. There is almost no 'Wash' in the model and a great deal of 'minister', or rather a great deal that is parliamentary in the sense that I have outlined. This is a model that can accommodate federal and unitary states, monarchies and republics, bicameral and unicameral states, and relatively powerful upper houses as well as weak ones. All can share these eight characteristics. That said, every parliamentary state is different from every other one in some way and I want, as my second topic, to say something favourable about the special way Australia operates parliamentary government, specifically the role of the upper house.

The upper house is always a problematical chamber in a bicameral system and many countries have chosen not to have one. Indeed, only fifteen British Commonwealth members have a second chamber. The fundamental problem is how to give the second chamber sufficient legitimacy and authority to avoid redundancy, but not so much as to make it impossible for a government selected from the lower house to govern.

It is always in the interest of a government to resist any growth in the authority of the upper house, but too many parliamentarians and academics have internalised the government's value that a strong upper house is unnatural in a parliamentary system. Recently an English friend, a constitutions specialist, sent me this message:

> I went to a 'seminar' at the Lords, on reform of the Lords, by Lords, last week. A better argument for abolition you'd go far to find; complacent not to say smug, with not an idea between them except to agree with the Labour Lord chairing the event that the future Lords must be more legitimate than at present but 'less legitimate than the more legitimate House' so as not to be a source of potential 'trouble'.

It is hard to believe that the 'Labour Lord' referred to is a member of the party of upper house reform in the United Kingdom!

I found the same kind of timidity about upper house reform in Ireland. The Irish Senate has defeated a government motion only three times since the present constitution was adopted in 1937, but the Constitution Review Group that published a report in 1996 made no substantial suggestions for Senate reform. Indeed, the group would not be unhappy were the Senate to be abolished. Eamon de Valera, who as Irish Prime Minister was responsible for the present Irish Constitution, believed that Parliament exists to elect the government, and should then get out of the way, and the Review Group accepted this view implicitly. Everything it recommended about Dail Eireann (the lower house), the Senate, the President, and the government was designed to protect the government.[10]

There was no recognition in the Review Group report of the excessive concentration of power in the executive that Australians call 'the executive state', even though Ireland had already begun a round of judicial inquiries into government misconduct that continues today and closely parallels the royal commissions into government corruption or impropriety conducted in four Australian states in the 1990s. What the Australian inquiries found was that parliamentary executives in the states do not adequately monitor themselves, that parliaments do not adequately monitor executives, and that systems of public service accountability are hopelessly flawed.[11] To date the Irish have not come to this conclusion.

If you accept, as I do, that the concentration of power in the executive is an unfortunate, and very often corrupting, characteristic of modern parliamentary government, you will probably accept that just about the only check on the executive comes from a house that it does not control. Sometimes it is the lower house that is not controlled, if the government finds itself dependent on independents or minor parties for its majority. This happened in New South Wales and Tasmania, for example, in recent years, where governments had to concede substantial reforms of

[10] Alan J. Ward, 'The Constitution Review Group and the "Executive State" in Ireland', *Administration*, vol. 44, no. 4, winter 1996–97, pp. 60–61.

[11] In Queensland, South Australia, Victoria, and Western Australia. See Alan J. Ward, 'Responsible government and recent constitutional change in Australia and New Zealand', *Adelaide Law Review,* vol. 15, no. 2, p. 1.

Parliament in order to secure majorities.[12] In Australia it is generally to the upper house that one looks for a check on the executive. It would be redundant here to record what the Australian Senate has done in the past thirty years in this regard, but I want to stress that state upper houses have asserted themselves too since they were democratised between 1950 and 1978. For example, when Barbara Page examined periods between 1976 and 1989 when the government did not control the New South Wales Legislative Council, she found that ministers worked harder than hitherto to brief, consult and negotiate with members of the Council, and that members of the Council came to see themselves as full-time legislators. Their sitting hours doubled, their average attendance rose, they took an interest in a broader range of activities and formed new standing committees.[13] All very admirable in my view. Scott Bennett finds similar developments elsewhere. There is, he says, a new 'upper house ethos', and Legislative Councils are 'no longer ridiculed as retirement homes for geriatrics or attacked as the havens of ultra-conservative politicians.'[14]

The important lesson from Australia about the upper house is that, contrary to what is generally believed overseas, effective parliamentary government does not collapse when an upper house asserts itself. I know that Australian federal and state governments often have to tailor their budgets and bills to accommodate the upper house, which is no bad thing if the upper house is a legitimately representative body, but the evidence is strong that governments still hold the legislative initiative and get most of what they want, and certainly most of what they absolutely need, out of the upper house.[15] What we see at work in state and federal upper houses most of the time is what Senator Fred Chaney describes as 'a degree of enforced reasonableness', enforced in the sense that unless the Senate restrains itself, governing is impossible.[16] Barbara Page writes, 'For upper houses to perform an effective review function without undermining [lower house] primacy, they need to operate with a mixture of independence and restraint.'[17] Australian politicians understand what parliamentary government entails, and they do not push it to the point that it freezes up, which is exactly what has happened in the United States in recent years of divided government in the executive President model.

The last major review of House of Representatives procedures was, I think, the Blewett report of 1993 and the data it presented showed me, at least, that the Labor Governments of 1983 to 1996 undermined the House of Representatives by mauling

---

[12] Alan J. Ward, 'Minority government and the redefinition of parliaments in Australia and New Zealand', *Legislative Studies*, vol. 11, no. 2, Autumn 1997, pp. 3–5.

[13] Barbara Page, 'Developments in the Legislative Council of New South Wales since 1978', *Legislative Studies*, vol. 5, no. 2, summer 1991, pp. 24–27.

[14] Scott Bennett, *Affairs of State: Politics in the Australian States and Territories*, Allen and Unwin, Sydney, 1992, p. 71.

[15] See the publication, *Business of the Senate*, published annually by the Table Office, Department of the Senate, Commonwealth Parliament.

[16] F.M. Chaney, 'Bicameralism Australian style: governing without control of the upper house', *The Parliamentarian*, vol. 69, no. 3, July 1988, p. 170.

[17] Page, op. cit., pp. 28–29.

question time and misusing the guillotine. But Blewett's own conclusion from this was not the one we hear most often in the northern hemisphere, that there should be reform of the lower house with lots and lots of new committees and expanded private members' opportunities. He knew the Australian federal government would not accept this. It already feels harassed by Senate committees and is not about to add House of Representatives committees to its problems. Instead, in his Gordon Reid lecture, published in 1994, Blewett said:

> It may be ... that instead of paying attention to reform of the House of Representatives we should accept that chamber as essentially a debating forum between two party teams, and particularly their leaders, designed to clarify choices for a mass electorate, and concentrate on perfecting the Senate as a House of legislative review and as the body for effective scrutiny of the Executive.[18]

I think this was an awfully wise statement, one that probably only an Australian would make because the upper house is so discounted in other parliamentary countries. Furthermore, the statement applies to state parliaments as well as the Commonwealth. Indeed, the Royal Commission on WA Inc. recommended just such a role for the Western Australian Legislative Council in 1992. It also recommended that no ministers should sit in the Council in order to distance the upper house from the ministry.[19]

Turning to the upper house for effective review and scrutiny, as Blewett suggests, is not without risk. There is the risk of legislative stalemate, for example, because none of the conflict resolution procedures in the federal and state constitutions work adequately. There is also a risk of overloading members. There is only so much that the Tasmanian Legislative Council, for example, with nineteen members, can do, or even the Commonwealth Senate, with seventy-six members covering over forty committees. The question of giving upper houses additional staff support to do their jobs adequately has to be addressed. On balance, however, I think that Australian bicameralism is working quite well. Furthermore, it is being supported by a credible, if opportunistic, theory of democratic pluralism. Pluralists like Brian Galligan, Campbell Sharman, and Harry Evans argue that dispersing power away from the executive reflects the diversity of modern society and the fragmentation of modern party politics better than does party duopoly in the lower house.

Having said something nice about Australia I want to end with my third topic, on a critical note, by addressing reform. I realise that I will be talking about matters which will be decided, in large part, by the referendum on an Australian republic later this year [1999], but what I have to say should be relevant whatever the voters decide. If the republic is approved under the terms proposed by the 1998 Constitutional Convention and the government, Australia will enter the new century with a pre-modern Constitution that no informed person I have met on this visit to Australia

---

[18] Neal Blewett, 'Parliamentary reform: challenge for the House of Representatives', *Australian Quarterly*, vol. 65, no. 3, spring 1995, p. 12.

[19] Bruce Stone, 'Accountability reform in Australia: the WA Inc Royal Commission in context', *Australian Quarterly*, vol. 65, no. 2, winter 1993, pp. 25, 27.

thinks is adequate. They see it as a very poor choice, and those who propose to vote for the republic will do so in hopes that the Constitution can be improved later. The record of constitutional reform in Australia should not give them much hope in that regard. If the republic proposal is rejected, reformers will gather their forces to try again, but they may have a very long wait.

I want to deal primarily with the executive and what we in the United States call reconciliation, meaning reconciling differences between the two houses. These subjects are related and I think that reform in both of them could be directed quite consciously at perfecting and clarifying the parliamentary model that I described earlier. Doing this would, I think, eliminate unnecessary tension and uncertainty in the Australian political system, and would make some sections of the Constitution intelligible for the first time to the average citizen.

Constitutional literacy is very important in a democracy and for that reason I find the calculated constitutional obfuscation practiced here to be irresponsible.[20] At the 1897 Constitutional Convention, Joseph Carruthers pleaded with his colleagues. 'Here we are framing a written constitution … It is better to let that Constitution clearly express what it is intended to effect; do not let us have to back it up by quoting whole pages of Dicey.'[21] Dicey, you may recall, explained in 1887 how constitutional law in Britain was, and still is, qualified by customary rules, called conventions. In law the monarch ruled but in practice, by convention not law, the executive was in the hands of a prime minister and cabinet selected from the majority in the House of Commons. This was how the Australian colonies, now states, arranged the executive in the nineteenth century, and it was how the Commonwealth Constitution arranged the executive in 1900. All but two of the central rules of parliamentary government, that ministers must sit in Parliament and financial bills must originate in the lower house, were left to convention, not law, in the new federation, as in the colonies. What is astonishing to an outside observer, and would surely have astonished Carruthers, is that the Constitution for the republic will be little better. The 1998 Constitutional Convention's recommendations for an Australian republic, which will be written into the constitution if voters approve a republic in November 1999, make no serious attempt to clarify the executive in the Constitution. We will still be left having to quote whole pages of Dicey to explain the revised Australian Constitution.

This indicates that Australia is making very heavy weather of codifying or redefining constitutional conventions, the rules that define the executive and relations between upper and lower houses. This criticism applies at both the state and federal levels, but I will concentrate on the latter. As you know, executive power in the Commonwealth is vested in the Crown. The prime minister and cabinet are not created by the Constitution and there is no requirement that the government have the support of a majority in the lower house, or that the Governor-General accept ministerial advice. Although the proposed republican Constitution will identify the Prime Minister and other ministers in Section 59, the Constitution will not create or define those offices or require the President to appoint ministers having the support of a majority in

---

[20] Campbell Sharman addresses this issue in 'The Senate and Good Government', *Papers on Parliament*, No. 33, May 1999, pp. 153–170.

[21] Australasian Federal Convention, *Debate*s, Adelaide, 19 April 1897, p. 913.

Parliament. That will be the prerogative of the President, as it is of the Governor-General. Furthermore, while the President will be obliged to accept the advice of ministers and the Federal Executive Council in some matters, this obligation will not extend to all matters and the Federal Executive Council in Section 59 is not the same institution, in law, as the Cabinet.

One is left to wonder why a country would go to the immense trouble of modernising its Constitution to become a republic on the centenary of its Constitution without using the opportunity to write the model of government it actually practices into constitutional law. What seems widely unappreciated here is that virtually every parliamentary country, other than Britain and the three old dominions, has committed the rules of parliamentary government to constitutional law quite successfully. Latvia did it, for example, in 1922. Ireland went most of the way that year, with no objection from the British government of the time, and finished the job in its 1937 Constitution. Germany and Japan received detailed parliamentary constitutions after World War II, and the post-1947 parliamentary countries of the British Commonwealth, in Asia, the Caribbean, and the Pacific, identify parliamentary government in constitutional law. William Dale, Legal Adviser to the Commonwealth Office from 1961 to 1966, describes how Whitehall lawyers drafted at least thirty-three independence constitutions. Most of the new states adopted the British model, and all of them wrote British constitutional conventions into law. 'And this,' Dale observes, 'from almost the only country in the world to be itself without a written constitution.'[22] And finally, the reactivated constitutions of the newly democratised states of Eastern Europe, Bulgaria, the Czech Republic, Estonia, Hungary, Lithuania, Poland, and the new Slovak Republic, similarly identify parliamentary government in law, although most of them practice the external executive variant.

As early as 1922, therefore, and many times since 1947, states have been able to write the conventions of parliamentary government into constitutional law quite successfully. There is nothing so mysterious, so subtle, so nuanced about conventions that they cannot be written into law, once their purpose is clear. There have been several attempts to correct this deficiency in Australia. Sir Henry Parkes tried, for example, in resolutions introduced into the National Australasian Convention in 1891, but was rebuffed.[23] In 1983 and 1985, following the debacle of 1975, the perambulating Constitutional Convention that ran from 1973 to 1985 tried again. It identified an extraordinary list of forty-three constitutional conventions, far more than is necessary and some of which it invented, which is not quite how conventions are supposed to grow. But it could not agree to place them in the Constitution and it resolved that they should simply be respected as conventions.[24]

The republic debate provided an opportunity to revisit the question but the ball was dropped again. The 1998 Constitutional Convention accepted the view of the

---

[22] William Dale, 'The making and remaking of Commonwealth constitutions', *International and Comparative Law Quarterly*, vol. 42, January 1993, p. 67.

[23] La Nauze, op. cit., p. 38.

[24] Australian Constitutional Convention, Adelaide, *Proceedings*, 1983, vol. 1, pp. 319–22, and Australian Constitutional Convention, Brisbane, *Proceedings*, 1985, pp. 7–45, 389–91.

Republic Advisory Committee of 1993, better known as the Turnbull Committee, that the Governor-General has two kinds of powers, ordinary and reserve. Ordinary powers are those that, by convention, are always exercised on the advice of ministers: issuing writs for elections, appointing judges and ministers, summoning Parliament, assenting to legislation, entering into treaties, and declaring war and peace. Reserve powers are those that are ordinarily exercised on the advice of ministers but which may, in unspecified but exceptional circumstances, be exercised without, or contrary to, ministerial advice. They include refusing the royal assent to bills, appointing and dismissing a prime minister, and dissolving, or refusing to dissolve Parliament. The Turnbull committee recommended that the Constitution should recognise that ordinary powers may only be exercised on the advice of a minister, but it reluctantly recommended that a republican President should retain the reserve powers.[25] This is what Prime Minister Paul Keating recommended to Parliament in 1995,[26] it is what the 1998 Constitutional Convention also recommended,[27] and it is what will be adopted if the republic is approved. Section 59 of the Constitution will read:

> The President shall act on the advice of the Federal Executive Council, the Prime Minister or another Minister of State; but the President may exercise a power that was a reserve power of the Governor-General in accordance with the constitutional conventions that related to the exercise of that power by the Governor-General.

Think carefully about what this says. It requires the President to act on advice except in the case of *unspecified* reserve powers that shall be exercised in accordance with *unspecified* constitutional conventions. Bear in mind that the reserve powers are unspecified because, over and over again, in constitutional debates going back at least to the Federal Conventions of the 1890s, Australians have determined that they cannot be defined. Bear in mind, too, that constitutional conventions are by definition non-legal rules, and you will see how odd Section 59 is. The President, it says, will be obliged to accept advice, except when he or she decides not to, and in those cases, when exercising totally legal, if unspecified, reserve powers, the President shall be bound by non-legal rules. Given this calculated ambiguity, how is the High Court supposed to rule on a government petition to annul an act of the President which was contrary to ministerial advice and, in the government's view, either did not involve a reserve power or violated a constitutional convention? The court would be obliged to determine matters which a host of Australian authorities have deemed to be indeterminable. I know that the proposed Section 59 is the outcome of a difficult process of bargaining, in which there had to be give and take, but it is still a constitutionally absurd provision. The fact that Section 38A of the New South Wales Constitution is very similar does not make it any less so.

Why do Australians cling like leeches to constitutional conventions and reserve powers? Prime Minister Paul Keating offered three very conservative reasons when he presented his republican proposals to the House of Representatives in 1995. First, he said that conventions offer a constitution the flexibility with which to respond to

[25] Republic Advisory Committee, *An Australian Republic,* Canberra*,* 1993, vol. 2, pp. 241–95.

[26] *Sydney Morning Herald,* 8 June 1995.

[27] *Report of the Constitutional Convention*, *Canberra, 2-13 February, 1998*, vol. 1, p. 45.

changing circumstances. However, as the Turnbull committee report points out, the reserve powers are used so rarely in Australia that they cannot possibly support a theory of constitutional evolution.[28] For example, only one Commonwealth government has been dismissed by a Governor-General, in 1975, and experts still disagree over whether he acted properly. Furthermore, why do so few countries, none with a modern constitution, recognise this kind of flexibility as a valuable constitutional attribute?

Second, Keating argued that codification would open the reserve powers to judicial review, thereby involving the High Court in political disputes. This strikes me as an essentially monarchist argument. Republics have no difficulty subjecting executive acts to judicial review because only sovereigns, not presidents, are beyond the law. Furthermore, I see nothing in the proposed Section 59 to preclude judicial review should a government decide to challenge a presidential decision. Indeed, the notions of reserve powers and conventions would be specifically fixed in the Constitution for the first time, and hence subject to court interpretation.

Third, Keating argued that because the reserve powers will only be exercised in unpredictable circumstances, they cannot be codified with precision. This was repeated time and again by members of the Constitutional Convention in 1998, but it is simply false. What Australia calls reserve powers are either eliminated from, or dealt with quite specifically in, a great many constitutions. Heads of state in parliamentary republics have few discretionary powers, and those they do have are carefully prescribed by law, not convention.

I would also add that the circumstances which might trigger the use of the reserve power are not really as unpredictable as Keating suggested. Four contingencies are usually cited, all of which can be satisfactorily addressed in constitutional law. The first is that the head of state must have a reserve power to refuse his assent to an unconstitutional act of Parliament. Why does this have to be a reserve power, in the Australian sense? Why cannot a head of state be authorised to refuse assent to an unconstitutional act, particularly if that decision is reviewable? In Ireland, for example, the President may refer a bill she thinks unconstitutional to the Supreme Court, after consulting the Council of State, and she need only sign it if the court finds the bill constitutional. Irish Presidents have referred nine bills to the court since 1937.

The second contingency is that a reserve power is needed in case the government acts illegally. I presume that this means that the government asks the President to act illegally, because other illegal government acts can be challenged in the courts. In this case, I would argue that a President could safely be given constitutional authority to refuse illegal advice, and even to dismiss a government for cause, perhaps after taking advice from some statutory body, a Council of State, for example, as in Portugal.[29] This would be a political act but the final decision would always rest with Parliament, which has to find a new government, or with the electorate if there is a dissolution. Furthermore, in a republic there are always procedures to impeach a President who

[28] Republic Advisory Committee, *An Australian Republic*, Canberra, 1993, vol. 1, p. 99.

[29] Portuguese Constitution, Article 195.2.

acts capriciously. Impeachment to remove a President is a traditional feature of republican constitutions, but Section 62 of the proposed Australian Constitution will give the power of dismissal to the Prime Minister alone, a very odd way to insulate the presidency from politics.

The third contingency is that there might be a deadlock in the process of government formation requiring the intervention of the head of state. My view is that a modern parliamentary constitution should eliminate the false notion that the use of a reserve power can make this problem go away, and almost all of them do. Some permit the head of state to act as a broker between political leaders, or to nominate someone, a 'formateur' in the European sense, to act as a broker, or even, as a last resort, to name a prime minister for the lower house to approve. But there is no escaping the fact that there are really only two ways to resolve a deadlock in government formation in a parliamentary democracy, by political accommodation in the lower house or at the ballot box. The most a President can do is jump-start a process that has stalled, and this power can safely be provided in law.

There is no need for an unspecified reserve power for any these three contingencies. There arguably is such a need for a fourth contingency, the one that occurred in 1975. The upper house might refuse supply to the government and the head of state might decide to dismiss a prime minister who refused to resign or request a dissolution. Ever since the Australasian Federal Conventions of the 1890s, this has been the critical argument for reserve powers, and it was very evident in the 1998 debates too. However, I do not think that the facts of the 1975 crisis support a reserve power. I think they show instead that no head of state would ever want to act as Sir John Kerr did then because it would start another almighty political and constitutional row, which nobody wants. Furthermore, if we set 1975 aside, it is clear that in practice Australian politicians in the Commonwealth and the states have resolved the possible conflict between a government and the upper house over supply in favour of the government. They might argue over the details of the budget, but no government is going to be driven out of office by being denied enough money to govern.

My conclusion, as an outsider, is that Australians should accept this question as settled in practice and amend the state and Commonwealth constitutions in two respects. First, they should recognise that governments must have the confidence of the lower house only. Second, they should provide that an upper house may not destroy a government by blocking the supply of money *for the ordinary annual services of government*, which is to say, for the day to day operation of government under existing law. This has been proposed time and time again, in the states and the Commonwealth. It was recommended in one form, for example, by the 1988 Constitutional Commission, which argued that supply should not be rejected in the first three years of a four year Parliament,[30] but in Australia only New South Wales has settled the issue by a constitutional reform.

I recognise that it will be argued by some that the absolute key to the power of Australian upper houses is their power over supply. Without that, the whole estimates process in the Commonwealth Senate, for example, which is so important to the

[30] *Report of the Constitutional Convention*, *Canberra, 2-13 February, 1998*, vol. 1, p. 17.

Senate's oversight role, would be toothless. The power to reject supply serves as a kind of nuclear deterrent; a powerful weapon, even if never used. I think this argument is problematical, but if it is accepted, one can still amend a constitution in such a way that a crisis of supply can be resolved very quickly, without the use of reserve powers, and not drawn out in turmoil. There might be, for example, an automatic dissolution of both houses if supply is rejected or delayed beyond some statutory period. This would expose both the government and every member of Parliament to a general election, something few politicians relish. This formulation would depart from a pure parliamentary model by making the government accountable to the upper house in this one case, but it would be preferable to the uncertainty that now surrounds supply.

While dealing with supply, Australians might also turn their attention to the issue of conflict between the two houses on ordinary bills, and I know many of you have. As I have said, none of the procedures for resolving deadlock work adequately, either in the states or the Commonwealth. Like the power to block supply, the double dissolution followed by a joint sitting of a Parliament, which is provided in the Commonwealth and some state constitutions, is used primarily as a threat not a constructive constitutional device, which is not the best use of a Constitution. Foreign experience does not offer much guidance in this matter, because the lower house can override the upper in most cases, but there are a few precedents that might help. In India, for example, Parliament can move to a joint sitting without a double dissolution in a case of deadlock, and I know this has been suggested here.

But you do not absolutely have to solve this problem in constitutional law because the Goods and Services Tax (GST) legislation of this year shows that a government can negotiate a deal if it wants one. What seems odd to me, however, is that after fifty years of proportional representation in the Senate and the states, Australian governments have still not internalised the art of negotiation. We hear, for example, that the Coalition and the Australian Democrats did not meet to discuss the GST until the government lost the support of the Independent, Senator Harradine, and hence its majority for the budget, in the Senate. Negotiation is dragged out of governments here like pulling teeth. The experience of parliaments in Europe is that a proportional representation election generally precedes a period of negotiation. It is not a prelude to a slanging match between people who need each other, which is the Australian way because political relationships are dominated by the customary confrontational behaviour of government and opposition in the lower house. The good news on this front, however, may be Prime Minister Howard's interview with the ABC after he and Senator Lees, the Australian Democrat leader, had agreed on the terms of the GST bill to be presented to the Senate. When his interviewer, Barrie Cassidy, pointed out that the Democrats in the Senate were not, after all, 'a threat to democracy,' the Prime Minister agreed, and noted that 'in a sense a bit of the political paradigm has been altered today.'[31]

If those responsible for constitutional reform had been able to codify the executive, eliminate the reserve powers, clarify the issue of supply, and possibly review conflict resolution procedures, I am sure they would have been able to give the Australian people what they really want in the republic referendum, even if they really should

[31] ABC transcript, 28 May 1999.

not, which is a popularly elected President. This would have been so because there would have been no significant powers for an elected President, claiming a popular mandate, to abuse. Australia could have had an Irish President, which would be no bad thing. About half the parliamentary republics in the world have popularly elected presidents and half do not, and it does not seem to make a dime's worth of difference, because every elected President operates within a framework of clearly understood, and very limited, powers. This was understood by many speakers in the 1998 Constitutional Convention, but the necessary reform of the Constitution to eliminate reserve powers eluded them. Instead, the 1998 Constitutional Convention agonised to create a presidential selection process that would produce a 'non-political' President who would not abuse the reserve powers. And what a mess they made of it. The nominating committee the Convention recommended is not to be trusted to nominate the best person for the job because, in an indictment of all politicians, it will be obliged to nominate a political eunuch, someone who is a member of neither a political party nor a parliament. Then the Prime Minister will make a recommendation from the committee's short list, which will be confidential. This recommendation must be seconded by the Leader of the Opposition and approved by a two-thirds majority of both houses of Parliament.

This process will produce someone who is not associated with partisan politics, it is true, but the nomination and dismissal procedures for the President provide an extraordinary role for one of the most partisan people in the country, the Prime Minister. He or she will nominate half of the thirty-two person presidential nominating committee and the Prime Minister's supporters, those who form a majority in the House of Representatives, will appoint another three or four. And once the President is installed, the Prime Minister alone will be authorised to dismiss the President, without a stated cause. The only constitutional restraint on the Prime Minister is that within thirty days, the House of Representatives may vote against the dismissal, which would constitute a vote of no confidence in the Prime Minister. But that chamber is controlled by the Prime Minister's party or coalition, and even if you can imagine it censuring a Prime Minister, this act would not bring back the President automatically. He or she will have to be reappointed by the same process as the original election. All this strikes me as cumbersome and unnecessary. The only benefit for Australia is that the process will probably not produce an Australian version of Jessie 'the Hulk' Ventura, the professional wrestler who was elected Governor of Minnesota in November 1998.

This discussion of the appointment and dismissal of the President reminds me that the Prime Minister is the one certain winner in the Australian constitutional debate. John Howard is a monarchist who would rather see no change to the Constitution, but if it happens, the enormously powerful position of the Prime Minister already present in the Australian monarchy will be confirmed. As I have argued above, parliamentary government has the effect of concentrating power in the centre, in the Cabinet and the Prime Minister. This has made for a particularly powerful government in Britain and the old dominions because the Prime Minister and Cabinet control the royal prerogatives through their advice to the head of state: the appointment of public servants, military officers, and judges, declarations of war, and the signing of treaties. Republican constitutions are not so generous to governments and some, at least, of these responsibilities are invariably shared with the legislature. This will not be the case in Australia. In their determination to rock as few boats as possible by adopting a

minimalist approach to constitutional change, constitutional reformers have simply rolled over the prerogative from the Governor-General to the President, and that means that the extraordinary powers of Australian prime ministers and their ministerial colleagues have been confirmed. That, surely, is another opportunity missed.

Question — In the lower house, if the Premier or the Prime Minister was elected by the lower house—rather than the way it is now—would this change the power of the Prime Minister?

Alan Ward — It might. I think it has changed the power of the Chief Minister in the ACT because the election is secret. I think it might not, if it's public. If it's an open election, then the Prime Minister who is the leader of the majority party or coalition will always get elected. I don't think that, given the present party sanctions and the norms of party behaviour, an open election in Parliament is going to change the powers of the Prime Minister. I don't think in general that it would make very much difference.

What would make an enormous difference would be to codify the powers of the Prime Minister and codify the powers of the Government. I don't think any codified Constitution would give a republican Prime Minister the kinds of powers that you're proposing to give the Prime Minister here through his advice to the President, which are extraordinary, such as the appointment of judges and all sorts of public officials, declaring war and peace, and entering into treaties. Once you start to spell it out, its absurdity becomes evident. That is certainly Campbell Sharman's view. So one of the reasons why Australians don't want to spell out the government's powers is that, as soon as you start to codify, you realise that you can't give the Prime Minister all those royal prerogatives, which will become presidential prerogatives. So I think that starting to spell things out and open up the process will lead you down a different road.

Prime ministers do behave differently in the European model where the government is external to parliament. Parliament takes on some independence from government, even though the government has to have the support of the majority there. So prime ministers in, say, the Hungarian Parliament, do not enforce the same sort of discipline that you would find in a parliament where the Prime Minister and the ministers sit in, and are involved in the management of the place.

There are two kinds of selections of prime ministers. There is one where the Prime Minister is nominated or elected by the lower house—that's the Irish system and most European systems. The other is that the head of state selects someone who in his or her judgement has the support of the majority in the house. That's the monarchists' way of moving in a republican direction. I think that's eminently desirable.

Question — You mentioned party discipline and you mentioned South Australia a couple of times. I sat under a professor of political science and history in Adelaide—W.G.K. Duncan—and he was passionate on parliamentary democracy and, if I

recollect correctly, one of his principles was a two party system. Could that not be your eighth principle?

Alan Ward — Not without narrowing the model to the point that it starts to exclude countries like Ireland. There are too many parliaments around the world which have some form of proportional representation in the lower house. Once you've accepted that, then you've accepted that two party politics is unlikely. You end up with the Irish system. I don't think there has been an Irish government for about twenty years which has not been a coalition government. I don't think it's two party politics once you've got proportional representation. So I wouldn't put that in the model because it restricts the model far too much.

Question — In your model would you include the present government of South Africa? And what would you do about Israel, where they're electing the Prime Minister?

Alan Ward —No, I wouldn't include South Africa, though I honestly don't know enough and I would have to take that question on notice.

Until recently Israel had a parliamentary system in which the lower house was elected by pure proportional representation, and the threshold was effectively one or one and a half percent of the vote, so it had lots of little parties. This meant that every government had to be a very tortuous coalition and in fact every government was dependent upon the votes of tiny religious parties in the end.

So what the Israelis in their wisdom decided to do was to get stronger government by electing the President—for example, as they do in France—where you allow anybody to run, but you end up with a run-off between the two leading candidates. It was thought that this would force the system into duopoly. But the actual result is that they elect the new President that way, but they continue to elect their Parliament the old way. They therefore elect a prime minister who has a majority of the popular vote, but his party does not have a majority in Parliament, and there is a clash between a presidential system and majority government. I know a few political scientists in Israel who called this lunacy.

They've now run two elections under this system—I don't think they'll run a third under it. It's very easy to amend the Israeli constitution by just an ordinary act of Parliament. They were already talking about amending it before the second election, and I suspect they will amend it before the next one, unless things work out reasonably smoothly. But the changes to the rules have not solved the problem of government formation thus far.

I wouldn't put the Israeli system in my model. To me, the Israeli system is *sui generis*, it's on it's own. It's like the Finnish system. No one else has it.

Question — I was pleased to hear you demolish Elaine Thompson's use of 'Washminster', because I think this has been too easily accepted and repeated for a number of years. I would draw attention to the fact that in the 1950s, Percy Partridge said that any nation that thought the combination of responsible government and federalism would produce a new creature was quite wrong—that our government had

developed very much on British lines. When you stressed that the Senate had roughly the powers of a colonial legislative council, you hit the nail upon the head because, although we copied the American Constitution a great deal, the point was that in the debates there were constant references to examples of the then upper houses, particularly South Australia.

Alan Ward — Yes.

Question — In Australia we have a three-level system of government, the federal, state and local government, with the exception of the ACT. Do you have any comments on the desirability of trying to reduce three levels to two levels?

Alan Ward — No, I don't see any need. I'm a pluralist who does not like excessive central control. But let me use this question to say something about federalism. One of the things I'm rather unhappy about here—and you see it described in Brian Galligan's work—is the way the levels of government interact. A lot of what goes on is not really federalism. It is dominated by a kind of state to federal government diplomacy, which is conducted secretly, covertly. You don't know really what's going on. You see the state and federal governments caucusing somewhere to sort things out, in ways that we don't see in the USA. I think this is, in large part, because the states have handed over too much of their power to the Commonwealth.

I think the decision to hand the federal government control of universities, for example, was a disastrous one. The states have also handed over their budget power. Now, because of a High Court decision on excise taxes, the Commonwealth controls just about all the taxing powers in the country. There's not much left but for the states and the federal government to bargain, in a kind of diplomatic way, for their shares. This is non-parliamentary and I don't like it very much. I don't know how you can reverse it, but you should try to stop it going any further.

Constructing Legislative Codes of Conduct*

Meredith Burgmann

Today I will be talking about the way in which we in the Legislative Council in New South Wales went about constructing a code of conduct, why we were asked to do that, and what the problems were along the way.

I want to start by talking about the big issue in Canberra at the moment, which is the way in which a ministerial code of conduct keeps changing. I see a ministerial code of conduct as quite different to an ordinary member's code of conduct, in that a ministerial code of conduct is quite specifically about conflict of interest—meaning mainly financial interest.

That sort of code is much less problematic than a backbencher's code of conduct, because there are a whole lot of other issues that come into a backbencher's code of conduct. A ministerial code should simply say: 'You should have no financial interests that can in any way conflict with anything you do as a minister', and there's no point in just changing the rules as more and more of your ministers get caught in it. Basically, if you are taking on public office to some extent you end up with less rights than a normal member of the public, and you've just got to cop it, even if it means that your spouse gets less rights as well.

I remember once reading an article about Bob and Helena Carr, and they were sitting in their very beautiful house, which is in his electorate, in Maroubra. The house has 180-degree views over the sea, and right in the middle of the view is this very ugly telegraph pole. Bob Carr commented to the journalist that if he were anyone other

---

* This paper was presented as a lecture in the Department of the Senate Occasional Lecture Series at Parliament House on 23 July 1999.

than the Premier of New South Wales, he'd be able to pay to get that pole removed. And it's true—you can always pay to get telegraph lines put underground, but as Premier of New South Wales he actually had to give up that right, because it would have been seen as some extra sort of perk that he got as a politician. My view about ministers is that yes, you do give up rights when you become a minister. And one of those rights may well be the right to make a lot of money in, say, a mining venture, when you're the Minister for Mines.

So I don't want to talk about ministerial codes of conduct. We have a separate ministerial code of conduct in New South Wales which I had nothing to do with developing. I think it is a good code and needs to be adhered to strictly. What I'm talking about is the general code of conduct for members of parliament.

The New South Wales Legislative Council's code of conduct arose out of the so-called Greiner/Metherall affair. For those of you who are young, in the early 1990s, the then Premier, Nick Greiner, had a recalcitrant backbencher, Terry Metherall, who had resigned and become an independent and who was voting against some government legislation. Mr Greiner wanted to get rid of him, so he was found a job in the public service, and this was considered scandalous. It was in fact not only unethical, but may have been illegal. It was found not to be, on appeal. But that's how the Independent Commission Against Corruption (ICAC) was brought into the issue, and in 1994 an amendment to the Independent Commission Against Corruption Act was moved by the independents in the lower house.

This amendment had two aims: first, it sought to expand the definition of corrupt conduct of ministers and members as presented in the existing Act; and secondly, it called for the establishment of an ethics committee for each house, whose duties would include the development of draft codes of conduct for members of the house. When this bill came to the Legislative Council however, the Council took the view that there shouldn't be community members on the ethics committee. The committee that was envisaged by the independents' amendment had three community members on it. The Legislative Council took the view that *they* were elected to represent the community, and why should there be another set of community representatives? Although I didn't particularly agree with that view at the time, when I saw the community representatives I realised they had been chosen by politicians too, so they were no more representative of the community than we were.

So that's how we ended up with two committees. The lower house one, which had the community representatives on it, and the upper house one, where—instead of setting up a new committee—we just changed the Privileges Committee to the Privilege and Ethics Committee. I ended up on that committee, in a strange way. No one was interested in the slightest in being on a committee called the Privileges Committee (as it was then) because it wasn't a paid position. I thought it sounded interesting, so agreed to do it. Shortly after that it also became the Ethics Committee, and shortly after that it became incredibly powerful and important—and paid. Everyone was in fact quite cranky that I'd volunteered to do a job that was low-status and no one wanted. It became incredibly important because we then embarked on the Franca Arena inquiry, which took almost two years, and I won't tell you how much it cost—but small third-world governments could live on it.

The first job this committee had was to produce a code of conduct. One of the problems that faced us when we went about trying to work out how politicians should behave was that the public thought we behaved terribly. My view is, even if the Greiner/Metherall affair had not occurred, the New South Wales Parliament would have eventually been called upon to adopt a code of conduct, because codes of conduct are now widely expected in the community and are being developed and enacted worldwide. I always say that in the 1980s everyone was doing mission statements, and in the 1990s everyone is doing codes of conduct.

If you look at what the public think of politicians, you realise we need a code of conduct. In a recent poll in which citizens were asked the question: 'Which person do you believe would tell you the truth?' nurses scored 87 percent and politicians scored only 12 percent—but what was really galling was that police scored 55 percent. The one bit of joy I got out of it was that journalists actually scored lower than us. But when only 12 percent of people believe that politicians tell the truth, we have a problem. My view is that politicians actually feed into the problem, and I'll talk about that as I go along.

Codes of conduct in the legislative sphere are problematic. They have their limitations and clarity is needed regarding the purposes and type of code to be adopted. For instance, should the code aim to provide members with a frame of reference for making decisions that involve competing values? Someone said that we should have in our code a statement that every decision that we make should be in the public interest, and I—as an ex-academic—said *no*. What is the public interest? How on earth could you have a code that said decisions you make should be 'in the public interest'? Because I can assure you that the public interest that I stand for is a very different public interest than the one David Oldfield stands for. There is no such thing as the public interest, in fact, so I was very clear that I wanted all that absolutely meaningless rhetoric out of the code of conduct.

Alternatively, should it attempt to provide detailed statements of the conduct required of members in all conceivable situations? Then again, there's a middle path, as our proposed code suggested, and I'll just quote a part of our report, which was good and solid. This is only the first volume; there are two volumes of report on our code.

> The Committee believes that the code of conduct has an important role to play in combination with other factors. In particular, it considers that, combined with an effective program of ethics training and induction, the code of conduct will heighten members' awareness of ethical issues, such as conflicts of interest.
>
> Secondly, combined with appropriate tools, such as a casebook of specific examples, illustrating the principles embodied in the code, the code will provide guidance in areas where members are uncertain or confused as to the nature of their ethical obligations.
>
> Thirdly, combined with an effective enforcement mechanism, which is applied fairly and in a non-partisan manner, the code of conduct may enhance public confidence in the institution of parliament by

> demonstrating that members of the Legislative Council are accountable for their conduct.
>
> And fourthly, combined with strong accountability mechanisms in other areas of political life—for example, an effective legislative committee system, and continuing public debate concerning the nature of members' roles and responsibilities—the code of conduct may contribute to the enhancement of ethical standards.

My view is that none of those things have happened. We tried to get both the Legislative Assembly and the Legislative Council committees to adopt the same code. Regretfully, in the process of trying to get them to adopt the same code I discovered that the great divide in parliament is not between Liberal and Labor, it is between the upper house and the lower house, although I'm told it's not as bad in the federal parliament. Certainly in New South Wales it's trench warfare.

Not only could we not get the same code, but the real battle came down to how the code should be implemented. Our committee supported an outside commissioner for ethical standards, or a conflict of interest commissioner, whereas the lower house committee continually supported what I call a 'catch-and-kill-your-own' model—that is, an in-house committee that deals with what may or may not be an ethical breach.

Why did our committee come to the conclusion that we needed some sort of outside person or body in order to regulate parliamentarians' behaviour? My view was that a parliamentary committee, which seemed the other alternative, was nearly always going to end up voting on party political grounds. And not only could delicate issues be trampled on during an unseemly party political brawl, but you could get the alternative, a conspiracy of silence arising out of all sides having something to hide. I just felt that an outside person would be more appropriate.

We looked at how outside ethics commissioners have operated in other countries, and the place that I liked best, in terms of its model, was Saskatchewan, which is a very cold province of Canada, and which has had socialist governments for most of its history. When I asked why they kept having socialist governments, they said it's so cold we all have to stick together. But they have this excellent code of conduct and an excellent ethics commissioner model. Being of a suspicious nature, my view was that the places with the best codes of conduct always got them arising out of a terrible scandal, and I asked what terrible scandal occurred to have their code of conduct arise? They said, 'Oh, nothing'. And it was only some time later I discovered that the Attorney-General had murdered his wife, and hence the code of conduct (although one would have thought that that was probably just considered illegal, rather than unethical).

The option of having an ethics commissioner with a capacity to receive public complaints, to investigate and then to sanction or enforce discipline against ethics breaches, is clearly important. When our committee looked at models of implementation, we came across the classic problem of how to establish an outside commissioner who could not only advise, which is one of their most important roles, but sometimes also arbitrate. These dual roles obviously have the potential for conflict. If you go to someone to ask for advice on a course of action, and then you

follow that course and it's not right and it comes back to him or her for judgement, then that's a classic legal problem. You cannot sit in judgement on something you have already advised on.

In the United States, where an enormous bureaucracy has sprung up around the ethics committees—and they have two ethics committees in the States too, one for the lower house and one for the upper house, and I suspect that also arose out of the sort of problems we had in our house—one of the problems is that it has split into two divisions to reflect this dichotomy of roles. One arm does not know what the other arm has done. Perhaps a better solution would be to have two commissioners; one who provides advice and one who may eventually arbitrate on the facts. Certainly closer consideration of the powers of such commissioners is needed. I might also say that it's proving very hard to find one. Ours has just resigned and we're still trying to find another one.

The other model, of course, is the 'catch-and-kill-your-own' model, which is favoured by most legislators. I often wonder why. I mean, who on earth wants to be on a committee which looks at the ethics of your fellow members of Parliament? I was on a committee that looked at whether one of my sister members of Parliament should be expelled from the Parliament. It was a privilege committee rather than an ethics committee situation, and it was horrible. For a year and a half we sat there trying to decide whether she should be expelled, and it was not a pleasant experience.

Members of Parliament want an inside model, because they imagine that an outside commissioner will be like our former head of ICAC, Ian Temby, whose findings led to the downfall of Greiner. There is an absolute fear in New South Wales that we'll get another Temby and then we'll all be thrown out of Parliament. People who adopt this position argue that the real sanction anyway is always a political one, that is, losing your party's support or having the public turn against you in an election.

However, the problem with a 'catch-and-kill-your-own' approach is that the ethics committee, and unfortunately the chair, then becomes the police person of Parliament. In fact we've even had one of our quite eccentric upper house members (and you can guess which one) suggest that members of Parliament should be random breath tested. I have visions of myself wandering the corridors with an RBT trolley, testing parliamentarians as they come out of the bar. Those are the sort of issues that some people see as ethical issues—should parliamentarians be drunk in Parliament? I always get rid of that discussion by saying: well look, if you sit sensible sitting hours you won't see drunk parliamentarians, because quite frankly I've never seen anyone drunk before five o'clock—not in the chamber. Still, one might end up as the new McCarthyite ogre, gaining enormous power through being the chair of the ethics committee, and that has happened in America. The chairs of the ethics committees are *enormously* powerful.

When I discussed with the Canadian members of Parliament what they liked about the outside ethics commissioner in the Saskatchewan model, they thought the idea of the ethics commissioner being an ex-MP was a good one. When I discussed it with members of Parliament in New South Wales they also thought it was a good idea—not because they think they'll get more favourable advice, but because he or she would actually understand the issues.

I must say that the ethics adviser that we appointed was basically a former public servant, and he didn't understand enough of the issues that members of Parliament have to deal with, so he always did real 'black-letter law' stuff. For example, I was trying to find out whether it would be OK to take, on a charter flight, a member of staff and a senior person in the Human Rights Commission who was making a speech in the same town. We were trying to get to Broken Hill and Wilcannia for Women's Day. His decision eventually was that I couldn't take any members of staff, and I couldn't take the Human Rights Commissioner; she had to fly to Adelaide and then fly to Broken Hill and then get some staff there to drive her to Wilcannia, while I was flying there. It was a crazy decision.

That was what made me aware that you have to get someone as a commissioner who is confident enough of their own position to say 'yes, you can do that', or 'no, that would be a bit silly'. You need someone who understands transparency—who understands that the real judge, in the end, is the *Sunday Telegraph*. You need someone who understands that the question is, if the *Sunday Telegraph* found out that I had taken a senior person from the Human Rights Commission on the plane with me, would they see that as a terrible junket or would they see that as something that was sensible and saved the government a bit of money? It's the same as the incredible ongoing battle about what is legitimate parliamentary activity, and what is party political.

So that whole discussion about whether to have an outside commissioner—and if you do, what sort of person they should be—has been an ongoing debate in New South Wales.

When we came down to the nitty-gritty of the actual code, the problem was whether one supported an aspirational or prescriptive code. Our committee's view was that a purely aspirational code could really only say: 'be good and eat your greens'; or it could be a meaningless code that said 'you will always act in the public interest'. We also felt that the public would have eaten us alive if we had adopted a short aspirational code.

There were other differences—the Legislative Council committee modified the injunction to uphold the law. The original code we were working on had the words 'we must uphold the law.' It seems self-evident that that's what you would have in a code, but I looked around and on our committee we had at least four or five people who had deliberately gone out and broken the law at some stage, and probably intended to do so in the future. So why bring in a code of conduct which said you must uphold the law? We also had an extensive account of conflict of interest in our draft code, more so than in the Legislative Assembly code, and we also included a section on post-employment restrictions.

The upper house and lower house couldn't come to an agreement, so what we agreed to do was have something that hadn't been used since 1917, called the Free Conference of Managers, and that was where it stood for about six to nine months. We had agreed that we'd have a Free Conference of Managers to bring about a joint code.

However then *real politik* reared its ugly head. There was an election coming, and we had an ICAC commissioner who was looking at us a bit askance, so the executive government came up with a code of conduct and everybody immediately said: oh yes, we'll have that. It was interesting. The lower house had their code, which was pretty ordinary, and we had our code, which we thought was terrific. Basically this new code was called the Premier's Code, but then the executive government said 'we'll have that'. I call the Premier's Code the 'credit card code' because our Deputy Clerk had it printed on a card the size of a credit card, to show how limited it is.

However, the Premier's Code was extremely popular with members of Parliament, because no one actually wanted a code of conduct anyway. The code that we eventually adopted comes down to six points—it was originally five points, but a sixth point was added, and this is the one that I wanted to talk about. It is actually a useful point. It talks about the fact that we are members of Parliament and members of parties. It says:

> It is recognised that some members are non-aligned and others belong to political parties. Organised parties are a fundamental part of the democratic process, and participation in their activities is within the legitimate activities of members of Parliament.

That, for us, has solved the ever-present problem, which we always had, of what is legitimate parliamentary or legislative use, and what is political party use. Our resources are meant to be for legitimate legislative or parliamentary purposes. That really means that you are very limited on what you can use your travel vouchers for, what you can use your stamps for, what you use even your stationery for. Having had that point added, it is now clear that if we want to catch the train to Goulburn in winter for a country conference, then that is part of our work and not just wanting to go to Goulburn for a weekend in winter—which, for some reason, people always thought we were doing for fun.

That, I think, was a very good aspect of the code. When we grappled with the idea of what you could do with parliamentary resources in the upper house code, we've actually used the expression 'parliamentary resources are not to be used for private financial benefit.' We've been quite happy with that, because we didn't want to get into the distinction between what is political and what is parliamentary.

When we asked our distinguished public witnesses, the people who were giving evidence to our committee, what they felt was parliamentary and what they thought was political, we got very odd answers. In fact our auditor-general, who is an interesting character, was of the view that anything you did to get yourself re-elected was private gain, because you were getting your wage again, which of course was private gain. His view was that if you used the parliamentary conference room to have a press conference where you talked about how good you were, then that was using it for private gain, because that might get you re-elected and you therefore got money out of it. Basically that meant that you couldn't walk around Parliament House, because that would have been private gain. So there were differing views, and they have been cleared up and I'm very pleased about it.

What do I see as the real issue? The real issue for backbench members of Parliament is exactly what I was talking about—it is private gain from public office. It is never as clear as, say, conflict of interest. It's those little, low-grade actions that members of Parliament take quite often, and don't even think about. For example, it could be a member demanding an upgrade at the airport; or ringing up the Sydney Cricket Ground and saying, 'I'm Joe Bloggs, Member of Parliament, can I park under the stadium for today's match?' Or it could be a member of Parliament going down to the local police station and saying, 'I'm the local member, that's my nephew you've got in there, get him out.' It could be a member writing to the council on his letterhead objecting to the neighbour's noisy cocky. It's those sorts of behaviours that create the grey areas that members on the whole are not very clear about. I've discussed this for the last four or five years. Every time I talk to a member of any parliament in Australia, I start talking about these issues. I get so many different responses, it's extraordinary. Some people think it's OK to write to the council on their own letterhead to complain about something that is in fact a private issue. I was so proper about it, that when I had an issue with the restaurant behind me I only ever approached the independent member of the council about it, because I felt too embarrassed to actually talk to the Labor Party members, because it might look as if I was using my political position.

On the whole, members are not corrupt—they are confused. This goes right up to the leadership. When I was trying to get my version of the code of conduct accepted, the leader of the ethics committee in the lower house and I went to see the three leaders of the major parties, and the responses I got from them made me realise that, if that was the leadership response, it was no wonder the members themselves don't actually know what I'm talking about on ethical issues.

When I was speaking at a seminar in Western Australia on ethical issues, I asked the Deputy Premier, Hendy Cowan from the National Party, what he did about the grey areas, and he said that there were no grey areas—there were standing orders, and there was the criminal law. And most members of Parliament actually believe that. They think the standing orders say you can't call someone a liar, and the criminal law says you can't murder your wife, and in between that there is no such thing as a grey area. I get grey areas all the time.

A friend was telling me that he had done a routine immigration case for a constituent. He later went to a restaurant which he had no idea was owned by that constituent, and when it came to the end of the meal, the constituent said that he mustn't pay. It was an embarrassing and difficult situation. I asked how he solved it, and he said that he solved it by letting them give him the meal, but that he never went back to that restaurant again because he was too embarrassed. He was afraid it would happen again.

Those are the sorts of issues that parliamentarians deal with daily, and yet there has been no support for us putting out a more prescriptive code, one which says: in this situation you can do this, in that situation you can do that.

In America they have produced an ethics manual which is very comprehensive, and includes things such as, if a lobbyist offers you a glass of water you cannot accept it—you cannot accept a *thing* from a lobbyist. Mind you, in America it's a lot more

difficult for backbenchers because there is no party voting system, so every vote is for sale—and it's *literally* for sale. I've always felt, in Australia, that tight party voting protects backbenchers, particularly, enormously. We say, 'Don't even bother to talk to me about that, Caucus will decide', and then I just put my hand up. And it does mean that lobbying in that American sense doesn't actually happen to us. But over the years, I've decided that what we do need is a case book, where cases are put to members and then the correct ethical action, or way of dealing with it, is put forward, because there are just so many differing views on what is ethical and what isn't.

The other thing that we were meant to do, of course, is to have ongoing education. I'm no longer responsible for the ongoing education of members of Parliament about ethics, because I'm no longer the Chair of the Ethics Committee. However, as President, the Speaker and I decided to put on a compulsory induction for all members of Parliament about their responsibilities under the various acts—the Ombudsman's Act, the ICAC Act—and I would have thought it would have been pretty important and that people would have responded. We asked that Parliament be held up for an hour and a half so that this seminar could take place, and we did that specifically because we wanted everyone to be in the building so that they would all come to the seminar. We were actually refused the right by executive government to hold up Parliament for an hour and a half, so we had to put it on before Parliament started, and we didn't get a terribly good roll up. We refused to let the press attend, mainly because I was terrified they would report that less than half the politicians turned up.

So, not only do we have a problem with it being a much more complicated area than most people think—it is not black and white, there is this huge area in the middle. I always say to members when they ask. 'If something came out tomorrow in the press, would you be able to say: yes, I did that, and I stand by it?' That's a good rule of thumb to use.

At the moment we don't actually have an outside ethics adviser. The same ad hoc advice systems go on, and they're all totally inappropriate. You can ask your own Whip—who may be a very wise person and give you good advice, but I tell you what, the media isn't going to accept that as an excuse. You can ask the clerks—the media think that's alright, but the clerks hate it, because there's a sense in which they are your servants, and then they are also having to tell you that no, you can't do that, so they get into trouble from the members of Parliament. You can ask Pat in the Printing Office—you say, 'Can I use my crest for this?' And some poor, lowly person in an office has to make a totally inappropriate decision, and feels very put upon by it. You can ask the presiding officers—well, my experience after two or three months as a presiding officer is that no one has asked me anything, and I wouldn't know the answer anyway. Also, I don't think that members from the opposite party would feel comfortable about that. So who knows? Some of my more formal friends say they just send everything they're going to do to ICAC, and ICAC has to give a response to it, which is a strange way of going about things.

So, at the moment we have a situation where it's all ad hoc, nothing much is working, and we have to come to some sort of decision and stick to it.

The compromise conflict of interest commissioner that we ended up with isn't even a statutory appointment—it's someone who's appointed by a motion of both chambers of the Parliament, and it's just not working well at all. In fact at the moment we don't have one.

Those are all the issues that I wanted to raise, and I would be really interested in questions.

Question — Given that you seem interested in the idea of an ethics commissioner, do you think that there's a possibility that the politicians—if they had an ethics commissioner to ask advice of, rather than accepting responsibility for their actions—would then move that responsibility to the ethics commissioner, much in the same way as the Canadian ethics commissioner operates at the national level? Instead of saying, 'Yes I take responsibility for having taken this action', they say, 'I sought advice from the ethics commission, they thought it was OK.' The Canadian ethics commissioner for the government is actually required to support action taken by a minister if their advice supported that. What I am suggesting is that there may be some shifting of responsibility from the individual member of Parliament to the ethics commissioner. Do you think that's a real problem?

Meredith Burgmann — I think that, in 90 percent of the decisions you make, you wouldn't bother to put them to an ethics commissioner because you know what's right and what's wrong. For that other 10 percent, it's an enormous help to be able to ask an appropriate person. I tend to ask my Clerk, which is quite mean, because if ever he says no to me he feels terrible.

Under the Saskatchewan model, if the commissioner gave you advice, which you then took and subsequently got into trouble legally, you are not covered. But all the members of Parliament were quite sure that you would have been covered in an area that they saw as more important, which was the media—that the media had faith in the person who was the commissioner, and the media wouldn't have judged you as wrong. But it didn't give you indemnity from legal attack. And to most politicians, the law isn't the issue—the issue is what the *Daily Telegraph* is going to do with it.

Question — I'm really interested in the use of the verb 'help' in terms of your answer. You said you considered it a major help to have some assistance in forming your opinion on ethics matters. That suggests to me that while you are asking an ethics commissioner about a particular problem, the responsibility for the ultimate decision on how you act still resides with you. Do you as the individual politician in this particular example see the ethics commissioner's responsibility as being to assist in the formulation of a decision, not to actually make that decision on a politician's behalf?

Meredith Burgmann — Yes. Presumably, if you asked an ethics adviser, 'Can I employ this person who is my wife?' and they said no and you still did it, then the building doesn't fall down. But then if the media find out about it and attack you for it, you can't say that you asked the ethics adviser and he said yes. The decision is still yours, but I think you'd be very silly to go against the advice of an ethics adviser,

because you have no comeback then when the final arbiter, which is the media and the public, find out about it.

As I said, politicians do a lot of things that are unethical, but they don't see it as unethical or corrupt. They actually think it's all right to ask for an upgrade. No wonder only twelve percent of the public like us.

Question — The small card that you had with regard to a code of ethics from the Parliament, and then the massive one you referred to, presumably that big one is a Federal USA code and not a state one?

Meredith Burgmann — It's called the House Ethics Manual. It's the lower house American one. The states also have them like that.

Question — The small card you had, and the code of ethics written into that—is that good enough, would that have stopped the Metherall/Greiner affair?

Meredith Burgmann — You'd have to pull a long bow, but probably not, no. The essence of the Greiner affair was that they created a public service job and did not use proper public service procedures in order to put someone into it, out of which they gained another liberal vote, that is, they got Metherall out of Parliament and put someone else in who was another vote for them. You need a fairly prescriptive code. This is a totally aspirational code. This is a 'be good and eat your greens code', into which you can read almost anything.

I actually don't accept that there's right and wrong. To me there are all these areas in the middle. I know I myself need guidance on it all the time. It's very difficult. What gifts do you accept? Now, in our code we struggled with the issue of a private organisation saying, we really want you to see this tunnel that we have in Hong Kong, because we think that's the tunnel you should vote to have in Australia. If they then send you up to Hong Kong, is that a junket or a bribe, or is that a fact-finding tour to see if it's a good tunnel or not? We sat down with our committee, and said, if you go for a specified number of days and you don't take your wife and kids and you don't stay on afterwards etcetera, etcetera, then it's a fact-finding tour. We actually wrote down what's considered an acceptable gift of travel. I would find something like that enormously helpful. If there was a guideline there, I'd read it through and I would stick to it. Whereas now, people say, should I have taken that? I think you need an ethics manual like that.

Use of letterhead is one situation which I angst about all the time—it never occurs to a lot of other members of Parliament, they use their letterhead for everything. It got Geoff Prosser into a lot of trouble, didn't it? He wrote on his ministerial letterhead to the local council about beautifying his street. That got him into a lot of trouble.

In America they have a system where they have four different sorts of stationery. The first is the totally official one that says Senator Bob Bloggs, US Congress, etc, for totally official stuff; then you have one that says Senator Bob Bloggs, but doesn't say US Congress; then you've got one that says Bob Bloggs, etc—there are four different grades of stationery. I would find that pretty useful. I have just been travelling, and part of what I was doing was totally official, and part was totally private. I kept

thinking, should I be handing out my President cards, maybe I should have had a card that says 'Meredith Burgmann, MLC', not 'Meredith Burgmann, President, Legislative Council', because I was visiting as someone who was interested in Southern Africa, rather than as the President. So those sorts of issues arise daily. I would have an ethical issue five times a day, and most members would.

Question — My interest is in the blurring of the lines between what is parliamentary and what is party political. What I've noticed in the last couple of years is the extent to which the Remuneration Tribunal and the other law makers tend to prescribe things which previously members and senators used to do which were inappropriate or not covered, and which are now being covered by the law. You suggested that getting oneself re-elected is a good thing. The Taxation Commissioner took that decision some years ago and everyone seems to be following it with some enthusiasm. If you're not totally 100 percent a politician every minute of the day, and I suspect most politicians are, where else do you draw the line with respect to the lawmakers, in those positions of Remuneration Tribunal people? The party system seems to have run over all of the separation that used to be exercised by independent authorities. Do you see that happening with the ethical questions?

Meredith Burgmann — I think that's why, in the end, we just said, you can't get private financial benefit out of the use of parliamentary resources, because it is almost impossible to say what's a parliamentary and what's a political activity. I was elected by four and half million electors, or I was elected by the left of the Labor party who put me there. So it's a question of who are your electors.

I think you probably are a politician all the time, which is why you never get to behave badly. One of the questions we asked, I think of the Ombudsman, was 'When is a politician not a politician?' Like 'When is a policeman not a policeman?' The Ombudsman said, 'Look, I'm always the Ombudsman, I'm not even allowed to push in in a queue.' And it's true—you actually have to behave properly at all times.

Another issue, which is one that no one will look at, is having a big fundraiser and charging the local businesses $200 a head to come and meet the Minister for Planning, or the Treasurer, or something. Is that ethical? Everyone does it. Do you get around it by saying, come and meet Joe Bloggs; he's a nice man—rather than Joe Bloggs, Finance Minister? I have half a dozen of those little questions every day. I'd love there to be something written out that gives proper guidance on it all. That's what we set out to do with our code, and everyone laughed at it, because they didn't think they needed to have advice on what was an acceptable gift.

Was it right for Bronwyn Bishop to get the services of a member of staff from the health insurance funds when she was the shadow Minister for Health? We actually sat down and wrote out 'The use of staff as a gift'. We wrote down guidelines. And nobody wanted to know about it, because politicians, especially in leadership, believe that the ultimate judge is the public. And my view is that the public is only the judge when they know about it, which comes back to transparency. If Bronwyn Bishop had announced to the world that one of her staff members was being paid for by the health insurance companies, then that's probably fine, because then she would have been judged on it. But no one knew. I suppose it's a bit like John Laws—if he'd said, 'I'm being paid a million dollars by the banks', then it wouldn't have been an issue.

Question — You started off with the problem that most of the country thinks you're a bunch of crooks. Do you think the country trusts you to set up your own ethics process? And how do you move to the next stage, of validating and gaining confidence in your ethics process?

Meredith Burgmann — I don't think they trust us, but they certainly want us to do it. What has amazed me is that no member of the media has had a go at this. Journalists' ethics is another story. They don't trust us to do it ourselves, but they want us to do it, so we're going to have to do it, and do it a bit better than we're doing it at the moment.

Even though I'm sad at what's happening in New South Wales, we're still well ahead of most other parliaments. I'm shocked to discover that they have stalled in other parliaments.

In Queensland they're *obsessive* about use of travel, that's the only thing they think ethics is about. They're not in the slightest bit interested in the noisy cocky or what sort of stationery to use. They're obsessive about travel. But of course—half their previous ministers ended up in jail over use of their travel. So, they're stalled on travel.

In Western Australia they just don't believe there's such a thing as a corrupt politician, so they just send them to jail.

In New South Wales we've battled on quite well. One of the sad things is that one of the few people to have been caught in some ethical problem was Brian Langton, who was basically doing nothing which helped himself. There, but for the grace of God, would have been me. When I was asked if I could lend my travel warrants to one of the shadow ministers, the only thing that saved me was that I'd been such a good little hardworking MLC and I'd used all my warrants, so I didn't have any to hand over. So the one person that's caught under the so-called 'travel rorts affair' is a bloke who simply used someone else's travel warrants to get his job done as shadow minister. As far as I can see there's a lot more unethical stuff going on than that.

Making Sense of the Referendum*

John Uhr

Introduction

This is the second of three presentations that I am making today on the referendum. The other two are part of the great experiment in public participation beginning today in Old Parliament House. This experiment goes by the somewhat grand title of *Australia Deliberates*. It is sponsored by the *Australian* newspaper and ABC TV and run by a non-profit organisation new to Australian opinion polling called 'Issues Deliberation Australia'. The model on which this exercise draws is the brainchild of the Centre for Deliberative Polling in the United States, under the direction of democratic theorist James Fishkin, who wants to give citizens opportunities to debate politics reasonably, unlike so many of their elected representatives. Happily for me, the Australian National University is also involved as a sponsor.

This new form of opinion polling reflects a fresh approach to opinion gathering, which is to get together a large sample of around 350 Australians and to walk them through the options on offer and to listen to the people as attentively as possible. The heart of the matter is the structured give and take between the body of 350 and the referendum activists, so that the sample can have time to consider the deeper implications of the alternatives. It is qualitative research into community attitudes done on a grand scale. The weekend will provide an opportunity for those in the sample to stand back from their daily responsibilities and talk through the issues, taking note of the input of the key players—but also of outside experts, such as Sir Ninian Stephen and his group of neutral experts already advising the government, who can provide a reality check on the claims of the main contestants.

---

* This paper was presented as a lecture in the Department of the Senate Occasional Lecture Series at Parliament House on 22 October 1999.

Australia Deliberates will go live to national television and bring back memories of 'ConCon', the people's convention, held also in Old Parliament House in February 1998. Rest assured that you can follow the developments and watch through ABC TV how our sample citizenry, a kind of people's parliament, work their way through to a fully deliberated and considered view of the options. At the end the group will vote, registering Yes or No to the two referendum questions. Now the final view might change from the initially recorded views; and part of the object of the exercise is to document such changes as deliberation matures. The past experience of such deliberative polls is that opinions and inclinations move, as the participants think through the details of the policy options in their dreamland of deliberation. Their conclusions might well preview the final count in two weeks time. Indeed, in one model of a perfect world, their conclusions might be a substitute for the sort of unproductive public debate usually associated with Australian referendums. We might say that their considered views represent what Australian voters as a whole would arrive at if—and it is a big if—they had access to all the relevant information and a chance to deliberate at such length.

My two other presentations today are directly on the substance of this 1999 referendum, where I have been invited to speak on behalf of the Yes case. I want this Senate Lecture to rise above the partisan fray and to focus on process as distinct from the substance of the referendum. And in many ways, the distinctive process of this referendum is highlighted by *Australia Deliberates*. This is 'ConCon' without the politicians, or at least with the politicians armed with their voice but not a vote. Only the sample citizenry get a chance to vote at the end of the proceedings. The large interest in this experiment, particularly among the 350 participants, suggests that *Australia Deliberates* seems to answer the community's appetite for more and better information—and an environment conducive to genuine political deliberation.

I want first to review the Australian framework for managing referendums, and to put the 1999 referendum in context: as not just the referendum to end the century, or even to end the millennium, but the referendum to end all referendums, at least as we in Australia have traditionally conducted them. My theme is that the 1999 referendum will break the mould of Australian referendum practice and that future referendums will be more open and participative—but also less predictable and manageable by elected representatives than those of the past.

So be warned: I take issue with the conventional wisdom among referendum experts that we are yet again facing a wrecked referendum—collision between voter misunderstanding and partisan misrepresentation. My story is one of hope and of the promise of more open community deliberation arising from this referendum.

Preliminary disclosure

First an important disclosure: I should acknowledge my publicly stated position on this referendum. Earlier this year I edited and contributed to a book called *The Australian Republic: the Case for Yes*.[1] The book draws on papers presented originally in February this year at the first anniversary conference to celebrate the 1998 'ConCon', which is the source of the two referendum questions now before us.

[1] The Federation Press, Sydney, 1999.

I want to stress that the contributors to the conference and the book include many direct-electionists, including Australian Capital Territory Chief Minister Kate Carnell. Quite a few contributors to the book (e.g. Tim Costello, Dorothy McRae-McMahon) have gone on to form the 'Yes … and More' group which, while properly acknowledging the great contribution of the Australian Republican Movement (ARM) to Australian republicanism, seeks to go beyond the limitations of the minimalist model. Not everyone is convinced that all direct-electionists are sincere or genuine republicans. Such suspicions have always been around during referendums. Indeed, at the time of the pre-Federation referendums to accept the draft Constitution, some clever opponents of Federation pledged their undying commitment to unification and abolition of the states, simply as a scare tactic to hold the tide against Federation. They lost out, but the spoiler strategy is ever-present at referendum time.

So for the sake of fairness, I make it clear that I already do have a publicly stated position which is pro-republican, pro-Yes, and not necessarily opposed to the drive for direct-election of the President. My task today is different: to examine aspects of the referendum process and to warn you against accepting the conventional wisdom that the problem with referendums is the negativity of the people. Critics charge that Australian voters and the Australian voting system are biased against change. The critics are wrong. The real reason for Australia's record of conservatism at referendums (with a rejection rate of 80%) is not that the people are apathetic or ignorant but that they resent governments that *presume* they are apathetic or ignorant. The record of referendum failure reflects more on the lack of direction of governments proposing referendums than on the limitations of voters.

Grounds for hope

I am convinced that the process of getting to the referendum vote is just as important as the substance of the end-result. To me, one of the most valuable results of any Australian referendum is the referral process itself, the process of community deliberation that begins, for most referendums, with the reference from Parliament and occupies the uncertain mind of the electorate through to the final vote. Recent New Zealand experience with referendums over the introduction of proportional representation shows that even in the face of bipartisan agreement among the major parties *not to support* reform proposals, voters can overcome that cold neutrality with their own hot enthusiasm.[2]

Let me explain why I am very hopeful about the 1999 referendum. I'm not thinking so much about the merits of the outcome as the merits of the process itself. I see the 1999 referendum as the one that will help break the mould of our traditional approach to constitutional referendums. The very messiness of the process before and after last year's 'ConCon' makes this referendum special. This messiness has upset the tidy plans of both the Yes and No camps. To me, messiness means business: not business as usual but the business of democracy which every referendum ought to celebrate. Whatever its defects, the 1998 'ConCon' was a spur to civic engagement and that itself is a very substantial change to democracy in Australia. The experts will tell you that Australian voters are disengaged from the hard grind of constitutional change, and that Australia

[2] Richard Mulgan, 'Defeating Defeatism', in John Uhr (ed.) *The Australian Republic,* op. cit., p. 180.

has a sad reputation as the 'frozen continent' when it comes to popular endorsement of constitutional change. Nothing much has changed in one hundred years of Federation, they say: only eight formal changes in nearly one hundred years. This view is frequently heard within the Labor Party. This is not surprising, since Labor has only ever secured one referendum success, in 1946, from its twenty-four attempts since Federation. Despite this record, I think this reputation for lazy ignorance is mistaken. If voters detect this prejudice among reform proponents then we can expect something of a backlash against the republic.

Australians are in fact great innovators, with a reputation as early adopters of technological products and commercial innovations. And of course many political innovations have taken their place in the international institutions of effective democracy: think only of 'the Australian (i.e. secret) ballot', of compulsory enrolment of voters and then later compulsory voting, or of the Senate system of proportional representation, or indeed the Senate lectures, with the remarkable legacy of over thirty-three volumes of *Papers on Parliament* containing ten years of Senate lectures, with this being the ninety-seventh lecture.

Those who allege that the public can not deliberate competently should remember that the public can certainly discriminate, in the sense of pick and choose among two or more referendum questions, approving some while rejecting others. This targeting takes some real effort in decision-making, i.e. real deliberation. Since Federation, there have been thirteen occasions (this will be the fourteenth time) when voters have faced two or more referendum questions. The record shows that there is always a difference in the levels of Yes and No across the different questions. The classic case is 1967 which saw the largest recorded Yes vote, 90% in support of giving the Commonwealth power over Aboriginal affairs, by the same voters who at the same referendum gave just 40% support for a proposal to abolish the constitutional nexus between the size of the House of Representatives and the Senate. Similar differences were recorded in 1977 and before that in 1946: both important cases when voters approved some but not all proposals put to them. The Prime Minister, John Howard, is one of those who hopes that the same may well be the case in 1999.

I think the real reason why Australian voters have in the past overwhelmingly voted against proposals for constitutional change can not be reduced to the fear of change or lack of interest in change. The real reason is that Australian voters are suspicious, and rightly so, of governments that presume that voters are change-resistant and are incapable of making an intelligent assessment of the merits of government proposals for change. Australian voters want to know more, not less, about proposals for change. The traditional civic disengagement in past referendums makes some sense when seen in the context of distrustful governments which have not had much confidence in the electorate's civic capacity to make sound judgments on constitutional change. Governments get it wrong. At most referendums, governments shy away from providing much-needed information for fear that voters will only get confused and vote against change, staying with the devil that they know. To cite one eminent referendum authority:

> The failure of constitutional reform in Australia … is not the product of an impossible procedural requirement in section 128, but a failure of political persuasion, of education of Australians

> about their Constitution … and of a party system that fails to punish misleading anti-referendum campaigns conducted without real reference to the merits of particular proposals.[3]

This referendum will be a watershed because it will change the way we do referendums. In the past, the role for the people was meant to be a passive one as determined by governments. But as this referendum has already demonstrated, the Australian electorate wants a more active role. Voters want their voice heard. This does not necessarily mean that the people want to rise up *en masse* as noisy players in public policy debate. The professionals who study public opinion, particularly qualitative investigators like Hugh Mackay, suggest that what voters mean when they protest that 'government is not listening' is not simply that they want their turn at the microphone. One of their messages is that they want governments to start to talk more openly in their presence about the wider range of policy options that voters suspect governments are reluctant to debate publicly.

The persistent demand for direct election is revealing. The conventional wisdom from the political elites is that this hankering for direct election is further proof that voters are confused and probably incapable of focusing on the issues at hand. I disagree. I think that voters are focusing on what really matters, which is where they fit in, or where they should fit in. This is not the occasion for me to canvas the merits of direct election. Professor Brian Galligan has done that excellently.[4] I interpret the persistently high popular support for direct election as evidence that the people are yet to be convinced that either of the two camps has risen to their responsibilities as providers of public argument. Let me put forward a minimalist position on popular support for direct election: that voters are inclined to an Australian republic but they are gripping on to direct election as a hostage or bargaining chip, which they will not release until the political elites open up the republic to the public. Whether that is through direct election of the President or some form of special purpose electoral college in place of the proposed nominating committee is an open question.

Deliberative deficits

Australia faces something of a democratic deficit: I call it our *deliberative deficit.* I want to show that this deliberative deficit goes back a long way in our political system. Our system of parliamentary government is compatible with deliberative democracy but it does not always deliver deliberative democracy—sometimes not even democracy! In computer language, the political system has something like a 'default position' of traditional preferences to which it retreats unless overriden by sustained public pressure. This default position tolerates but is far from friendly to community participation. Opening up the deliberative process to public participation takes considerable public effort. The system 'defaults back' to its traditional preferences whenever public pressure eases off.

---

[3] James Crawford, 'Amendment of the Constitution', in Gregory Craven (ed.), *Australian Federation*, Melbourne University Press, Carlton, Vic., 1992, p. 192. See also R. Miles, 'Australia's constitutional referendum: a shield, not a sword', *Representation*, vol. 35, no. 4, pp. 237–48.

[4] B. Galligan, 'The Australian Republic: a defence of popular sense', *Quadrant*, October 1999, pp. 46–52; cf R.S. Parker, *The People and the Constitution*, Monograph No 1, Australian Institute of Political Science, Sydney, 1949.

The aim of a deliberative democracy is not really consensus, although more often than not consensus will emerge as a valuable outcome of a deliberative process. The real aim is to encourage public dialogue, including the airing of public disagreements, as a precondition of effective government decision-making.[5] The aim is to protect the rights of all citizens, including minorities and dissidents, to participate and be heard in the halls of government. Think of this focus on the argumentative side of democratic politics as a defence of *civil disagreement*, a few steps shy of *civil disobedience*. Civil disagreement is one of the very important forms of political deliberation. The rules for public deliberation should encourage the give and take of open argument, even while protecting the restraints of civility. A deliberative democracy tolerates civil disagreement because it knows that good decision-making in government should be anchored in a process of shared deliberation with open discussion of options and alternatives. Civil disagreement is debate without the name-calling and imputation of motives that has characterised this referendum—with all its 'twisting and turning', to quote the disapproval of former deputy Prime Minister Tim Fischer when distancing himself from the disappointing antics of his own No side.[6]

So what's the link to the referendum? To my mind, the 1999 referendum provides an unusual opportunity to reconsider the design of deliberative democracy in Australia. I can do this by abstracting from the particulars of the Yes/No contest and by reviewing the general place of referendums in Australian democracy.

Australia's distinctiveness

The first element in standing back is to realise just how distinctive Australia is in having national referendums to change the Constitution. The Australian Constitution provides that the Constitution can be formally altered or amended only through popular approval of any proposed changes at a national referendum. The Constitution can be *informally* changed through the slow evolution of what are called constitutional 'conventions' or shared understandings relating, for example, to the powers of the Governor-General or of the Senate. Another avenue of informal change is through calculated government (or parliamentary) decisions to turn a blind eye to certain provisions in the hope that they can be regarded as outmoded or exhausted provisions or as 'dead letters'. But the main point is that *formal* constitutional change can not proceed without the express approval of the Australian people.

Few other democracies have such a prominent and direct role for the people in the process of constitutional change. The United States for instance requires proposed amendments to arise either through a two-thirds vote in each House of Congress or through the initiation of two-thirds of state legislatures. Ratification is by approval of three-fourths of the states, either through their legislatures or by special conventions (where the people can play their modest part as electors) but not by the people through direct determination of the outcome. The recently repatriated Constitution Act of Canada provides for amendment by resolution of national and provincial parliaments: first through a resolution from the two Houses of the national parliament, then

---

[5] See John Uhr, *Deliberative Democracy in Australia: the Changing Place of Parliament*, Cambridge University Press, Melbourne, 1998.

[6] *Australian*, 20 October 1999.

supported by resolution of the parliaments of two-thirds of the Canadian provinces. (I note in passing that amendment to the office of the Queen or the Governor-General requires the unanimous consent of all provinces.) But the main message is clear: approval of constitutional change is a matter for elected politicians—not the people as a whole.

Look at the contrast with Australia. For a start, Australian governments are compelled to obtain popular approval. And because of compulsory voting, voters are compelled to go to the polls: Australia is again distinctive in its very high voter turnout at referendums compared with other democracies. Section 128 of the Constitution provides a very demanding test of popular approval. A successful referendum requires the famous 'double majority' test: a *national majority* of voters plus a *federal majority* of states (i.e. four of the six states). This second or 'federal majority' was loosely modelled on Switzerland, a pioneering federation where formal constitutional change required popular approval at a national referendum plus the approval of a majority of cantons.

Think what a special opportunity the 1999 referendum provides. We know, for instance, that Prime Minister Howard is opposed to the republic, so that a Yes vote could not be interpreted as ratifying the Prime Minister's preference; just as a No vote for the proposed preamble could not be seen as ratifying the Prime Minister's preference. The term 'ratification' does not do justice to the power at the disposal of the people. What goes for the Prime Minister goes for Parliament generally: this referendum shows just how limited is the conventional wisdom which holds that the practice of referendums is reactive rather than proactive—simply ratifying proposed laws that have already won support within the elite of elected representatives. The 1999 vote might turn around the conventional wisdom because we could see the Prime Minister in effect having to ratify a popular vote in support of a republic, or having to shelve his personal support for a preamble on the basis of popular rejection of his model preamble.

The referendum framework: foundation and scaffolding

But all these fascinating pressures for change rub up against the traditional system for managing referendums, with its in-built deliberative deficit. To my mind, there are structural defects in the way we run referendums. Some of these defects are flaws in the constitutional foundations and others are limitations in the ordinary rules which Parliament has adopted for the machinery of referendums. I want to highlight aspects of the deliberative deficit as it exists in both the constitutional foundations and in the scaffolding erected for the machinery of referendums.

Let's start with the constitutional foundations. The last words of the Australian Constitution are those detailing the rules for referendums. In the records of the 1890s constitutional conventions one repeatedly finds our constitutional framers declaring that this final provision dealing with constitutional change was one of the most challenging tasks of constitution-making. As was said by Isaac Isaacs at the Constitutional Convention in Melbourne in 1898: this provision is 'one of the most important—in many respects the most important—in the bill' (i.e. the draft Constitution). Or again by Isaacs: 'We may make mistakes in other parts; this is our means of correcting those mistakes.'[7]

The eventual provisions of section 128 did not emerge without hard struggle: the right for referendum had to be fought for, against well-argued opposition in defence of the rights of elected representatives, either in Parliament or in special conventions, to decide things on behalf of the community. To appreciate just how special is this right to referendum, let me take you back in time to the 1890s constitutional conventions and illustrate the range of objections to the practice of referendum, and the rather edgy accommodation that underpins this crucial provision of the Australian Constitution.

The friends of referendums had to overturn at least three deeply-held prejudices against referendums which illustrate the default position of our political system. I stress that the system is open to deliberative democracy, but that in the absence of repeated public pressure the system defaults back to its position of diminished interest in community deliberation, thereby displaying the deliberative deficit.

Referendums will undermine responsible government

There was universal acceptance of the need for some sort of change mechanism but the initial preference was for something along the American lines with indirect participation through elected conventions. What is worth noting is the depth of opposition and resistance to the idea of popular referendum, even from such eminent framers as Edmund Barton, Australia's first Prime Minister, who stated that the principle of referendums 'tends to eat away at the foundations of responsible government.' Indeed, Barton feared that the rise of referendums threathened 'rendering responsible government a myth'.[8] This is a classic expression of the diminished expectation for popular participation and community deliberation held at the beginning of Australia's constitution-writing decade. This very traditional view was that responsible government conferred power and responsibility on the government of the day, and the political role of the people, or at least those lucky enough to be invited to share in the franchise, was to stand back and watch between elections.

There were champions of wider public deliberation who worked hard to reduce the deliberative deficit of the emerging national political system. The progressive view was put early by Alfred Deakin, who warned the opponents of referendums that Australian parliaments were 'adopting the principle of the popular vote more and more into the present framework of representative and responsible government.' The referendum practice can be 'an assistance to Parliament if they desire to obtain distinctly and without the introduction of foreign matter the verdict of the people on any particular question.'[9] Note this emphasis on turning directly to the people 'without the introduction of foreign matter'. Deakin appreciated that the success of referendums depended on the ability of Parliament to keep the arena of public debate free from 'foreign matter', particularly the sorts of misleading irrelevancies frequently found in parliamentary debate (e.g. personal imputations about the hidden motives of opponents that have recently disgusted Tim Fischer).

[7] *Official Record of the Debates of the Australasian Federal Convention*, 9 February 1898, pp. 716, 719.

[8] ibid., p. 751.

[9] *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 8 April 1891, p. 896.

Right from the start, referendum proponents like Deakin feared that referendums would work only if elected representatives gave the people an effective opportunity to deliberate and arrive at what he interestingly called their 'verdict'. Just as a jury's verdict is preceded by an impartial process of cross-examination of disputed evidence, so too the people's verdict at a referendum should be preceded by some sort of impartial process of weighing the pros and cons of each proposal. Deliberation literally means weighing up options, as on a set of scales.[10] As I shall now illustrate, many of our constitutional framers conceded that referendums were a fact of life but they doubted that the electorate had the intellectual capacity to play an active as distinct from a passive part, simply stamping their approval on policies already agreed on within Parliament. Those who warmly supported the principle of referendum began to search for new ways in which Australian citizens could be assisted to participate positively: by protecting public deliberation from the sorts of debating practices common in Parliament and also by providing citizens with impartial information on the core arguments of the Yes and No case surrounding referendum proposals.

Referendums will undermine the role of Parliament

A second aspect of the deliberative deficit is the belief that Parliament should restrain the impulse to referendum through rules designed to keep matters alive within Parliament until they are ready for popular ratification. In this conservative view, referendums should be seen as passive ratifications of the results of parliamentary deliberation and not as opportunities for the community to reopen the policy deliberation. In contradiction, proponents of referendums argued that Parliament should have few restraints and should certainly not restrain the referendum impulse until a parliamentary consensus has emerged. Proponents did not want to confine referendums to policy preferences already determined by elected members, and so they resisted the imposition of barriers which would confine referendums to formal ratifications of policy preferences already settled within Parliament.

An example of this aspect of the deliberative deficit was the framers' debate over the size of the parliamentary majority that should be required for the passage of a referendum proposal: should it be a simple majority or some sort of super-majority? Proponents of referendums wanted an ordinary majority; opponents of referendum wanted a super-majority to check the impulse for rash referendums.

The framers made two fateful decisions that opened up the possibility for wider public deliberation. First, they ensured that the Constitution did not put the bar too high, certainly not as high as the US Constitution's requirement that a proposed amendment must obtain a two-thirds majority in each House of Congress. The Australian Constitution requires that a proposed change normally requires an absolute majority in each House. But our framers made a second fateful decision. The Constitution also permits either House to initiate a referendum if the two Houses of Parliament are deadlocked over three months. Under such conditions, the initiating House may request the Governor-General to submit a referendum question to the people. At first glance this looks very similar to the provision in section 57 of the Constitution which regulates the procedure for resolving deadlocks over ordinary legislation which leads to double dissolutions. But there is one very important difference: unlike the case in section 57

[10] Uhr, *Deliberative Democracy in Australia*, op. cit., pp. 12, 22, 93–94.

which really only deals with the rights of a government when facing an obstructive Senate, here it is the case that section 128 protects the right of the Senate to go to the people.

What would happen if the Senate did not pass a government's referendum proposals? This was a real possibility in 1999 given the determination of the Opposition parties to prevent the passage of Prime Minister Howard's original Preamble. The only time that the Senate has tried to put a referendum over the protest of the House of Representatives was in 1914 when the conservative Cook government ensured that the Governor-General declined the kind offer from the Opposition or Labor Party-controlled Senate. And the only time that the House of Representatives proceeded to hold a referendum on a proposal that had been refused by the Senate was in 1974 when the Whitlam government unsuccessfully tried to get voters to approve changes which would have broken the famous nexus in the Constitution regulating the relative size of the two Houses.[11]

There is a remarkable alignment between promoters of the referendum like Isaacs and Deakin, who also demonstrate their support for other forms of popular legislative control like the citizens' initiative and the right of the states as a group to initiate referendums. Indeed, conservatives demanded to know whether the right of an initiating House to seek a referendum was really a back-door form of the initiative. The conventional wisdom of the time, and perhaps of our time as well, was nicely stated by O'Connor who protested: 'This proposal strikes at the very root of our system of government, wherein the people admit that they have not the experience, the intelligence, or the time to govern themselves.'[12] O'Connor went on to become a prominent justice of the High Court but at this earlier time in his career we find him getting the attention and support of his peers with his explanation of to whom he was attributing the deliberative deficiences: 'I will not say to the ignorant but to the less enlightened electors'—less enlightened compared to the few who are, if not the elect, then at least the elected.

The dual majorities are deadlocks on democracy

A third aspect of the deliberative deficit in our constitutional foundations for referendums is the thinness of support for the dual majorities approach to securing a referendum majority. As I mentioned earlier, approval of a referendum proposal requires the dual majority test: obtaining a national majority, which is a majority of votes on an Australia-wide basis; and also what was originally termed a federal majority, which is a majority of the votes in a majority of the states. My comments on this dual majority requirement will be comparatively brief, as this aspect has attracted extensive commentary in the referendum literature, and in the Australian analysis of the institutions of federalism.[13] What has not been acknowledged is the original design for deliberation that informs the choice of the dual majorities.

---

[11] G.S. Reid and M. Forrest, *Australia's Commonwealth Parliament, 1901–1988*, Melbourne University Press, Melbourne, p. 243.

[12] *Official Record of the Debates of the Australasian Federal Convention*, 9 February 1898, p. 746.

[13] See John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth*, Legal Books, Sydney, 1976 (originally published 1901), pp. 985–995.

Looking more generally at this federal dimension to referendums, one can see the provision for the double majority in negative terms: as a sign of the power of states' rights to block national majorities. My own view is that one should look more positively and see the double majority requirement through the eyes of the original framers, as a rule designed 'to encourage public discussion' and as a safeguard to ensure the 'maturity of thought in the consideration and settlement of proposals leading to organic changes.'[14] Thus again we see the role of referendums in facilitating deliberative democracy outside the usual framework of parliamentary rule.

Thus far five referendum proposals have won a majority of national votes but failed to secure a majority of states. It is certainly possible that this second requirement could itself be altered through a referendum, as the Whitlam government unsuccessfully attempted to do in 1974, when it sought to reduce the number of states requiring a popular majority from four to three—half rather than a majority of states. If the majority was reduced from four to three, then three additional referendum questions would have been carried: two for Labor in 1946 and one for the Coalition in 1977.[15]

But what counts for a majority at the state level? It is a majority of those voting, which before the introduction of compulsory voting could have resulted in a minority of those entitled to vote. But there was an even murkier problem. What happens when two of the original states (South Australia and Western Australia) have women's suffrage? Does that give those two states some sort of unfair advantage over the others, a kind of double-dipping system which might give them disproportionate influence when it comes to counting a national majority? (A contemporary version might be a protest over the rights of territory voters to participate in referendums, on the ground that our votes might give an unfair boost to a national majority, even though we are not strictly part of the federal compact.) The same framers who finally accepted the requirement for a majority of States lost their nerve over women's rights. On the dark side of the Constitution we find included in the referendum provision one of the document's few explicit references to women's rights.[16] Don't go searching just yet: the words used are not quite so direct, which is understandable when we discover this as yet another instance of the deliberative deficit.

Our constitutional framers knew that at some time after Federation, the national Parliament would adopt a uniform national electoral law for elections and referendums. But while they were prepared to allow the two progressive states to permit women to vote at elections for members of the House and the Senate, they held the line (or lost their nerve) when it came to referendums. The framers included in the third paragraph of section 128 a provision that is still there but now (I hope) a dead letter, which defines the constitutional situation until such time as Parliament enacts a national uniform suffrage. This arrangement holds that in any state with 'adult suffrage', votes for and against a referendum proposal shall be cut by one half, to bring them into line with the

---

[14] ibid., p. 988.

[15] Scott Bennett, *Constitutional Referenda in Australia*. Research Paper No. 2, Commonwealth Parliamentary Library, Canberra, 1999, p. 18.

[16] See section 128, paragraph four.

electorate of the other lesser states. Instead of providing for constitutional protection of adult suffrage, the constitutional framers bent the other way to protect the rights of those states without adult suffrage. Not that much harm came of this provision: uniform franchise for elections and referendums was guaranteed in 1902, well before the holding of the first referendum in 1906.

Deficit reductions: four attempts to reform referendums

So much for weakness in the foundations: now for the instability in the scaffolding. The deliberation deficit does not stop with the adoption of the Constitution. It is also evident in the rules for running referendums that Parliament has developed over the years since Parliament first made rules for the administration of referendums in 1906.

Parliament tried four times over a decade from 1906 to 1915 to erect scaffolding which would give voters every opportunity to make an informed choice at referendums. In 1906 (unsuccessfully) and again 1912 (successfully), Parliament debated the merits of an information pamphlet canvassing referendum arguments. Parliament knew that public deliberation must of necessity focus on the contending arguments and not simply the slogans of today or the background issues of yesterday. But Parliament could find no solution to the problem of editing the contending arguments into a state fit for public consumption. What makes for political nutrition? What forms of political argument or what forums for argumentation are healthy for a democracy? It did not take long for the friends of referendums to see that much of the parliamentary wrangling over referendums is unpalatable; some of it is indigestable; and a bit even poisonous—debilitating our democratic capacities.

The adoption of the Yes/No pamphlet illustrates the larger sweep of issues at work in Australian referendum practice. The friends of referendums were bold and ambitious: they wanted to bring voters into direct contact with the core arguments in constitutional contention. I emphasise that this term 'argument' is the very term that found its way into the referendum law.[17] How can legislators ensure that voters are provided with genuine 'arguments'—credible reasoning as distinct from clever but specious rhetoric? Parliament initially searched for some convenient external authority, such as a High Court judge, who might edit and credential the contending cases. When that option collapsed, they turned to authorities closer to Parliament, such as the parliamentary Clerks or the Chief Electoral Officer. And when that option collapsed, they finally dropped the search for external authority and turned directly to the authors of each case, the internal authorities, allowing the Yes and No partisans to resort to whatever form of 'argument' they thought appropriate.

There were two more steps Parliament took in 1915 which completed the original referendum scaffolding: the first was an unsuccessful final attempt to bring order and rationality to the Yes/No pamphlet; and the second was the fascinating and successful innovation of compulsory voting, a novel safeguard against voter misunderstanding and partisan misrepresentation. Think of this adoption of compulsory voting as an abandonment of the *supply focus* (trying to supply appropriate materials to help voters) and the adoption of a *demand focus* (trying to put in place incentives to stimulate demand among voters to get them interested in finding for themselves information

[17] See the current provision in *Referendum (Machinery Provisions) Act 1984*, section 11.

relevant to their referendum responsibilities). By 1915, the system as we now know it was pretty much in place.

Let me now walk you through the construction of this referendum scaffolding in more detail. It is a wonderful case-study of a democracy attempting to promote argument in place of mere contention.

The first attempt: the 1906 legislation

Right before the first shot was fired in the original referendum campaign, the initiating government was anticipating, quite correctly, that one of the basic issues was going to be the credibility of competing statements about the likely effect of any set of proposed changes. The Deakin government's aim, again altogether correct, was to inform the electorate with impartial advice about what would change under any given referendum: impartial here meaning free from party-political wrangling involving all sorts of allegations about the partisan purposes of disputed policy proposals. As Attorney-General Isaacs put it during the 1906 debate: 'Our object is to insure that when a change of the Constitution is proposed, the people shall have the matter placed before them in the full light of day, and with the best knowledge as to what they are being asked to do'. The issue was not a dispute over whether proposed changes might or might not be constitutional but over the appropriate means 'to insure that the people shall understand what they are being asked to do.' Isaacs held that the aim of the government was to ensure 'that an unprejudiced and unbiased statement shall be placed before the people.'[18]

The provision was rejected. There were good reasons to go slow with this attempt at 'designer democracy' but there were also poor reasons for this rejection of reason in politics. The aim was to provide voters with direct access to the core arguments for and against referendum proposals. The best instincts of the opponents sensed that democratic politics can not and maybe should not be purified of partisanship; the best instincts of the reformers sensed that democracy at its best is a contest of arguments—and remember that the original legislation wrote into law that the aim was to help voters understand the contending 'arguments'.[19] Perhaps one lesson from the initial defeat of the search for a pamphlet of impartial argument should have been that a better solution would be to think of *forums of argumentation* (some sort of specially convened deliberative assembly, anticipating *Australia Deliberates* if you will) rather than *forms of argument* in the black letters of a pamphlet.

Those who favoured the court or a justice made the strongest arguments to the effect that 'Surely the people are entitled to the very fullest information with regard to these very important questions' by resort to an authority 'entirely beyond the reach of party considerations' (Mr McColl). The opposite was put by those who argued that the people 'may be allowed to judge for themselves of the effect of proposed alterations' (Mr Mahon).[20] One common view held by elected members was that it is unrealistic to expect too much fine reasoning from electors who could not be expected to contemplate what Mr Glynn called 'all sorts of Chinese puzzles' that one finds in constitutional

[18] *CPD* (*Commonwealth Parliamentary Debates*), 4 September 1906, pp. 3890–3892.

[19] *Referendum (Constitution Alteration) Act No. 2, 1912*, section 2.

[20] See *CPD*, 4 September 1906, pp. 3886, 3895–3896.

dispute: 'As a rule, electors have a very poor idea of the elaborate arguments which have been employed in the Legislature … If they were compelled to listen to the pros and cons advanced in this House, they would probably be more confused than when they entered it. Instead they arrive at conclusions in a rough and ready way upon general principles.'[21] The message here is to leave well enough alone: let the voters make sense in their own terms. Of course what this implied was that voters would have to make do with the information as provided by the political parties, on the assumption (as one obvious partisan put it) that any proposal 'must be so simple that it can be left to the various political parties to explain what is meant.'[22]

What better options could Parliament have considered? Where could they have turned to provide electors with advice about the textual integrity of proposed constitutional changes? Three emerged in debate: one internal—in the Attorney-General of the day; one external—in the High Court as a whole; and finally a turn to independent professionalism—the two chief parliamentary Clerks. All three were discussed and discounted: the Attorney-General, then as now, faced a gulf of credibility given that he was normally the chief legal adviser to a government proposing a referendum; the High Court would jeopardise its own integrity if it played the part of expositor to the executive; and so too the parliamentary Clerks might well lose their party-political independence if they were drawn into partisan controversy.

As was stated in a later debate in 1915 over the same issue, members feared that it was not appropriate to involve the parliamentary Clerks in partisan dispute resolution, or to 'embroil them in party strife'. The Clerks were described by one pious supporter as 'gentlemen who keep their political opinions to themselves; I suppose that not even their intimate friends know their views on political subjects.'[23]

The second attempt: the 1912 legislation

It took the Parliament the experience of three referendums (1906, 1910, 1911) and another six years before it amended the referendum legislation to include within it the provision for distribution of the Yes and No pamphlet to all electors. The origins of the official pamphlet have been discovered in the records of the 1912 Hobart annual conference of the Parliamentary Labor Party, where the party agreed that the experience of the failed 1911 referendum could be explained by the twin evils of popular misunderstanding and partisan misrepresentation.[24]

The 1912 changes were introduced by Attorney-General Billy Hughes who went to great lengths to explain the innovation of providing electors with two statements of no more than 2000 words containing the Yes and No cases. These cases were prepared and authorised by a majority of those members of Parliament who voted for and against the

[21] ibid., p. 3886.

[22] ibid., Mr Edwards at p. 3890.

[23] Sir Robert Best, *CPD,* 8 September 1915, p. 6704.

[24] L. Lenaz-Koare, 'The History of the Yes/No Case in Federal Referendums', in Report, Constitutional Amendment Sub-Committee, Australian Constitutional Convention, June 1984, in *Proceedings of the Australian Constitutional Convention, vol 2, Standing Committee Reports,* Brisbane, 1985, Appendix 5, pp. 85-91.

proposed changes. The pamphlet was also designed to contain a statement showing the textual alterations and additions proposed to be made to the Constitution. Hughes defended this innovation as providing electors with 'the plain facts of the case, as set forth by each side'.[25]

From the Opposition benches, Deakin lent support and reflected on the experience of earlier referendums with their 'wide sway of mistaken opinions' resulting in the situation that 'a very large section remained very imperfectly informed.' It was 'our duty to them', stated Deakin, to assist electors 'form an independent judgment.' The 2000 words are not burdensome for 'any person who is really interested in the fate and future of this country'. In his view, the contents would not duplicate parliamentary debate since 'there are to be no personal reflections or imputations', with the arguments entirely addressed to 'the merits of each question'.[26] This important qualification never made it into the legislation. Behind this rejection was a sentiment summed up by Senator Rae who confessed that voters were 'utterly befogged as to how they ought to vote'; hence it was important not to 'befog the electors with a lot of parliamentary and technical phraseology'. How best to reach out to the ordinary voter? Senator Rae's answer was to use 'the language of a bullock-driver or drover [rather] than … the language of a parliamentarian'.[27] The consensus, then as now, was that the pamphlet would in the words of one modest supporter, Mr McWilliams, 'do very little good and very little harm.'[28]

The third attempt: the 1915 legislation

Billy Hughes never rested. 1915 saw the important but unsuccessful attempt by him to amend this pamphlet provision to insure that the presentation of the contending arguments 'shall not deal with any matter which does not deal solely with those merits of the proposed law.'[29] As Mr Groom complained from the Opposition benches:

> … it means that those who oppose the alteration will have to make out a case dealing solely with its merits. Therefore, they will have to cogitate and think out what are the merits of the proposal, and, having done that, make out their case against those merits. That is not fair.[30]

The government proposed to amend the legislation to establish a Board to vet the arguments coming from the two sets of parliamentary groups. The Board would comprise the Chief Electoral Officer, and the two parliamentary Clerks. Hughes feared that the existing provisions were too open and loose because the term 'argument' is itself too loose: something of 'a generic term applicable to some very wild and

---

[25] *CPD*, 16 December 1912, pp. 7153–7154.

[26] ibid., p. 7155.

[27] *CPD*, 20 December 1912, p. 7593.

[28] *CPD*, 16 December 1912, p. 7159.

[29] *CPD*, 8 September 1915, p. 6691.

[30] ibid., p. 6701.

irrelevant outbursts'. Hughes was at his idealistic best, declaring: 'The electors are entitled to be told the facts and to be approached as reasonable beings in a reasonable way'.[31] Cook for the Opposition successfully talked the government down, protesting that the 'rigid technicalities' in the amendment amounted to a gag on parliamentary speech. What he meant was what another member said: that the proposal amounted to a 'little bit of Prussianism'. Others like Mr Glynn claimed that it was the duty of the Minister responsible for the electoral administration to ensure that the argument did not contain what one member described as 'vulgar abuse'.[32]

And so it came to pass that the official pamphlet emerged as we now know it: at best a great opportunity for *Australia Post*; at worst a missed opportunity to repair the deliberative deficit. Referendum scholars have traditionally held that 'the balance of advantage is with the proponents of the "No" case.'[33] The onus is on the Yes case to turn things around, and the official pamphlet provides an opportunity for the No case to confuse rather than clarify.

There have been referendums where the No case has been absent (most recently in 1967 in relation to the case for Commonwealth power over Aboriginal affairs). Indeed, at three early referendums Parliament in its wisdom suspended the operation of the whole pamphlet provisions: 1919, 1926 and 1928—two losses followed by the first win since 1910. The view at these times was that the expenditure of public money was not worth the exercise and one suspects that parliamentarians reckoned that each side could do better when left to its own devices, especially when referendums are held at the time of general elections, when the parties struggle for the very highest stakes.

Finally, a victory of sorts

After three attempts to bring reason to bear in referendum politics, Billy Hughes had one last try at bringing reason to referendums. The Hughes government in August 1915 devised a novel approach that completes our review of the scaffolding of the deliberative design behind Australian national referendums. The usual story is that compulsory voting was introduced by the Bruce government in 1924 to try to restore the levels of voter turnout that had dropped alarmingly after the end of the Great War. The truth is that the first experiment in compulsory voting dates from August 1915 and it began its life in the Senate, designed solely for the referendum intended for later that year but never held.[34] Thus the novel provision quietly expired and was never really put to the test.

The conventional wisdom about the introduction of compulsory voting is that it was introduced to make life easier for the political parties. I accept that many aspects of our electoral system have evolved precisely for this reason. Think only of the adoption of public funding of political parties. It is important to recognise that in its very first

---

[31] ibid., p. 6692.

[32] ibid., pp. 6693, 6698–6699.

[33] L. Webb, *Communism and Democracy in Australia: a Survey of the 1951 Referendum*, Cheshire, Melbourne, 1954, p. 52.

[34] See *Compulsory Voting Act 1915* and *CPD*, 13 August 1915, pp. 5753–5755; 25 August 1915, pp. 6047–6070.

national phase, compulsory voting was designed to repair the deliberative deficit. The idea was simple: if citizens knew that voting at national constitutional referendums was a legal duty, then perhaps they would pay greater attention to the debate over the merits of the proposals. The stated idea behind the proposal for enforced civic responsibility was put in terms by Senator Russell when introducing the bill:

> The majority are able to discuss football records, and make an accurate calculation of the time in which 6 furlongs can be done at Flemington, but, in many cases, those men have not had their attention sufficiently directed to the affairs of their country to be persuaded to exercise their franchise.[35]

Critics have suggested that this is a device designed not so much to bolster public deliberation as to lift the approval rating which would suit reformist parties like Labor. There is a supposition that Labor voters have traditionally been among a majority of those who have failed to turn out when elections have not been compulsory. While this might be true, it is still the case that compulsory voting might simply reinforce the conventional bias against constitutional reform by ensuring that the legions of reactive Australian voters turn out to register their disapproval. For years, referendum critics have believed that there is a link between compulsory voting and No voting. One bit of evidence that should confirm this would be a high incidence of informal voting, but this is not in fact the case.[36]

The best that can be said for this approach is as follows. Referendums are 'too important to be decided by a minority of the people', as was put by Senator O'Keefe. In his view, compulsion also is good because 'it will encourage the electors to find out what the referenda really mean.' In earlier times 'large numbers did not vote because they did not understand the issue … did not quite understand what the questions really meant'.[37] But the worst that can be said is just as revealing. Critics of the proposal like Senator Millen countered that Australia would be 'compelling persons to give a judgment, which may affect important decisions, on matters which they have not studied, and in which they take so little interest that, if let alone, they would not record their judgment….'[38] Compulsion alone would not generate voter diligence: as Senator Bakhap put it, compulsion 'will not insure the predominance of intellect in the council of a nation's affairs. It does not follow that everybody will cast a philosophic and intelligent vote.'[39] But compulsory voting stayed and was, as its critics feared, soon extended to voting at parliamentary elections.

Requisites of referendums

I have presented this review of the foundations and scaffolding of our rules for referendums not to depress you but to help shake you loose from the defective

---

[35] *CPD*, 13 August 1915, p. 5755.

[36] R. Mulgan, op. cit., pp. 177–178.

[37] *CPD*, 25 August 1915, pp. 6063–6064.

[38] ibid., p. 6048.

[39] ibid., p. 6067.

traditional framework. Just think how unusual is this 1999 referendum against the background of our traditional approach. Let me line up my reasons for hope with this review of the deliberative deficit revealed in the historical foundations and displayed each decade since 1906.

I think that the 1999 referendum will make great strides in overcoming the reputation for negativism attached to Australian constitutional referendums. Just compare the strength of the process this time round with the state of things at the last referendum, which was a decade ago in 1988, during that great year of celebrating 200 years of the arrival of the First Fleet. Last time round, a federal government put four referendum questions to the people and all four went down, generating historically low popular support. I suspect that most of you are like me and can't really remember what the four proposals were or indeed how you voted. Remember that the Hawke Labor government had been re-elected in 1987 for an unprecedented third term, and that 1988 was a very special year of national celebration of white settlement. But despite all that, many voters—including many Labor voters—turned their back on the 'gang of four' proposals, despite their voter-friendly appearance. Who could say No to 'fair elections', or 'rights and freedoms'? Well, more than two-thirds of us did say No, a record rebuff for *any* government at *any* referendum.

Let me itemise ten grounds of hope that the 1999 referendum will break away from the traditional restraints on deliberative democracy.

1. Consider this contrast with the 1988 experience. Last time round, the trigger for the referendum was the 1988 Final Report of the Constitutional Commission, an expert advisory body convened by Bob Hawke in 1985 and chaired by Sir Maurice Byers. It was a classic gathering of 'the experts' experts', and it produced a marvellous Report, one which the government picked over and found enough evidence for their 'gang of four' referendum proposals. What they did *not* pick out were some of the recommendations about referendums: including the recommendation that state parliaments should be allowed to initiate constitutional referendums (paragraph 13.1) and that the Governor-General should be freed from the manipulating pressure of executive governments so that she or he will put referendums sponsored by one House but opposed by the other, making a living reality of the deadlock provision now in section 128.[40]

2. Just think of the contrast to this referendum, when the trigger was the 1998 'ConCon', also just an advisory body but much more in line with a council of community representatives, even though only half were popularly elected. The 1999 referendum which arose from 'ConCon' has been correctly described as 'a type of defacto popular initiative'.[41] We will see more of 'ConCon', and it is encouraging to remember that the 1988 'ConCon' resolutions included reference to the need for greater reliance on popular election for future 'ConCons', and that the agenda of future reform

[40] *Final Report of the Constitutional Commission, 1988: Volume Two*, AGPS, Canberra, pp. 851–852.

[41] R. Mulgan, op. cit., p. 180.

should include changes to the system for constitutional change, as one of many 'ways to better involve the people in the political process.'[42]

3. The timing of this referendum is also encouraging. It does not coincide with a general election where the fates of governments rest in the balance: nine of eighteen referendum outings have been at elections. Referendums have a greater tendency to generate Yes votes when held separately from general elections; but at such referendums there is also a tendency for voters to stray from their traditional party loyalties.[43] The outcome of the 1999 referendum will have no direct effect on which particular parties are in government and Opposition, and so has the potential to encourage a less partisan policy debate than the political nastiness normally evident at election time.

4. Also reassuring is the free vote guaranteed by the Prime Minister to his coalition members: free from party direction, that is, but not free from intra-party bickering, as we have repeatedly seen. This deviation away from traditional forms of partisanship has reduced the usual form of referendum partisanship from a government versus Opposition struggle to a form that might make the process of change more palatable to the people.[44]

5. Also unusual and encouraging has been the March 1999 release of draft versions of the proposed changes to the Constitution.[45] One would like to think that the release of drafts of the referendum proposals indicates a willingness of the government to listen to the community and to widen community involvement in the deliberative processes of government.

6. Also unusual and reassuring was the establishment of the parliamentary inquiry into the referendum proposals. This committee, chaired with distinction by Liberal backbencher, Mr Charles, took evidence around Australia and its records and Report are a welcome sign that Parliament wants to deal itself back in as a proactive contributor to the whole process.[46] The committee took mountains of public evidence on the head of state options and produced a report that substantially altered the precise terms of the republic question being put at the referendum. Like many who gave evidence, I was impressed with the good will of the select committee and its chair to do their part to help reduce the deliberative deficit.

7. Another good thing about the 1999 referendum is that Parliament has amended the referendum law to overcome the severe limitations on public expenditure. The Commonwealth law has restrained the federal government

---

[42] 'Communique of the Constitutional Convention', in Uhr, *The Australian Republic*, op. cit., pp. 191–196.

[43] R. Miles, op. cit., pp. 244–245.

[44] R Mulgan op. cit., pp. 181–182.

[45] Extracts are included in Uhr, *The Australian Republic*, op. cit., p. 196–202.

[46] Joint Select Committee on the Republic Referendum, *Advisory Report*, August 1999.

but has never limited non-government expenditure by private individuals or groups or even by state governments. At this referendum, in a once-only experiment, the law has been amended to permit the government to spend substantially more than any earlier referendum, and so generate a higher level of reliable information for the public.[47] The main beneficiaries have been the government-appointed Yes and No committees, each given $7.5 million. This is welcome because the traditional reliance on the official pamphlet is past its use-by date: these official cases are far from educational and are, as Professor Joan Rydon has commented, 'political propaganda and are often badly written and constructed with a minimum of honesty or logic.'[48] The pamphlet alone cannot be expected to stay the hand of partisan manipulation, given what Prime Minister Menzies once called 'the amount of sheer hard lying that goes on' during referendums.[49]

8. The good news was not meant to stop there: the same amendment to the referendum law also allowed the government to establish, with a budget of $4.5 million, an expert's group chaired by Sir Ninian Stephen to direct a 'neutral public education campaign that will support the referendum on the republic'—meaning that they will support the process of public deliberation that leads up to the casting of ballots. The 1985 Report of the working party of the Australian Constitutional Convention canvassed all the usual suspects capable of providing a 'neutral' publication of the merits of referendum issues: the Electoral Commission, a judge, and 'an independent panel of experts', the final option of which has finally come to pass in 1999.[50] The importance of this injection of impartial material is underlined when we appreciate the limitations in referendum law designed to prohibit material that is 'likely to mislead or deceive' electors. The High Court has affirmed that these type of anti-deception measures in Australian electoral and referendum law are quite narrow in their scope: the provisions prohibit only deception bearing on the placement of a formal vote in the ballot box, and are not designed to regulate political speech or attempts, however misleading, to form the judgment of electors.[51] Thus Parliament has passed a law which tolerates misleading and deceptive statements so long as they are designed to form minds and not spoil ballots. This shows just how important it is that there be some public authority which can inject some balance into the public debate, to protect the community, and truth, against misleading and deceptive contributions from referendum partisans.

---

[47] *Referendum Legislation Amendment Act 1999*, section 4.

[48] Joan Rydon, 'Referendums in Australia', *Reference Australia*, Australian Reference Publications No. 5, Melbourne, February 1990, p. 36.

[49] Quoted by J. Richardson, 'Reform of the Constitution', in G. Evans (ed.), *Labor and the Constitution 1972-1975*, Heinemann, Melbourne, 1977, p. 85.

[50] Report, Constitutional Amendment Sub-Committee, Australian Constitutional Convention, June 1984, in *Proceedings of the Australian Constitutional Convention, Volume Two, Standing Committee Reports*, Brisbane, 1985.

[51] Evans v Crichton-Browne, 1981, 147 *CLR* 169.

9. There is yet another significant difference this time round. One of the greatest resources available at this referendum is not the ample amounts of money being fed into the national and government-appointed Yes and No committees, or the valuable work of the Australian Election Commission in making available to the public so much useful material on the proposed changes. And it is not the remarkably busy websites of the two main camps: the Australian Republican Movement and Australians for a Constitutional Monarch. No, I am referring to the Constitutional Centenary Foundation (CCF) established in 1991 as a publicly-funded think tank to educate and inform Australians about the many issues surrounding the centenary of Federation, including but by no means confined to the issue of a change to an Australian republic. The balance exemplified by the CCF is suggested by the involvement of its patron, Sir Ninian Stephen and its presiding spirits, Professor Cheryl Saunders and Marian Schoen. Many of you will remember that special supplement of the *Weekend Australian* of 9–10 October dealing with the 1999 referendum. This was a good example of the excellent public information made available, in part because it made such prominent use of the CCF as an impartial source when evaluating the credibility of the Yes and No case.

10. My final ground for hope is the one I began with: the *Australia Deliberates* meeting at Old Parliament House. Australian Federation grew out of widespread civic engagement. Few if any of the forty-two referendum proposals thus far have engaged the people in the same way. In part this sense of disengagement reflects the pessimism of Australian politicians who have not held voters in high regard. The 1999 referendum has given voters the opportunity to return the compliment. The republic is in part the issue and in part the accident site for this clash between 'them' and 'us'. Recent elections at federal and state level have revealed historically high levels of popular distrust of 'the system' and of those responsible for managing 'the system'. Referendums are about popular control, so it is no surprise that large sections of the mobilised public are gathering around the option of a directly-elected or popularly controlled President. Speaking personally, I think that the direct election option has yet to face the test of sustained public investigation. It emerges as an alternative to the 'ConCon' model but as yet it lacks any of the detailed specification of the model being put to the people in two weeks.

Conclusion

This defect in detail is not as surprising as the very existence of the sustained support for direct election. Maybe the two are related and support for direct election will begin to fade as people see the potential power of big money and big centres of population, and the potential vulnerability of minority groups and the smaller states. But I repeat my theme that this resurgence of interest in forms of popular control over 'the system' might tell us more about the changing process of referendums than the substance of presidents or preambles.

The big lesson of this referendum is that is has done more than any other single event to turn around our deliberative deficit. More still needs to be done. And among the most

promising first steps are those of Old Parliament House, which later today will facilitate the arrival of the 350 'representative Australians' to the *Australia Deliberates* weekend. This experiment in deliberative democracy will help to throw light on what is missing in our referendum routines, where political debate gets weighed down with the posturing of personalities, equally adept at name-calling and the imputation of hidden motives. But *Australia Deliberates* can act as a circuit breaker. By allowing the delegates, in the standard phrase, to come to considered judgement, it will help to demonstrate that popular capacity is deeper and richer than 'the system' fears.

So I conclude with the recommendation that we pay attention to the detailed workings of *Australia Deliberates* because its promoters believe the results will represent what the average Australian would think about an Australian Republic if they had the opportunity to deliberate thoroughly. Would that all citizens had the same opportunity.

Question — We have this rosy view that we're going through a more deliberative process, but the fact is that we're being *forced* to vote on a proposal that came out of a half-appointed lobby (not fully elected, like the 1890s); a lobby that was managed and was factionalised and seemed to take on all those unfortunate characteristics that used to go on in that gloomy Old Parliament House. Isn't that a failure of deliberation right at the start of this whole process?

John Uhr — Yes. What I was suggesting was that the turning of the tide comes from us recognising—obviously, finally—the inadequacy of the system we now have, including the inadequacies to which you have drawn attention. But one has to nudge the system in one way or another.

Some people say that to vote No is the most positive inducement you can have to warn the system that you will no longer tolerate the sort of shallow-minded reformism that it's engaged in. I take another view, which is to vote Yes. Nudge the sort of 'ConCon' agenda. Give the system a chance to recognise that there's support for the symbolic changes attached to finally defining the head of state as an Australian citizen, to coincide with the centenary of Federation. Admit that substantially that's not going to change unemployment, it's not going to change the bus timetable in the ACT, it's not even necessarily going to improve the state of our governmental system more broadly, but it certainly pushes the ConCon-type agenda, which itself has some momentum going. Vote No, and the risk is that you're just throwing sand in the gears of that momentum and there could be a loss of momentum, maybe even a dead stop.

Question — You didn't mention the question of polling and its influence on people. I know that's a convoluted and difficult matter, but I believe a lot of people are affected by published polls. In that connection, do you know if this deliberative affair in Old Parliament House will have its deliberations published, and whether that might or might not be a good thing? I'm not questioning the deliberation as such, but if a result comes out, you can imagine the feeding frenzy of the media on that matter.

John Uhr — I think that's a very important question. There is a risk of over-reach in taking a sample; inviting people to Old Parliament House, polling their views before they enter—before they step on those steps—then polling their views and demonstrating the change. It is a danger of over-reach that could go either way, dramatically indicating that, after two days of intensive exposure to the referendum activities plus lots of neutral material, there's a kind of chill of confusion setting in. And the Australian community is then invited to ponder the lessons—that 350 of us have entered that building and come out feeling even more confused. On the other hand it could go the other way—that the 350 come out and there's a demonstration that, once confronted with an opportunity, not so much to hear, but to talk through with other ordinary citizens, they actually dramatically increase their interest. The symbolism might take on the kind of vital quality that we didn't realise—that the Constitution as it now stands has no definition of who is the head of state. That we didn't realise there is actually uncertainty as to whether it was the Queen or the Governor-General, and that that's been made clear, and that now they're gung-ho. Yes, if that's all it's about—that it really is minimalism—let's go for it.

So, at issue is a kind of danger of an exaggeration either way. And then of course there's the other issue to which you rightly allude—should the rest of us then be herded by that result? If that group turns one way or the other, does that mean that we then cede all rights to make up our own mind and say, 'well, they're a bigger group than us, they've had a better opportunity, this Centre for Deliberative Polling has the experience of having run these all around the world, it's bound to be a fair and good result, and we'll let that result stand?'

You can imagine a kind of misguided form of deliberative democracy seizing upon that experiment and saying 'yeah, if we actually want to have genuine deliberative democracy, what we have to do is make the democracy more deliberative—how can we do that? Oh, this cumbersome compulsory voting that went in at the beginning to try to force voters to recognise they had obligations of citizenship, we should just bypass that. We should work out some way of sampling the community, invite them to come together, rub them up against the experts and give them a chance to actually work it through for themselves and the rest of us can say that they represent us.'

In a way we do that with a lot of normal law and legislation. We allow Parliament to determine for us. But the crucial difference of course with this sort of sampling group is that somehow you trust the social science, that it somehow chose people in whom we can place our confidence. I have a few doubts and reservations about the selection side of it all.

Question — Is the selection process made public?

John Uhr — I'd have to get the people from *Australia Deliberates* to address the integrity of their own processes. There's a firm called Issues Deliberation Australia, which somehow satisfied itself that it had organised a list which has the names of a randomly sampled group of Australians, which had no bias whatever in the random sampling, and it then contacted the people and said 'here's your big chance.'

I'm not sure how big the list was, but the list of respondents is now over three hundred, and it's a fascinating experiment. But one wouldn't want to invest too heavily in it as a

replacement for everything that's good in our democracy. It just highlights the deficiencies.

Question — Would you like to explain the situation of the territories?

John Uhr — One of the few changes to the referendum provision in the Constitution was one that the rest of Australia made for the people of the territories. We didn't have a chance to make the change in 1977, to give us also the right to participate in referendums. Not as the constituent body of any particular state—because, by definition, those of us in the ACT and the Northern Territory don't belong to a state—so our vote counts as part of the national majority. But from 1906, at the time of the first referendum, to 1977, we watched—well, we weren't there in 1906—but we watched and took a keen observer's interest in the outcome. Then Australia kindly said that we could participate from 1977, and since then we have had our own obligations to take care of.

Question — We realise that the monarch doesn't have to be an Australian head of state, and neither does the Governor-General. If the No vote got up, and in order to have a Governor-General that was required to be an Australian citizen—would that have to go to referendum, or could that be legislated?

John Uhr — It could go either way. If you wanted it formally forever entrenched in the Constitution, it would have to go to a referendum, but it wouldn't be beyond the possibility of Parliament passing a law or resolution affirming the importance of always choosing an Australian. At the moment, you can't find any reference to a head of state in the text of the Constitution, because it's not there. You certainly find recognition of the Queen and the Governor-General. The Queen's certainly not required to be an Australian citizen, and neither is the Governor-General. That's part of the moral energy that seems to be behind the Yes side of the case.

One of the saddest features of the referendum provision as it now stands is a recognition that women don't have to count—or, in fact, that they can count half as much as the rest of us. There's a compromise in the provision in the Constitution that says that at the time of Federation, South Australia and Western Australia were the only two states that had universal adult franchise guaranteeing women the right to vote. And there was a fear amongst these stout-hearted friends of democracy, called our framers, that, if we had a referendum and these two states suddenly voted at a referendum, and if the women voted as well as the men, those two states would have a disproportionate influence. And they actually wrote into the provision—in another classic illustration of our deliberative deficit—that, in the event that that happens, before we've adopted any universal franchise we should ensure that the votes of those people participating in South Australia and Western Australia are cut in half, to equal their stakehood with the other States. So they lost their nerve on that one.

Question — Why did we have to substitute 'President'? Why couldn't we just have remained with the comfortable, familiar 'Governor-General'? I think that so many people who have struggled, without knowing a lot about what has gone on, would have been content if that had remained familiar. If one says 'President', one thinks about America.

John Uhr — I think you're absolutely right that part of the chill and nervousness that people have about the change is attached directly to that one name. There are a range of other possibilities we could have come up with, one of which was the retention of the current title.

Question — I thought it might have been illegal to retain it, that it would perhaps have to relate to an independent Commonwealth country. As we're all saying, if something is good, why change it?

John Uhr — Absolutely.

Question — I was watching *The Panel* a few weeks ago, and one of the issues that was raised was: what is a republic? I actually went to the dictionary, and got no help from it whatsoever. Is there actually an accepted definition of what a republic is, and are we using that for this referendum?

John Uhr — The dictionary normally says 'the absence of monarchy', and it's most succinctly defined by the absence of a monarch. A republic is a place where there is no established hereditary monarch ruling. Somebody else or some other group rule, either a representative body elected by the people, or maybe just a group of people unelected, but not calling themselves a monarchy. The negative definition is easy, but then there are a huge range of possibilities.

My colleague, Mark McKenna, author of the book *Republicanism in Australia*, spent 300 pages or so detailing the various models of a republic that have been entertained in Australian history. They all really turn, at their best, on some concept of popular sovereignty, where, whatever mechanism we throw up—and it could even be an elective monarchy—at least owes its source of authority back to us. But classically, a monarchy is something that comes down from the heavens. Or it might be tolerated over time—'divine right of kings', literally.

What a republic ought to be is another system that has its authorising principle arising out of popular sovereignty—that the people are really the owners of the system.

Question — Could you argue, from some perspective, that we already have a republic?

John Uhr — I have. There are twenty of us in this room who have done that as political scientists. We have said that, in effect, Australia is either a 'crowned republic'—to use one of the corny titles—or, 'in effect a republic'. We have said that we've got almost everything that would pass the minimal conditions test, and that the outstanding oddity is the fact that, if you open the Constitution, it doesn't read like that, and that the minimalist purpose behind this referendum is to repair the oddity, without affecting any of the substance.

Question — Compulsory voting—there is no such thing. The only compulsion is to go to the polling booth, have your name marked off, and go and sit down.

John Uhr — You're quite right, and at the time it was introduced for referendums, the opponents of compulsory voting said, 'this won't work—the people will never be on top of referendum proposals—they will have to turn up at the ballot box and they will have

to put something in the ballot box, but you'll never know what they are putting in the ballot box. A lot of them won't care—they'll have their name maked off the roll.' So our system at least was wise enough to recognise that.

But the defenders of compulsory voting really did have an idealistic expectation that, in the absence of trying to find any other way of providing an impartial set of materials that would help electors determine the merits of the question, maybe they could do it by just putting the fear of breach of criminal law at the forefront of their minds. And that could force them to actually search around and come to some satisfactory notion in their own mind as to what the merits are on which they are voting.

Question — Coercion?

John Uhr — Yes, it's a form of coercion, absolutely.

The Scandals We Deserve?*

Rodney Tiffen

I must admit that I have been enjoying the spectacle of the scandal currently dominating our news—the John Laws-Alan Jones 'cash for comment' inquiry. It has nearly all the ingredients that make scandals such irresistible fare for the media and for the public. At the moment we have the theatre of a public inquiry, and the sight of these two men, already very well known figures who arouse strong opinions in many, now being exposed in a very different way.

We see Alan Jones saying it was merely a coincidence that he made favourable comments about the Walsh Bay development a day after signing a six figure contract, claiming that he was unaware what he was obliged to do under various contracts from which he received hundreds of thousands of dollars. John Laws likewise is maintaining the sincerity of all his on-air statements, and we are asked to believe that it was pure good fortune that his personal convictions correlated so perfectly with groups who were prepared to pay him large amounts of money. As often happens as scandals gain momentum, the public hearings are the indispensible central source of news, but they are supplemented by a stream of revelations from elsewhere.

In this case inquisitive reporters have been rewarded by leaks from and about various parties, and stories of what I call 'backstage behaviour'. Various sources at radio station 2UE seem less than enchanted by their two major stars, and so tales of avarice and arrogance have been forthcoming. As in all the most newsworthy scandals, the weighty issues of principle have been spiced up with juicy gossip.

As also occurs in many scandals, what previously seemed like solid alliances among the defenders have disintegrated as the pressure from the scandal increases. The key moment came when the chairman of the station, John Conde, directly contradicted

---

* This paper was presented as a lecture in the Department of the Senate Occasional Lecture Series at Parliament House on 19 November 1999.

John Laws' account of a conversation between the two of them. They have each now pitted their own credibility against each other. The conflict between them seems irreparable not only at a personal level, but in their conflicting interests in the inquiry's findings. This crossfire of conflicts greatly reduces the chance that the parties will be able to contain the revelations by stonewalling the inquisitors.

Like many scandals, this one also had a false start. Last year the Australian Broadcasting Corporation's Media Watch program made some of the most central allegations about John Laws and his sudden backflip—moving from a bank basher to an admirer overnight. In 1999, Media Watch also had a key document, an agreement between Laws and the banks. The program was immediately followed up by other news media. Once the scandal was under way, being pursued competitively by a range of reporters, it was self-sustaining at least for a few weeks.

However, a question just as interesting and important as why it exploded in 1999 is how it disappeared so quickly and completely in 1998. In particular this raises questions about 2UE management, and its wish not to find out anything uncomfortable. It did not want to know anything that might shake its money tree. Less understandable was the apparent passivity of the Australian Broadcasting Authority (ABA). This now is obviously the most important inquiry the ABA has conducted in its seven year existence. Like many scandals, this one raises issues to do with the politics of procedures and penalties, about what procedures are appropriate for exploring such a case. When the stakes are so big and public scrutiny so intense, little used powers are suddenly subjected to unanticipated pressures.

The issue of procedural propriety got most attention over the actions of ABA chairman, David Flint. Unfortunately for Flint, the hearing coincided with the republican referendum campaign, in which he was an ardent advocate, sometimes seeming to be the monarchists' court jester. Flint made an understandable but nevertheless important misjudgment by appearing on the Laws program in this capacity. After a flurry for several days, he disqualified himself from the inquiry. It is of course rare for a senior presiding officer to be forced to disqualify himself, and perhaps unique for some defence barristers to argue that he didn't have the right to do so.

However problematic and ambiguous the procedures, I am not referring primarily to the momentary furore surrounding David Flint. The much more important question is the adequacy of the Broadcasting Services Act, and what seems to be the oblique relationship between the law and the major issues of public morality.

For the first time, the changes which had been introduced as part of the Broadcasting Services Act in the name of self-regulation came sharply into public focus. It emerged during the inquiry that the ABA has no power to punish individuals, only the licensee, 2UE. This is an important difference from the powers of its predecessor, the Australian Broadcasting Tribunal (ABT), which on several occasions temporarily forced individuals off-air, for example for making racist comments. I do not remember anyone commenting on this loss of power when the Broadcasting Services Act was introduced in 1992. The general impression given was that the ABA would retain the powers of the ABT, but would function in a different way.

It makes it very interesting to consider what, if any, penalties may flow from the inquiry if wrongdoing is established under the Act. If 2UE retains its license, it may face huge fines. As a general principle, in order to act as a deterrent, fines must exceed by a substantial amount the money raised by the illicit behaviour. Perhaps the station will need to take a loan from its famous stars to pay the fine it incurs for their behaviour.

Similarly, these offences were only covered by industry codes, which meant that 2UE could not suffer tangible penalties on this occasion, only if they re-offended. When this 'first offence is free' doctrine came into public focus, there was much disquiet that neither the broadcasters nor the station could be punished for what they had done.

The scandal has exposed new questions about the regulatory regime which has allowed such abuses to occur, both in terms of the Act and of the agency meant to enforce it. It is noteworthy that we are having the current inquiry not because of investigative efforts by the ABA, but because of revelations in the media. Earlier this year we had an investigation into whether Channel Nine was showing too many advertisements. The charge grew not from monitoring by the ABA, but because of complaints by Channel Seven.

When the Broadcasting Services Act was introduced, it was based upon industry codes, a sensible approach that strives for consensus rather than confrontation between agency and industry. However the fear was always that self-regulation may come to mean no regulation.

This is the final point I want to raise from the current 'cash for comment' scandal. We like to think when considering corruption that our society makes continuing progress against it, that previous avenues for abuse are exposed during scandals and then closed off. However sometimes, as here in the name of deregulation, we get into reverse. In many ways Australia's regulatory mechanisms had a better chance of coping with these transgressions in the 1980s than in the 1990s.

I have dwelt on the Laws-Jones scandal partly because it is so intrinsically interesting, but also to make some larger points. The interest in a scandal like this is most obviously in its content—who did what? Whose claims can be believed? What will be the tangible outcome? The content of each scandal is unique, commonly not directly comparable with other scandals.

But—as I have tried to indicate, not very subtly by the use of refrains like 'as in other scandals'—the processes by which they develop fall into recurring patterns. Thus although the 1999 scandal came too late to include in my book, *Scandals: Media, Politics and Corruption in Australia*,[1] it has exemplified many of the arguments in the book about how scandals develop and the issues they raise.

I argued that while the development of scandals is not predictable, the ingredients which can make a scandal escalate into a crisis and dominate the news media are identifiable. I concluded that three factors together will result in a scandal which will dominate the news media. First, a central forum facilitating disclosure. An

[1] University of New South Wales Press, Sydney, 1999.

indispensable source for intense coverage is a public forum, normally either Parliament or a judicial or quasi-judicial setting.

Second, a constellation of conflicts escalating the scandal. The single most important issue here is an Opposition determined to exploit it for partisan gain. What will often really move a scandal from normal partisan conflict to a crisis is when a three-sided conflict develops.

And third, diverse elements of newsworthiness. Issues of high principle are fortuitously spiced with personal drama and human interest. What especially animates the media is a view that events are moving towards some great climax. It follows from this that the forces of reaction have only a loose relation to the seriousness of the offence.

The most contentious issue in scandals is not normally the truth or falsity of individual claims but issues of proportion—that a scandal received too much attention, that the consequences were disproportionately severe. There has not been a case in recent Australian politics of negative consequences for someone completely innocent, or of sustained media coverage built on false charges, but the sense of proportion has often been problematic.

It follows also that we must be aware of the political and media forces which make some transgressions more visible than others. In particular, the forces escalating attention to political scandals are much greater than elsewhere (and not because politicians are more crooked than others).

In many ways the process by which scandals develop in the news media is erratic and unedifying, and will remain so. It is centrally influenced by the pursuit of political interests, which may or may not align with the public interest. It is centrally influenced by news values, which again only align partially and erratically with the public interest. The search for scalps overwhelms the analysis of institutions and structures which give rise to disputes.

Moreover, progress made is not often visible in the news. For example, police corruption in the mainland eastern states in 1999 is probably much less than in 1989 or 1979, and probably previous decades, although of a different kind.

I said earlier that my scholarly interest in scandals derived from trying to articulate the erratic processes by which they escalate to (sometimes) dominate the political agenda and have far-reaching impacts. The other reason, of course, relates to their substance. The implicit stake in many scandals is the accountability of powerful figures and groups. In this way, I am interested in process in a different sense. When we see conflicts in politics or elsewhere, as spectators or as partisans, the focus is primarily on the result, on who wins.

My view is that scholars and journalists should be partisans not for one side but partisans for the process. This is against the spirit of the age. The popular attitude today is that it doesn't matter how you play the game as long as you win. Not only in sport, of course, are ends valued above means, but also in business, the bureaucracy and in politics. We value results-oriented managers. Our politicians' views these days

on both sides seem to be that due process is for wimps. This is part of the pressure towards the triumph of short-term perspectives, which is sometimes mislabelled as pragmatism.

In the long term the quality of the processes of our democracy is linked to its effectiveness and legitimacy. Even when they prove to be short-term inconveniences, we should act in ways which strengthen those processes that enhance the integrity of our public life.

The single most important institution in this regard is of course Parliament. We should be reminding our MPs that not only are they members of a party—they are custodians of our most important democratic institution. Instead we find there is a bipartisan consensus to extend, when in power, the prerogatives of executive government at the expense of parliamentary accountability.

The size and complexity of contemporary government means we also need to strengthen institutions which increase transparency in executive government and in the judiciary. This means strengthening, instead of abolishing, the functions of auditors-general and strengthening, instead of amalgamating, offices such as the Ombudsman and Independent Commissions against Corruption.

It also means the efficient functioning of freedom of information provisions. Finally it means a vigilant and active news media, which sees its role as not just to commentate on the prevailing political games, but to act as partisans for the democratic process.

The argument above is that the development of scandals is fanned by political interests, by opportunities for media reporting, and by how the developments match judgements of newsworthiness. It means that at times some scandals will receive attention heavier than some may judge is warranted—that we get a skewed and erratic view of scandals. In considering whether we get the scandals we deserve, we need also to consider the other alternative: what scandals are being neglected? In what areas is the potential for unchecked corruption increasing?

I want to nominate three areas which I think deserve greater media and political scrutiny.

The first is political funding. Journalists sometimes say that they neglect Parliament because that is not where the power is. However, there is an area central to potential power into which they almost never venture. Elections have become hugely expensive for political parties, and the efforts that they put into fund-raising is enormous. Some donors no doubt give contributions to aid our democratic process, or give equally to both sides as insurance. Others must expect that they will get some return on their investment. Both parties are conniving in charades that effectively conceal most of their donors. I think it is time we knew who gives what—how much money, if any, for example, private health funds donate to political parties.

The second area for concern is the increasing use of ‘commercial in confidence’ reasons for secrecy. As interaction between government, the private sector and community groups increases, it becomes increasingly important that the spending of

public money be done in a transparent way. The basic principle should be that if private groups want public money, the transactions must be open to public scrutiny.

The third point is really an extension of the second. We have had a coincidence in public sector management of trends towards the corporatisation of government activities, the privatisation of government entities, and of deregulation. Often these lead to micro-economic reforms which benefit the economy, and bring better service to the public. They increasingly also mean that the public interest is not confined to public service and to elected members.

This brings us full circle, back to 2UE. It was recently claimed that no pro-republican speaker appeared on the Alan Jones program in the six weeks leading up to the referendum. At the same time, the ABC's performance was being timed with a stop-watch. The argument is that the ABC is a public broadcaster and 2UE a private station. However, 2UE is also a publicly licensed station. It enjoys privileged access to the spectrum. It plays a role in our democratic life. What policies, if any, should govern its performance?

In terms of the current 'cash for comment' inquiry, the immediate stake is whether there is a penetrating and accurate account of the transactions. Most public attention will focus upon the fates of Alan Jones, John Laws and the licensee of 2UE, the Lamb family.

Beyond the fate of those immediately involved the larger stake will be whether the inquiry upholds the rights of the audience, and confirms the basic value that media audiences have a right to know when they are listening to paid speech and when to free speech, and whether it leads to a vigilant regulatory environment on guard against such breaches of the public interest.

Again in this scandal, as in so many others, the largest stake is whether it confirms or fails to confirm the public's sense of justice, and so again a scandal has focused our attention on the cutting edge of democratic accountability. Scandals for all their idiosyncrasies thus play an indispensable role in our politics. In the same sense that we deserve our democratic rights, we deserve scandals like this to explore and define the exercise of power and responsibility.

Question — I was disappointed that there wasn't a single mention of the sexual peccadillos of our politicians. However, I certainly support your points about the 'commercial in confidence' issue. It is certainly a scandal that so much public money is spent without disclosure. I am not talking about monies spent for genuine security such as defence of the Commonwealth—that obviously has to be a one-liner. But any other expenditure of the taxpayers' money should be open to examination publicly as well as by the Auditor-General. And that includes his examination of corporations.

However, there is a different point, which you did touch on, but only obliquely. Editors of our free press maintain strenuously that they require freedom and should

not be directed by the owners of the press. That, of course, is a fiction, as anybody who has read about what happened to the editors of the *Times* and the *Sunday Times* in England would know. Equally, the recent behaviour of the press in the lead up to the referendum indicates that, while editors are demanding alleged freedom—and use it legitimately in their editorials—surprisingly they do not accord it to their reporters. The overwhelming proportion of the press in Australia supported one side in the Republic referendum, even though the actual outcome shows that they were unable to effectively gain public opinion to that point of view. There is transparency required within the press as well as by the press against the type of scandals that you have been dealing with in your publications.

Rod Tiffen — It would be a very interesting exercise to look at the growth of the words 'commercial in confidence' in our public life. My guess is that fifteen years ago, you probably never saw it. Throughout the last decade it has been climbing and climbing. There may well be occasions where such a stance is justified. My guess is that more than 80 per cent of the time the phrase 'commercial in confidence' is inappropriately invoked. I think that all of us who care about the quality of our government should be mounting struggles against this insidious term. It is not 100 per cent insidious, but it is maybe 80 per cent.

I think that it is also a very fair point, and one that will meet with enormous resistance within the news media, to say that there needs to be more ombudsman procedures within the media. Some of the best newspapers in the world, such as the *Washington Post*, employ an ombudsman. I hesitate to say this, to an extent, because I think the last thing we want is a series of straitjackets. When I said that Alan Jones had not allowed any pro-republican speakers on his show, part of the appeal of that program is Alan Jones' personality. It is very hard to get legislation that says that you can get balance by stopwatch, but you need to find a balance that allows some scope for the broadcaster—for their individual talents—and for the idea that this is not their sole private property, that this should not just be the Alan Jones soapbox. If you can do that in a non-draconian way, and if we could enlist the goodwill of the media, I'm sure that they would help find ways to get a more creative solution to those sorts of areas.

There are times when the powers of the proprietors are crucial. There are lots of other times when they're not crucial. I think to some extent you can argue that the main press of this country reflect their most immediate constituency. They try to reflect the concerns of the principle audiences. But that isn't always the only constituency in the country. That may provoke both a marketing and a professional consideration in the newspapers about how well they're reaching out to other groups as well.

That's a less than perfect answer, because the question you raised is a huge one that should continually be explored; issues to do with freedom of the press are not fought once and for all. They're ongoing battles that sometimes have to be fought between the media and government or the media and corporations, and that sometimes need to be fought within the media.

As to sexual peccadillos, it has often been said that Australia has been much less productive of sexual scandals than say America or Britain, and there is some truth in this. Some have explained it in terms of a different Australian attitude. I'm a bit

sceptical about that. The Cecil Parkinson scandal in Britain involved his pregnant secretary and former lover coming forward and saying certain things. If there had been a sexual scandal involving Bob Hawke, for example, in which you had such a person coming forth, I think it could well have exploded. I would think, so far, it's partly a matter of the way sexual scandals have arisen in Australia. I do think that there are genuine dilemmas here. I always go back to the 1960 presidential election between Kennedy and Nixon, and from what we know, Nixon was the much more monogamous candidate. I don't know if that should have been the determining factor in who was going to be the better President after that election. So there are issues that I am not confident anyone is tackling very well, such as when sex scandals should legitimately enter into the public domain and when they should not.

Question — In light of the 2UE inquiry and the recent fiasco with tickets for the Olympic games, do you think that the drive for greater transparency which is now fuelled by the media will not be dashed in Olympic glory and corporate gloating after the Olympics? In other words, are you a pessimist or an optimist?

Rod Tiffen — The crucial thing to remember about the news media is that, of all the major institutions in our society, they are the ones with the fewest pressures towards consistency.

To give a slightly different SOCOG (Sydney Organising Committee for the Olympic Games) example: one week there is sudden outrage that we've got too many foreign bands in our opening ceremony, and the talkback shows and the *Daily Telegraph* start saying so—then the politicians suddenly say: 'this is becoming an embarrassment, we must reverse the decision.' The next week, it turns out that in doing so they have broken contracts, they have broken the hearts of Japanese and American band members who have been practising for a year or so; then suddenly the news media will switch tack, and say 'how could they have made this expensive and heartless decision?' The different sources dominate differently from one week to another. In that sense I would expect that, if things go well at the Olympic games and if they come in close to breaking even, many of these other issues may then be forgotten. But that's just a guess, and certainly it's created a lot of very real anger in the last few weeks. (I should admit here that maybe I'm not taking this seriously, because I got two of the three lots of tickets that I asked for.)

Question — It's Christmas 1998, and SOCOG invites you to it's Christmas party and says 'we've got all these tickets, and we've got to get them out somehow, but the last thing we want is any scandal or any controversy.' How would you suggest they do it?

Rod Tiffen — Being an individual of complete probity, integrity and good judgement, I would first of all have said that a Christmas party is not the proper place to discuss this. And then I would have looked at their books. They have got huge financial problems, as we know, and what I think they did was engage in what we might call 'official scalping'. Scalpers make their money because, as the event draws closer, the people who missed out are willing to pay more. So what SOCOG did was to cut out the middle man, centralise the profits involved, put fewer tickets on the market in the normal way, and hold these other tickets back. One can see from a marketing point of view how that may have had some marketing advantages and revenue advantages, but it was also an exercise in public deceit on a gross scale.

I don't think I am likely, by the way, to be asked by SOCOG for ethical advice or to attend their Christmas party.

Question — Regarding recent use of the term 'commercial in confidence'—I think for decades now certain of our trade statistics have been curiously not stated because of this problem. Statistics on certain products are simply not available. I also wanted to mention the commercial side of the media that you spoke of, and the curious reluctance, that is scarcely even mentioned, of the media to comment in their news items on companies which advertise in the papers concerned. This is something which has had a certain amount of public exposure in the case of, for example, Rural Press, which I think now owns the *Canberra Times*. But it is a very broad question, covering all newspapers. It is a question of asking how on earth you can do anything about it—I'm not sure even an ombudsman would be able to. But I suspect an ombudsman might be one person who may be able to.

Rod Tiffen — I think your historical point is accurate. As I understand it, the trade figures where you could say that one commodity was sold overwhelmingly by one company used to be left out, or was left vague. That is an important point. I shouldn't have implied that this is just a completely new thing, although I think it is now on a much different and more important scale than it used to be, say twenty years ago.

I would think that the disclosures that I'm talking about as being important to the quality of our public life apply also to the media. Many media have codes whereby journalists have to reveal, for example, whether they have shareholdings in a company they are writing about. That's all to the good. I would think also that it is time that there was a register, published annually, of what sorts of non-professional payments went to various figures in the news so that they gave their story exclusively to one group and not another. The stations argue that paying people like that is a way of enhancing the public's right to know. In fact it's the complete reverse, because those payments are not just to talk to, say, Channel Nine, but to refuse to talk to Channel Seven, Channel Ten, ABC and SBS. In that sense I think they're a threat to the free flow of information, especially if, after signing a contract with one, the questions then are very soft. There were some moves in this direction maybe two years ago, by Channel Seven and Channel Nine, but they fizzled out.

On the question of advertisers, I'm old enough to remember when it used to be said that the *Melbourne Herald* was published on the back of Myers ads. You could find all sorts of good news about Myers in the *Melbourne Herald*, but not very much bad news. The more diversified the sources of advertising, the more this is taken care of. But where it has become particularly acute is in the growth of supplements. In travel supplements, computer supplements, motoring supplements, there seems to be a reluctance to get stuck in too hard—it's started to fall more into the realm of infotainment, rather than journalism, with a reluctance to show things that may have gone wrong with various companies or industry standards.

As a friend of mine said, those travel programs are devoted to showing the sun, without the sunburn. I think that's right.

The news media would oppose it strenuously, but there is a bit to be said not just for declaring the individual journalist's shareholdings, but for declaring the amount that the newspaper gets in advertising from a company that they are writing about. I think this is a long way off, and it would meet with great opposition. I must also admit that I haven't thought through the practicalities of it.

Question — Towards the end of your lecture you outlined three areas or institutions of our society—one of them being the Parliament—which needed attention in regard to the stimulus that they may give, perhaps unintentionally, to corruption and the lack of probity in our society. I suggest that there is one that you didn't mention. There is an institution called the International Institute for Democracy and Electoral Assistance in Stockholm, which is a clearing house for ideas about democratic practice. It also gives advice and practical assistance to the development of democracy in countries that are relatively new to it, like those of the former Soviet Union, in the third world and in Eastern Europe.

It said quite recently about Australia: 'on the Australian model, compulsory voting will not only produce a marginal increase in turnout, but also increase the number of people who habitually buy or lie their way out of complying with the law.' What do you make of the impact on probity, intellectual honesty and honesty generally in this society of our system of compulsory voting? Bearing in mind that almost all other countries which used to practice compulsory voting have abandoned it in the last twenty or thirty years—one of the principal reasons for doing so being the destructive influence it was having on honesty in their societies?

Rod Tiffen — To tell the truth, I vacillate on that question. With compulsory voting, it has been argued that several of our elections are determined by those who swing at the last minute, who tend to be the most ignorant, and so forth, and that you may get a different result if only the more interested voters turn out. On the other hand, there is something to be said for a parliament elected by the whole population and not just by less than 50 per cent of the population, as you get in the United States at times. So I don't have a firm consistent opinion on this.

I would like to say two other things about it. One is a tale of my own hypocrisy, I guess. I had the privilege in 1994 of being a monitor during South Africa's first democratic election and it was a very, very moving time. The voting was to open at 8.00am, and by 6.30am people were already queuing in the voting booths, with queues half a kilometre long, because they were so keen to vote. Feelings were very strong on that day, and I thought, well, I must never take this right to vote for granted again. The first election that I came back to was a local council election and, because of a car mix up between my wife and me, I forgot to vote, and had to pay a fifty dollar fine. So I don't know that I'm best person to comment on your proposal.

I also think that a more important issue is the codes of conduct that we have for behaviour by parliamentarians and others—many of which are good in content. The question really is, who is to enforce them? Looking at the explosive question of whether a minister should be forced to resign, there are some unique aspects of the decision-making process, the most important one of which is that that decision is the prime minister's, as the leader of the same party that the alleged transgressor belongs to. I would like to see not only a strengthening of such codes, but their enforcement

moving towards a more independent body. That is more important than the issues you mentioned. That would be one of the more important moves for raising the conduct of our public life.

Question — Regarding the power of the press, and the freedom of the press, who has the final say? The editor or the proprietor? It's keeping the people in the dark, in ignorance. How would you view that?

Rod Tiffen — In the private media, on those issues that really count to them, you could argue that the proprietor has the final say. Certainly in theory, the proprietor always has the potential for the final say. Most of the time, that is a power that is not exercised. However, what is perhaps more important is that on the whole we have a middle management in these news organisations who are keen to please their superiors—sometimes more keen to please their superiors than the superiors may want.

A recent case that comes to mind—and I don't know if I'm being too parochial here—is the Murdoch press' coverage of the decline and possible disappearance of the South Sydney Rabbitohs Rugby League Club. Essentially, for their corporate strategy, News Limited wanted them to disappear, and yet there was an uprising of popular sentiment against it. One would have thought that this was a perfect *Daily Telegraph* story. I think it was the second or third biggest demonstration in the last five or ten years in Sydney, with Ray Martin, Andrew Denton, a host of celebrities, Laurie Brereton and I think a Liberal MP as well, at the Town Hall. Yet it barely got covered in the *Daily Telegraph*. That, to me, was not a decision made on the intrinsic merits of the news story, but a decision made on the corporate interests of the Murdoch corporation.

I think in stories like that, the proprietor's say rules. On the other hand, you could not run a good newspaper that maintains its credibility with its readers if you did not trust your reporters and editors to make professional news judgements most of the time. So proprietorial intervention is relatively rare. I think middle management's desire to please the proprietors is somewhat more common, and I think that together these things probably influence a fairly small proportion of all our news, most of which is done by the journalists and editors on what they consider are the intrinsic merits of the issue. That's probably too vague, but it is the best I can do.

Survey of Literature on the First Parliament

Kay Walsh

The first parliament of the Commonwealth of Australia opened in Melbourne on 9 May 1901. The foundation parliamentarians, consisting of 36 senators and 75 members of the House of Representatives, sat in an inaugural session which ran until 10 October 1902, and a second session between 26 May and 22 October 1903.

This survey examines sources that deal with the formation and working of the first parliament, without venturing into the broad area of the long-term results of legislative and political issues which it addressed.

Bibliographies

The history of the federation movement in the second half of the nineteenth century has been a focus of research and has received detailed attention from bibliographers. The bibliography by L.F. Crisp in *The Later Australian Federation Movement, 1883-1901: Outline and Bibliography* (1979) remains an admirable summary of federation literature to the time of its publication. This work is now complemented by *Federation: the Guide to Records* (1998), a landmark work published by Australian Archives, which gathers details of archives and manuscripts in Australian repositories relating to federation and its aftermath. J.D. Holmes' typescript 'Bibliography of federation' in the National Library (ms 304), remains a valuable and under-used resource.

Historians, political scientists and biographers have generally examined the first parliament in the context of a broader study, and this is reflected in its bibliographic treatment. No bibliography has focused exclusively on the early parliament, although a number have included relevant material. These included J.J. Pettifer's 'Bibliography' in his 1981 edition of *House of Representatives Practice*, R.L. Cope's

'Parliament, parties and governments' in *Australians: a Guide to Sources* (1987), Robert Goehlert's *The Parliament of Australia: a Bibliography* (1988), Albert Liboiron's *Federalism and Intergovernment Relations in Australia: a Bibliography* (1967) and Henry Mayer's large, diffuse work in two volumes, *ARGAP* (1976) and *ARGAP2* (1984). Relevant bibliographies of note in published histories are in L.F. Crisp's *Australian National Government* (1st published 1965) and F.K. Crowley's *A New History of Australia* (1974). Many of the histories listed below also contain bibliographies.

Parliamentary, political and legal histories

Gavin Souter has written two histories which deal comprehensively with the early years of the federal parliament: *Acts of Parliament: a Narrative History of the Senate and the House of Representatives* (1988) and *Lion and Kangaroo: the Initiation of Australia, 1901-1919* (1976). Geoffrey Sawer's *Australian Federal Politics and Law 1901-1929* (1956) examines each parliament from 1901 in terms of legislation, procedure and party politics. *Australia's Commonwealth Parliament 1901-1988,* edited by G.S. Reid and Martyn Forrest (1989) contains ten thematic essays on the Commonwealth parliament.

Some works by contemporary writers throw light on the work of the first parliament. Foremost among these is *Federated Australia* (1968), selections from Alfred Deakin's anonymous column in the *Morning Post* during the early years of federation. Henry Gyles Turner wrote *The First Decade of the Australian Commonwealth: a Chronicle of Contemporary Politics 1900-1910* (1911) and B.R. Wise *The Commonwealth of Australia* (1909). George Cockerill, an *Age* journalist, wrote anecdotes of early parliamentarians in *Scribblers and Statesmen* (1948). Some autobiographies of early federal parliamentarians are mentioned below.

The Handbook of Australian Government and Politics, 1890-1964 (1968) by Colin Hughes and Bruce Graham is a standard source for state and federal ministries and election results for Commonwealth and states for the period covered. *The Business of the Senate 1901-1906*, published by the Department of the Senate in 1999, provides a summary of matters dealt with by the Senate in that period. *Australian Senate Practice* (first published 1953; 7th and subsequent editions titled *Odgers' Australian Senate Practice*) and *House of Representatives Practice* (first published 1981) provide details of practice in both parliamentary houses back to federation. *A Federal Legislature: the Australian Commonwealth Parliament 1901-1980* by Joan Rydon contains analyses of federal elections and representation, and careers and social backgrounds of members of parliament from 1901. *The Biographical Handbook and Record of Elections for the Parliament of the Commonwealth*, first published by the Parliamentary Library in 1915, contains short political biographies of all federal parliamentarians up to that time, and summaries of voting in federal elections 1901-1914.

General histories of Australia deal with varying detail with the first years of the Commonwealth Parliament. Of these, W.K. Hancock's essay 'The Commonwealth 1900-1914' in the volume 'Australia' of the *Cambridge History of the British Empire* (vol. VII, Part 1, 1933) is a very lucid examination of the issues facing the first parliament. In the same volume, essays by W. Harrison Moore 'The constitution and its working' and F.W. Eggleston 'Australia and the Empire 1855-1921' are also

relevant. Other works providing some degree of detail include C.M.H. Clark *A History of Australia, vol v: the People Make the Laws, 1885-1915* (1981), F.K. Crowley (ed) *A New History of Australia* (1974, chapter 7), Gordon Greenwood, *Australia: a Social and Political History* (1955, chapter 10), John Molony, *The Penguin Bicentennial History of Australia* (1987), Ernest Scott, *A Short History of Australia* (1916), A.N. Smith, *Thirty Years: the Commonwealth of Australia 1901-1931* (1933) and Russell Ward, *A Nation for a Continent: a History of Australia 1901-1975* (1977).

Books on the Australian Constitution in the early years of its implementation include W.G. McMinn, *A Constitutional History of Australia* (1979), W.H. Moore, *The Constitution of the Commonwealth of Australia* (second edition, 1910), and *The Legislative Powers of the Commonwealth and States of Australia* (1919), W.A. Wynes, *Legislative, Executive and Judicial Powers in Australia* (4th edition, 1970), and L. Zines, *The High Court and the Constitution* (4th edition, 1997). Although written before the first parliament sat, J. Quick and R.R. Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) and Andrew Inglis Clark, *Studies in Australian Constitutional Law* (1901) are fundamental to an understanding of how the parliament was intended to function.

Facets of the work of the early parliament receive attention in a number of books with particular themes. Colin Hughes has published research dealing with Australian elections, including, with Bruce Graham, *Voting for the Australian House of Representatives, 1901-1964* (1974), and see also B.D. Graham 'The choice of voting methods in federal politics, 1902-1918' in Colin Hughes (ed) *Readings in Australian Government* (1966). P. Loveday, A.W. Martin and R.S. Parker in *The Emergence of the Australian Party System* (1977) provide an analysis of party voting within the federal parliament up to about 1910. Ian Marsh in chapter 10 of *Beyond the Two Party System* (1995) examines the multi-party system which prevailed in the parliament in the first years following federation. In *Radical and Working Class Politics: a Study of Eastern Australia 1850-1910* (1960), Robin Gollan examines the legislative program of the early parliament in the light of the emergence of the Labor Party. John Rickard, in *Class and Politics; New South Wales, Victoria and the Early Commonwealth 1890-1910* (1976), considers the effects of class on labor and anti-labor representation. Ross McMullin, in his history of the ALP 1891-1991 (1991), *The Light on the Hill,* includes material on the early Federal Parliamentary Labor Party.

Other books which deal with aspects of the early commonwealth parliament, with largely self-explanatory titles, include K.T. Livingston, *The Wired Nation Continent: the Communication Revolution and Federating Australia* (1996), John Mordike, *An Army for a Nation: a History of Australian Military Development 1880-1914* (1992) (chapter 4; the first Defence bill); Myra Willard *History of the White Australia Policy to 1920* (1923), and D.I. Wright, *Shadow of dispute: Aspects of Commonwealth-State Relations 1901-1910* (1970).

Parliamentary and other official publications

A range of parliamentary publications date back to federation and comprise a primary source for research. The *Australian Parliamentary Papers* series, documenting much work of the chambers and parliamentary committees, commenced in 1901. The *Commonwealth Parliamentary Debates* provide a transcript of debate in both houses

from the first day of sitting. Copies of bills and acts were published as they were considered and passed; the multi-volume work *Acts of the Australian Parliament 1901-1973* appeared in 1972-77, and in 1914, a 3-volume *Statutory Rules from 1901 to 1914 made under Commonwealth Acts.* Each of the houses of parliament published an official record of its proceedings daily; *Journals* in the case of the Senate and *Votes and Proceedings* in the case of the House of Representatives, and each house from commencement published a *Notice Paper*. In 1903 the Senate published *Standing Orders Adopted by the Senate 19 August 1903*, and the House of Representatives published, in its parliamentary papers, *Temporary Standing Orders*, in 1901.

Other official publications of relevance as primary sources include the *Commonwealth Law Reports* from 1903; the *Australian Argus Law Reports*, which included High Court decisions after 1903, and became the *Australian Law Report* in 1973; *Commonwealth Arbitration Reports* from 1905; the *Classified Election Returns* issued by the Commonwealth Electoral Office from 1901; the *Commonwealth of Australia Gazette* from 1901; the *Official Yearbook of the Commonwealth of Australia* (No. 1, 1901-7, issued in 1908); and *Reports* of the Conferences of Secretaries of State and Prime Ministers of Self-Governing Colonies (in *Parliamentary Papers* 1902 and 1907/8) and State Premiers' conferences (Conference of Commonwealth and States), also in *Parliamentary Papers*.

Unpublished sources

Collections of papers relating to members or associates of the first parliament are held in public repositories in Australia. *Parliamentary Voices in History* (1991), compiled by Carmel McInerny, is a guide to the location of the personal papers of federal parliamentarians, including a number of members of the first parliament. The National Library of Australia holds major collections of papers of Edmund Barton (ms 51), Alfred Deakin (ms 1540), William Morris Hughes (ms 1538), Hugh Mahon (ms 93), Patrick McMahon Glynn (ms 553, 1196, 1084), King O'Malley (ms 460) Littleton Groom (ms 236) and Josiah Symon (ms 1736). Lesser collections relate to Andrew Fisher (ms 2919), James Fowler (ms 2280), Robert Garran (ms 2001), Henry Bournes Higgins (ms 1057), Frederick Holder (ms 2268) J.M.H. Cook (ms 601), John Kirwan (ms 277), William Lyne (ms 129), Lord Tennyson (ms 1963), John Christian Watson (ms 451), Isaac Isaacs (ms 2755), George Foster Pearce (ms 213, 192), and Samuel Mauger (ms 1895). The Mitchell Library, Sydney, holds papers of Samuel Walker Griffith (mss Q181-199), Richard O'Connor (mss F4) and on microfilm, the Earl of Hopetoun (mfm 936-937). The papers of James George Drake are held in the Oxley Library, Brisbane (OM 66-4), and papers relating to John Forrest are in the Battye Library (WA). A typescript by an *Argus* reporter, Herbert Campbell-Jones, 'A cabinet of captains: the romance of Australia's first federal parliament' [1935] (in the National Library at ms 8905) is also of interest.

Biographies

There are a number of scholarly biographies of early parliamentarians. Foremost among these are J.A. La Nauze's *Alfred Deakin* (2 vols, 1965), L.F. Fitzhardinge's *William Morris Hughes* (1964), F.K. Crowley's biography of John Forrest (1971 and 2000) and *Charles Cameron Kingston* by Margaret Glass (1997). Others include *Pit Boy to Prime Minister: the story of the Rt Hon Sir Joseph Cook* by G. Bebbington (1988) and *Sir Joe: a Political Biography of Sir Joseph Cook* by J. Murdoch (1996);

King O'Malley by Dorothy Catts (1957), *King O'Malley* by Arthur Hoyle (1981) and *O'Malley, MHR* by Larry Noye (1985); *James Howard Catts MHR* by Dorothy Catts (1953); *Isaac Isaacs* by Zelman Cowen (1967), and *Sir Isaac Isaacs* by M. Gordon (1963); *Alfred Deakin* by Walter Deakin (1941); *Nation Building in Australia: the Life and Work of Sir Littleton Groom* by Littleton Groom (1941); *Quiet Decision: a Study of George Foster Pearce* by Peter Heydon (1965); *George Reid* by W.G. McMinn (1989); *Patrick McMahon Glynn* by G. O'Collins (1965); *Henry Bournes Higgins* by Nettie Palmer (1931) and *H.B. Higgins* by John Rickard (1984); and *Edmund Barton* by J. Reynolds (1948). A major biography of Edmund Barton, by Geoffrey Bolton, is in publication.

Collective biographies which include early parliamentarians include Joan Rydon's *Biographical Register of the Australian Parliament, 1901-1972* (1975) and *The Australian Dictionary of Biography* (1966-). The first volume of a *Biographical Dictionary of the Australian Senate* is in press, and *The Parliamentary Handbook* has been mentioned above. There are also summaries of the lives and political careers of a high proportion of the first parliamentarians in the various biographical registers of the Australian colonial parliaments.

Autobiographies

Alfred Deakin's *The Federal Story* (first published 1944) does not extend to an account of Deakin's experiences in the first parliament, but it does provide pen portraits of a number of men who were later federal parliamentarians. *Prosper the Commonwealth* by Robert Garran is a first-hand account of the early years of the commonwealth by the first secretary of the Attorney-General's department, and provides insights into the early legislative program, and drafting. *Patrick McMahon Glynn: Letters to his Family 1874-1927*, published in 1974, includes letters about the opening of parliament and the first years of sitting by a member of the first parliament. Billy Hughes wrote two volumes of autobiography, one of which, *Policies and Potentates* (1950) is relevant to this period, as is *My Life's Adventures* by John Kirwan (1936), *Carpenter to Cabinet* by George Foster Pearce (1951); *My Reminiscences* by George Reid (1917) and, very slightly, *Australia's Awakening* by William Guthrie Spence (1909).

Papers on Parliament

1 Peter O'Keeffe, *Spoilt for a Ha'p'worth of Tar. How Bureaucratic Law-making can Undermine the Ideals of Civil Liberty,* April 1988

2 Anne Lynch, *Legislation by Proclamation—Parliamentary Nightmare, Bureaucratic Dream*
John Vander Wyk, *The Discharge of Senators from Attendance on the Senate upon a Dissolution of the House of Representatives,* July 1988

3 Peter O'Keeffe, *Deregulation, Merits Review and the Withering of Parliamentary Sovereignty,* December 1988

4 Brian Galligan, *No Bill of Rights for Australia,* July 1989

5 Jenny Hutchison, *The Big Picture on the Small Screen*, November 1989

6 *Senate Estimates Scrutiny of Government Finance and Expenditure. What's it for, does it work and at what cost?* March 1990
Papers presented at a Parliamentary Workshop, October 1989

7 *Unchaining the Watch-Dogs,* Parliament House, Canberra, March 1990
- John Taylor, 'The Auditor-General—Ally of the People, the Parliament and the Executive'
- Dennis Pearce, 'The Commonwealth Ombudsman: Present Operation and Future Developments'
- Cheryl Saunders, 'The Role of the Administrative Review Council'

8 Chandran Kukathas, *Democracy, Parliament and Responsible Government*, with additional observations by David Lovell and William Maley, June 1990

9 A.W. Martin, *Parkes and the 1890 Conference,* July 1990

10 Peter Bayne, *Tribunals in the System of Government,* July 1990

11 Ian Marsh, *The Committee System of the UK House of Commons: Recent Developments and their Implications for Australia,* March 1991

12 *Senate Committees and Responsible Government*
Proceedings of the Conference to mark the twentieth anniversary of Senate Legislative and General Purpose Standing Committees and Senate Estimates Committees, October 1990

13 *One People, One Destiny—Papers given at a series of Senate Occasional Lectures to commemorate the centenary of the National Australasian Convention 1891*, November 1991
- The Rt Hon. Sir Zelman Cowen, '"Is it not time?" The National Australasian Convention of 1891—a milestone on the road to federation'
- Professor Geoffrey Bolton, 'Samuel Griffith: the Great Provincial'

- Professor W.G. McMinn, 'Politics or Statesmanship? George Reid and the Failure of the 1891 Federation Movement'
- Professor Leslie Zines, 'What the Courts have done to Australian Federalism'
- Mr John McMillan, 'Constitutional Reform in Australia'
- The Hon. Frank Neasey, 'Andrew Inglis Clark and the Australian Constitution'

14 *Parliamentary Perspectives 1991,* February 1992
- Harry Evans, 'Parliamentary Reform: New Directions and Possibilities for Reform of Parliamentary Processes'
- John Black, Michael Macklin and Chris Puplick, 'How Parliament Works in Practice'
- John Button, 'The Role of the Leader of the Government in the Senate'
- Hugh Collins, 'Political Literacy: Educating for Democracy'
- Senate Procedural Digest 1991

15 Stephen Argument, *Parliamentary Scrutiny of Quasi-legislation,* May 1992

16 *Two Historical Views of Parliaments: Ireland and Russia*, June 1992
- Harry Rigby, 'Russia's Parliaments'
- Professor Oliver MacDonagh, 'Parnell and the Art of Politics'

17 *Trust the Women: Women in Parliament*, September 1992
- Senator Patricia Giles, 'Women in the Federal Parliament'
- Dr Marian Sawer, 'Housekeeping the State: Women and Parliamentary Politics in Australia'
- The Hon. Susan Ryan, AO, 'Fishes on Bicycles'
- Janine Haines, 'Suffrage to Sufferance: 100 Years of Women in Parliament'
- The Hon. Dame Margaret Guilfoyle, DBE, 'The Senate: Proportionately Representative but Disproportionately Male'

18 *Parliaments: Achievements and Challenges*, December 1992
- Bill Blick, 'Accountability, the Parliament and the Executive'
- Harry Evans, 'Parliament: An Unreformable Institution'
- Senator Bruce Childs, 'The Truth About Parliamentary Committees'
- Brian Galligan, 'Parliamentary Responsible Government and the Protection of Rights'
- Senator The Hon. Terry Aulich, 'Parliament's Last Stand'
- Senator The Hon. Peter Durack, 'Parliament and People'
- Senate Procedural Digest 1992

19 *Constitution, Section 53: Financial Legislation and the Houses of Commonwealth Parliament*, May 1993
- 'Amendments and Requests: Disagreements Between the Houses', Clerk of the Senate
- 'Amendments and Requests: A Background Paper', Office of the Clerk of the House of Representatives
- 'The Senate: Amendment of Taxation and Appropriation Legislation', Clerk of the Senate

- 'Supply', Clerk of the Senate

20 *The Future of Parliaments and Their Libraries:* A Review Article By Russell Cope, October 1993
(Includes Parliamentary Bibliography)

21 *Parliament and the Constitution: Some Issues of Interest*, December 1993
- Ian Temby QC, 'Safeguarding Integrity in Government'
- Professor Geoffrey de Q Walker, 'Constitutional Change in the 1990s: Moves for Direct Democracy'
- Professor Thomas J. Courchene, 'Aboriginal Self-Government in Canada'
- Professor Roger Wettenhall, 'Corporatised Bodies Old and New: Is Parliament Missing Out?'
- Professor Brian de Garis, 'How Popular was the Popular Federation Movement?'
- Dr Greg Craven, 'The Founding Fathers: Constitutional Kings or Colonial Knaves?'

22 *Views of Parliamentary Democracy*, February 1994
- Ferdinand Mount, 'Parliament and the Governance of Modern Nations'
- Kathy Martin Sullivan MP, 'Women in Parliament—Yes! But What's It Really Like?'
- Professor Michael Crommelin, 'Mabo—The Decision and the Debate'
- Professor Geoffrey Brennan, 'Australian Parliamentary Democracy: One Cheer for the Status Quo'

23 *Parliaments and Constitutions Under Scrutiny*, September 1994
- Derek Drinkwater, ' "Catspaw of the Minister?" Membership of the Joint Parliamentary Committee on Foreign Affairs, 1952–1967'
- Professor Ulrich Klöti, 'Reform Trends in Swiss Government'
- Kathleen Burns, 'A Stranger in Paradise? A Foreign Correspondent's View of the Parliamentary Press Gallery'
- Professor Kathleen Mahoney, 'A Charter of Rights: the Canadian Experience'
- Fred Chaney, 'Parliament: Our Great Expectations'
- Professor James Walter, 'What Has Happened To Political Ideas?'

24 *Essays on Republicanism: small r republicanism*, September 1994
- Harry Evans 'A Note on the Meaning of "Republic"'
- 'Republicanism, Continued: A brief rejoinder to Graham Maddox'
- 'Republicanism and the Australian Constitution'
- 'Introduction: the Agenda of the True Republicans'
- 'Keeping the Australian Republic'
- 'Essentials of Republican Legislatures: Distributed Majorities and Legislative Control'
- 'Australia's Real Republican Heritage'

25 *Constitutions, Rights and Democracy: Past, Present and Future*, June 1995

- Professor Peter Russell, 'Constitutional Odyssey: Can Canada Become a Sovereign People?'
- Professor Henry J. Steiner, 'Cultural Relativism and the Attitude of Certain Asian Countries towards the Universality of Human Rights'
- Senator Cheryl Kernot, 'For Parliament or Party: Whose Democracy is it, Anyway?'
- Dr James Warden, 'Parliament, Democracy and Political Identity in Australia'
- Dr Helen Irving, 'Who are the Founding Mothers? The Role of Women in Australian Federation'

26 *Republicanism, Responsible Government and Human Rights*, August 1995

- The Hon. Justice Michael Kirby, AC, CMG, 'Human Rights—the International Dimension'
- Senator Baden Teague, 'An Australian Head of State: the Contemporary Debate'
- Harry Evans, 'Electing a President: the elite versus the public'
- David Hamer, DSC, 'Can Responsible Government Survive in Australia?'
- John Taylor, 'Parliament and the Auditor–General'
- Dr Suri Ratnapala, 'Westminster Democracy and the Separation of Powers: Can they Co–exist?'
- Peter C. Grundy, 'Prima Facie Native Title'

27 *Reinventing Political Institutions*, March 1996

- Professor Beryl A. Radin, 'Reinventing Government in the United States: What is Happening with the National Performance Review?'
- Professor Neville Meaney 'The Commonwealth and the Republic: an Historical Perspective'
- Senator the Hon. Margaret Reynolds, 'Women, Pre-selection and Merit: Who Decides?'
- Pru Goward, 'The Medium, not the Messenger'
- Sir David Smith, 'An Australian Head of State: an Historical and Contemporary Perspective'
- Senator the Hon. Michael Beahan, 'Majorities and Minorities: Evolutionary Trends in the Australian Senate'
- Professor Howard Cody, 'Australia's Senate and Senate Reform in Canada'

28 *Poets, Presidents, People and Parliament: Republicanism and other issues*, November 1996

- Harry Evans, 'The Australian Head of State: Putting Republicanism into the Republic'
- George Winterton and David Flint, 'The Election of an Australian President'
- Les A. Murray, AO, 'And Let's Always Call It the Commonwealth: One Poet's View of the Republic'
- K.S. Inglis, 'Parliamentary Speech'
- Gwynneth Singleton, 'Independents in a Multi-Party System: the Experience of the Australian Senate'
- Jack Waterford, 'Ministerial Responsibility for Personal Staff'
- Derek Drinkwater, 'Rupert Loof: Clerk of the Senate and Man of Many Parts'

29 *Parliaments in Evolution: Constitutional Reform in the 1990s*, March 1997

- David Butler, 'Ministerial Accountability: Lessons of the Scott Report'
- Marilyn Lake, 'Women's Changing Conception of Political Power'
- Deryck Schreuder, 'Reshaping the Body Politic—the South African Experience'
- Campbell Sharman, 'Defining Executive Power: Constitutional Reform for Grown-Ups'
- John Uhr, 'Keeping Government Honest: Preconditions of Parliamentary Effectiveness'

30 *The Constitution Makers*, November 1997

- The Hon. John Bannon, 'Towards Federation: the Role of the Smaller Colonies'
- Professor Stuart Macintyre, 'A Federal Commonwealth, an Australian Citizenship'
- Professor Geoffrey Bolton, 'The Art of Consensus: Edmund Barton and the 1897 Federal Convention'
- Dr Mark McKenna, 'Sir Richard Chaffey Baker—the Senate's First Republican'
- Professor Greg Craven, 'The High Court and the Founders: an Unfaithful Servant'
- Dr Kathleen Dermody, 'The 1897 Federal Convention Election: a Success or Failure?'
- Derek Drinkwater, 'Federation Through the Eyes of a South Australian Model Parliament'

31 *Papers on Parliament No. 31*, June 1998

- Dr Anne Summers, 'The Media and Parliament: Image-making and Image-breaking',
- Hugh Mackay, 'Three Generations: the Changing Values and Political Outlook of Australians'
- Professor Marian Sawer, 'Mirrors, Mouthpieces, Mandates and Men of Judgement: Concepts of Representation in the Australian Federal Parliament'
- Harry Evans, 'Bad King John and the Australian Constitution: Commemorating the 700th Anniversary of the 1297 Issue of Magna Carta'
- Dr Henry Reynolds, 'Aborigines and the 1967 Referendum: Thirty Years On'
- Richard Broinowski, 'Robert Arthur Broinowski: Clerk of the Senate, Poet, Environmentalist, Broadcaster'
- Kelly Paxman, 'Referral of Bills to Senate Committees: an Evaluation'
- Juliet Edeson, 'Powers of Presidents in Republics'

32 *The People's Conventions: Corowa (1893) and Bathurst (1896)*, December 1998

Corowa

- Stuart Macintyre, 'Corowa and the Voice of the People'
- Helen Irving, 'When Quick Met Garran: the Corowa Plan'
- David Headon, 'Loading the Gun: Corowa's Role in the Federation Debate'
- Jeff Brownrigg, ' "Melba's Puddin'": Corowa, Mulwala and Our Cultural Past'

- James Warden, ‘From Little Things Big Things Grow: Thresholds of Citizenship (1893–1993)’
- Paul Keating, ‘The Prime Minister’s Centenary Dinner Speech, Corowa, 31 July 1993’

Bathurst

- John Bannon, ‘Return Tickets at Single Fares: the Bathurst Convention as a Representative National Gathering’
- Stuart Macintyre, ‘The Idea of the People’
- John Hirst, ‘Federation and the People: a Response to Stuart Macintyre’
- David Headon, ‘Resurrecting the Federal Ideal: Mr Astley goes to Bathurst’
- A.E. Cahill, ‘Cardinal Moran, Bathurst and the Achievement of Federation’
- Tessa Milne, ‘Barton at Bathurst: ‘Front Stage/Backstage’’
- Mark McKenna, ‘John Napoleon Norton and the 1896 Bathurst Convention’
- Robin McLachlan, ‘A Foreign Agent Unmasked: Colonel Bell at Bathurst’
- Kevin Livingston, ‘Joseph Cook’s Contribution’
- Jeff Brownrigg, ‘ “The Sentiment of Nationality”: Bathurst and Popular Support for Federation’

33 *The Senate and Good Government, and Other Lectures in the Senate Occasional Lecture Series, 1998*, May 1999

- Clem Lloyd, ‘The Influence of Parliamentary Location and Space on Australia’s Political News Media
- Philippa Smith, ‘Red Tape and the Ombudsman’
- Elizabeth Evatt, ‘Meeting Universal Human Rights Standards: the Australian Experience’
- Hilary Charlesworth, ‘Globalisation, the Law and Australian Sovereignty: Dangerous Liaisons’
- Chandran Kukathas, ‘Tolerating the Intolerable’
- David Headon, ‘Republicanism, Politicians, and People’s Conventions—Goulburn 1854 to Canberra 1998’
- Scott Reid, ‘Curbing Judicial Activism: the High Court, the People and a Bill of Rights’
- Martin Krygier, ‘Fear, Hope, Politics and Law’
- Campbell Sharman, ‘The Senate and Good Government’
- R.L. Cope, ‘Biographical Dictionaries of Parliamentarians: Considerations and Examples’

34 *Representation and Institutional Change: 50 Years of Proportional Representation in the Senate*, December 1999

- Marion Sawer, ‘Overview: Institutional Design and the Role of the Senate’
- John Uhr, ‘Why We Chose Proportional Representation’
- Elaine Thompson, ‘The Senate and Representative Democracy’
- Arend Lijphart, ‘Australian Democracy: Modifying Majoritarianism?’
- Harry Evans, ‘Accountability Versus Government Control: the Effect of Proportional Representation’
- Murray Goot, ‘Can the Senate Claim a Mandate?’
- Marian Sawer, ‘Dilemmas of Representation’
- Helen Coonan, ‘Survival of the Fittest: Future Directions of the Senate’

- Andrew Bartlett, ‘A Squeeze on the Balance of Power: Using Senate ‘Reform’ to Dilute Democracy’
- John Faulkner, ‘A Labor Perspective on Senate Reform’
- Fred Chaney, ‘Should Parliament be Abolished?’
- Dee Margetts, ‘The Contribution of The Greens (WA) to the Australian Senate’
- Campbell Sharman, ‘The Representation of Small Parties and Independents’
- Paul Bongiorno, Michelle Grattan and Melissa Langerman, ‘Reporting the Senate: Three Perspectives’
- Peter Sekuless and Frances Sullivan, ‘Lobbying the Senate: Two Perspectives’
- Anne Lynch, ‘Personalities versus Structure: the Fragmentation of the Senate Committee System’
- Ian Marsh, ‘Opening Up the Policy Process’
- Kate Lundy, ‘Cyberdemocracy and the Future of the Australian Senate’
- Geoffrey Brennan, ‘The Senate and Proportional Representation: Some Concluding Observations’

Senate Briefs

1 *Electing Australia's Senators*, July 1999

2 *The Opening of Parliament*, June 1999

3 *Women in the Senate,* September 1999

4 *Senate Committees*, September 1999

5 *Consideration of Estimates*, September 1999

6 *The President of the Senate*, March 1998

7 *Disagreement Between the Houses,* April 1998

8 *The Senate and Legislation*, September 1998

9 *Origins of the Senate*, March 1998

10 *Role of the Senate*, September 1999

11 *Parliamentary Privilege*, September 1998

12 *Questions*, July 1998

13 *Rights and Responsibilities of Witnesses before Senate Committees,* June 1999

14 *Ministers in the Senate,* July 1999

Copies of *Senate Briefs* are available from the following address:

Research Section
Procedure Office
Department of the Senate
Parliament House
CANBERRA ACT 2600

Telephone: (02) 6277 3074

Senate Briefs are available on line at
www.aph.gov.au/senate/pubs/briefs/index.htm

Order Form for *Papers on Parliament*

On publication, new issues of *Papers on Parliament* are sent free of charge to a mailing list. If you wish to add your name to the list, fill in the details below, copy it, and sent it to:

Research Section
Procedure Office
Department of the Senate
Parliament House
CANBERRA ACT 2600

Telephone: (02) 6277 3074

I wish to have my name placed on the Senate Department's mailing list for future issues of *Papers on Parliament*.

Name: .....

Address: .....

…….

Signature: ……

Back copies of *Papers on Parliament* may be available on request.

Most past issues of *Papers on Parliament* are available on line at
www.aph.gov.au/senate/pubs/papers.htm