

# Serving the Senate: The Legacy of Harry Evans\*

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## Introduction

It is indeed a singular honour to have been asked to deliver the inaugural address in honour of Harry Evans' forty years of parliamentary service. It is fitting that this should occur in this Parliament House that was opened in the same year that Harry became Clerk of the Senate. I am hopeful—as I am sure are the organisers of this lecture series in the Department of the Senate—that this annual address will, over time, provide a comprehensive account of the contributions that Harry Evans has made to the workings of the Senate and through it to the operation of the federation.

My approach will be a personal one for two reasons: first Harry was one of those people who looked you in the eye and worked with you as a person not as another addition to his workday and second I wanted to record the human interactions that this man of deep conviction and daunting intellect had. I know no better way to do this than by setting out what I encountered over the decade of the 1980s.

On 1 July 1981, the Australian Democrats gained the balance of power in the Senate and I took on the role of Whip on my first day in the Senate—an unenviable task at the best of times and this was not the best of times given the hostility of the then government to our very existence. Luckily for me, I had two great mentors, Don Chipp and Harry Evans. Don had twenty-five years of experience in the House of Representatives and the Senate and was a quick thinker in the often fast-moving parliamentary struggles. He was also someone who thought that upsetting the apple cart was a useful tactic. On the other hand, Harry's expertise was not so much about the immediate reaction but about the underpinning procedures, practices and structures that needed to be addressed. These two men were almost the embodiment of Nobel Prize winner, Daniel Kahneman's System 1 and System 2 where System 1 is fast, instinctive and emotional while System 2 is slower, more deliberative and more logical. It was certainly fortuitous for me that in the early 1980s Harry was given the job of heading up the Procedure Office—an office tasked with not only providing support to the opposition but also with a special brief to assist the minor parties in the Senate with procedural advice and legislative support.

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\* This paper was presented at the inaugural Harry Evans Lecture at Parliament House, Canberra, on 8 September 2015. The Harry Evans Lecture commemorates the service to the Senate of the longest serving Clerk of the Senate, the late Harry Evans. This annual lecture will focus on matters championed by Mr Evans during his tenure as Clerk including the importance of the Senate as an institution, the rights of individual senators and the value of parliamentary democracy.

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In my address today, I would like to reflect upon how Harry went about his task by referring to a number of events which I hope illustrate not only his capacities but also his political philosophy. It may seem strange to suggest that a political philosophy was central to Harry's work when it is normally assumed that the role of the Clerk and his/her various assistants is essentially apolitical. However, I contend it is simply not possible for someone fulfilling such an important role in an effective manner not to bring to it a comprehensive and well-developed philosophical stance. I will contend that, in Harry's case, this stance informed the advice he gave and how and when he gave it.

A good example of this is to consider the idea that gave unity to Harry's extraordinary lifetime contribution—the advancement of the Senate as part of our federated democratic structure. In other words, he took the considered view that the Senate is not only part of our federal parliament as determined by the Constitution but that the Senate should be viewed as a good thing. He believed that enhancement of its role provides more benefits not less. Harry had a clear and cogent view as to what the role of the Senate ought to be and how best that might be achieved. Harry's political philosophy also happened to be one with which I concurred. Nevertheless, it is reasonable to reflect that this concept is not universally admired amongst people in this building and that, from time to time, even prime ministers have been heard to express their emphatic views to the contrary. In other words, his espousal of such a political philosophy was not without significant political and personal risks.

It is this central idea of Senate advancement upon which I wish to focus in this lecture and to do so via a discussion of a number of items that, at least for me as a cross-bench senator, epitomised Harry's approach to his work. I have chosen items with which I was involved in order to unpack not only the theoretical aspects of this work but also to illustrate how this theory became concrete via the day-to-day personal interactions that Harry had with senators who sought his advice and counsel.

### ***Odgers' and standing orders***

As one would expect, Harry carried out his various roles in the Department of the Senate through a wide variety of approaches. A clear and readily accessible example is how he sought to systemise his advice to senators so that it would be seen as part of a coherent whole.

His most impressive intellectual contribution in this regard appeared with his rewriting and simplification of *Odgers' Australian Senate Practice* and the standing orders of the Australian Senate.<sup>1</sup> Unfortunately, the value of these works to enhancing

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<sup>1</sup> Copies of these documents—subsequently updated—are readily obtained via the Senate website.

Senate practice has gone almost unrecognised. In seeking to elucidate Senate practice, Harry was not just about recording what was but also about commenting on practice and illustrating how that practice provided the legislature with an operational Senate fit for purpose. It is only possible to carry out such a task if one has a comprehensive, indeed encyclopedic, understanding of the wide variety of standing orders, how they interact and why, together with an ability to show how such rules enhance the Senate's capacity to carry out its work within the federal parliament. His work on these two volumes consolidated the past, amplified the context at that time and prepared the Senate for its future.

Of course, as Harry was not reluctant to point out, the Senate is rarely under government control in terms of the numbers and so procedures and practices assume a far more important role in the Senate than they do in the House. I well remember often hearing in the corridors of this building the adage 'If you haven't got the logic, then the numbers will do' as an explanation for how a government which has a majority in a chamber will eventually act.

The daily Whips meetings in the Senate at that time were ones where a group of people worked together harmoniously in an attempt to achieve the maximum output from the Senate for all parties concerned. In those early years, I very much appreciated the wise counsel and advice provided to me by both the Labor and Liberal Senate Whips, Ted Robertson and Bernie Kilgariff, both extraordinary personalities. The work that we had to carry out was not easy but our decisions were reached through reasonable discussion and adequate compromise. Of course, this was necessary since it took two of the three Whips to agree in the Senate whereas it only takes one, the Government Whip, in the House. This is one of the reasons that the practices in the Senate have developed differently from those in the House of Representatives where the government almost always has a majority.

The Senate's historic lack of a single group in control has meant that the cross-bench senators, in particular, have had to spend countless hours reading and digesting both *Odgers'* and the standing orders in order to be able to comprehend and be involved in a meaningful way in the often arcane operations of the Senate. Those who remember Senator Harradine will remember how effective he was even though he operated alone for most of his political career. One could but delight in his calling upon seldom-used Senate practices to the consternation of the government of the day and to the gratification of the opposition.

Harry was of the view that all senators ought be able to so contribute and his work on the standing orders and *Odgers'* were directed to providing as much support as possible in order to bring this about. It is testament to Harry's clarity of thought that

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cross-bench senators, whilst coming from a wide range of previous occupations, could still find the operational practices of the Senate as revealed in Harry's writing both comprehensible and comprehensive. For some in Parliament House, providing such support to the cross-bench smacked of subversion of the government of the day but, upon more mature consideration, it was clear that those who occupied the so-called 'balance of power' seats needed to be able to be involved as systematically as possible if the legislative program was to move ahead effectively.

## **Privilege**

Interestingly, the reason for the complete rewrite of *Odgers'* and the standing orders was largely due to another of Harry's controversial approaches and this was his capacity to inspire reform. Again this may seem strange but let me illustrate with what is probably *the* major federation reform with which Harry was involved. This was the historic patriation of parliamentary privilege via the passage of the *Parliamentary Privileges Act 1987*, the consequential adoption by the Senate of the privilege resolutions in 1988 and through a cascading effect the far-reaching amended standing orders adopted in 1989 (for a chronology of the Act see appendix 1). These three intertwined items have Harry's fingerprints indelibly imprinted upon them. All those around at that time will remember Harry's devastating reasoned responses to various judges who sought to assert their court's supremacy over the historic freedom of the parliament to conduct its own business.<sup>2</sup> The clarity and persuasiveness of his written responses ensured comprehensive cross-party support for the historic move to assert the rights and privileges of the parliament within the federation.

Of course, this move had started much earlier with the appointment of a Joint Select Committee on Parliamentary Privilege in 1982 of which I was a member for the two years and two parliaments under the two different governments that it took for us to deliberate and deliver our report. Unfortunately like all other previous attempts to utilise the constitutional power and patriate parliamentary privilege from the House of Commons to the Commonwealth Parliament, our report once presented looked as though it would merely gather dust since the government, like all previous governments of various persuasions, was extremely reluctant to set aside time for such matters out of their busy legislative programs. While the Constitution clearly pointed to the ability of the parliament to declare its own powers, privileges and immunities as well as those of its members and committees, no progress had been made since 1901 despite a number of attempts to do so during that period.

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<sup>2</sup> Harry Evans, 'Parliamentary privilege: reasons of Mr Justice Hunt—an analysis', *Legislative Studies*, Autumn 1987. Reprinted in *Papers on Parliament*, no. 52, December 2009, pp. 15–24.

In 1985, I had introduced a private member's bill into the Senate to give force to the recommendations contained in the report of the Joint Select Committee on Parliamentary Privilege. In the House of Representatives, a fellow committee member and eminent QC, John Spender, the then Member for North Sydney, had also introduced a bill different in style from mine but with the same essential purpose. Regardless of these attempts, no movement had occurred on either bill over a number of sitting months and so, on 9 April 1986, I took the opportunity while debating a proposal from Mr President to intervene in the court case concerning Justice Lionel Murphy<sup>3</sup> in which *inter alia* parliamentary privilege was under attack to suggest that:

There has been 86 years of government in this country and nothing has happened ... In directing my remarks to you, Mr President, I wonder whether it may not be a time for unprecedented action on your part in sponsoring a Bill in this chamber and providing time, as you are able to do, for us to debate that Bill. I would hope that you might give serious consideration to the proposal that I put to you because it seems to me that without your taking some action nothing is ever likely to happen.<sup>4</sup>

Of course, I knew when I put the proposal to the Senate President that it was possible for the presiding officer to introduce such a bill since I had raised the issue with Harry Evans prior to the statement being made by the President in the chamber and also sought advice on the wording of the amendment. As Whip, I knew from our daily Whips meeting that the statement was to be made that day and I had taken the opportunity after the meeting to ask Harry if it were possible for the President to introduce a bill on privilege given that this was more a matter for the parliament itself than for the government of the day.

Harry's response was so immediate and so strongly affirmative that it leads me to suspect that Harry had already discussed this very possibility with the Clerk and, through him, with the Senate President. So as much as I would like to take credit for this unprecedented move, the sequence of events was that the then Clerk, Alan Cumming-Thom, and Harry, then Deputy Clerk, had suggested this course of action to the President and I simply stumbled upon the idea serendipitously. This has now been confirmed by the then President, the Hon. Doug McClelland, who in private correspondence to the current Clerk wrote:

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<sup>3</sup> For a succinct overview of the issues involved concerning the Justice of the High Court, Justice Murphy, see Nicholas Cowdery, 'Reflections on the Murphy trials', *University of Queensland Law Journal*, vol. 27, no. 1, 2008, pp. 5–21.

<sup>4</sup> Senator Michael Macklin in response to the statement by the President on the 'Use of Senate committee evidence in court proceedings', *Senate Hansard*, 9 April 1986, p. 1453.

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I well recollect Alan Cumming-Thom, the then Clerk of the Senate, and Harry Evans coming into my office in the Old Parliament House and expressing their concern about the recently delivered judgement of Mr. Justice Hunt in the Lionel Murphy matter, which basically destroyed the principle of parliamentary privilege. It was as a result of that discussion that we agreed that something had to be done by Parliament itself to re-assert this vital principle, and we determined the only way was the introduction of a completely new Bill into the Australian Parliament guaranteeing to its members the long held principle of the Westminster system. Alan had Harry work on the drafting of the legislation, I had a discussion with Senator John Button, the then leader of the Government in the Senate, and basically it all flowed from that original discussion I had with the two Senate officers.<sup>5</sup>

This episode illustrates well how pivotal was the role undertaken by Harry Evans and how delicately he had to step to ensure absolute integrity in his relations with the various people he was required to assist.

In due course, the President of the Senate and the Speaker of the House of Representatives introduced a bill for an Act to patriate privileges. Such an action by the presiding officers to introduce a bill themselves had never been undertaken previously in the history of the federal parliament. The *Parliamentary Privileges Bill 1986* was introduced into the Senate on 7 October 1986 by the then President of the Senate, the Hon. Douglas McClelland, and passed by the Senate on 17 March 1987 with Harry beaming in the Clerk's seat at the table. The bill was subsequently introduced by the Speaker and then passed by the House of Representatives on 6 May 1987.

### **Senate practice**

Of course, these highly formal mechanisms for assisting the Senate and senators did not consume all of Harry's working day. Harry's concern for enabling senators to go about their business in as effective a manner as possible saw him spend considerable time and effort devising innovative approaches to the Senate's daily workload. However his ethical approach meant that he did not offer these without being asked. Nevertheless, once asked, one could almost always be assured that Harry would be ready.

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<sup>5</sup> Private email correspondence to the Clerk of the Senate, Rosemary Laing, 24 August 2015 and 25 August 2015.

I well remember approaching Harry about our frustration as a small group of senators holding the balance of power. We were constantly being presented with bills coming into the Senate at very short notice and being expected to debate them without consultation or research. This rush of bills turned into an avalanche as the end of each sitting session approached. I do not think that we were unusual in wanting to know what the bill before us actually did and what might be its benefits and disadvantages. However without any members in the House of Representatives, our party had not had to take up a position on all of those bills previously introduced there and then forwarded to the Senate. In addition, our staff numbers were minimal compared to those of the major groupings even though we held the balance of power. It is for these reasons that we had more of a concern than did others in the Senate at that time. I hasten to add that I do not put the blame entirely in the government's lap. I remember a senior cabinet minister telling me of his frustration and how he had begged, pleaded and demanded but still had been unable to get his hands on a draft bill until near the end of the session when they never stopped arriving on his desk.

Harry had clearly been considering the issue for some time for he was able to produce a file from his desk drawer and show me a series of possible motions aimed at establishing a 'cut-off' by imposing a deadline on bills coming from the House of Representatives. This was a novel and innovative approach that certainly caught the attention of members of our party room when I put it to them as a proposed course of action. The then opposition was only too happy to support the motions provided to me by Harry since they too had been feeling the pressure particularly around those bills which had not been introduced into the House of Representatives previously. These procedures operated for a number of years and were generally known then as the 'Macklin Motions'. Naturally, as governments sought new ways of overcoming this Senate-imposed deadline, the approach to obtaining reasonable debating time has had to be refined a number of times in subsequent years but the general idea has become a permanent part of the Senate's approach to its work.

### **Accountability**

One is able to see from what I have already said that running behind Harry's approach was a strong political ideal. It was based on what Harry termed his 'Whig' propensities—referring to those in Britain who in the previous centuries had worked to limit the power of the monarch by seeking to make the parliament supreme. However, if it were to be supreme then, in Harry's mind, it clearly had to be accountable.

Accountability in the Australian political environment has had a chequered history. One has only to avert to the stance taken by a number of major media outlets after the last election that relied upon the belief that if a party had achieved a majority in the

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House of Representatives then they should be completely free to do whatever they like without let or hindrance—and certainly no interference by the Senate.

Unfortunately, party discipline in Australia is so strong that government backbenchers no longer seem to believe it is their duty to hold their own government to account by scrutinising its actions but rather take their role to be that rather strange nodding backdrop to whatever a government minister wishes to say to a TV camera. One only has to think back to a giant like Liberal senator David Hamer to realise that this was not always the case.

It is for this reason that accountability within the federal parliamentary structure has been left to the Senate when it has, as it does most times, a non-government majority. In a chapter for an edited book where Harry was considering the outcome of the 2004 election which gave the coalition parties a one-seat majority from 1 July 2005, he averted to the fact that there had been a 24-year hiatus since this last occurred when the Fraser Government had a majority of six from 1976 to 1981. However, as Harry pointed out, during that previous parliament

The Fraser Government ... never really controlled the Senate, because there were up to twelve coalition backbenchers who were willing to vote against the government, particularly on accountability issues, and there was therefore little fear of a major decline in accountability.<sup>6</sup>

In his opening address to the Association of Parliamentary Libraries of Australasia Conference on 26 July 2007, Harry said this:

... parliamentary libraries ... have continued to provide members of parliament with facts and analysis. By doing so, they necessarily live dangerously. The holders of power do not necessarily welcome facts and analysis which do not support their cause. They spend a great deal of time and energy suppressing and manipulating facts and analysis which appear to threaten their hold on power. Anyone who produces facts and analysis contrary to that consideration is likely to be unpopular with the powers that be.

Here one can plainly hear Harry talking not only about the Parliamentary Library but also about his own situation. As an outstanding and outspoken advocate of the rights

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<sup>6</sup> Harry Evans, 'Having the numbers means not having to explain: the effect of the government majority in the Senate', published as chapter 10, 'The Senate', in C. Hamilton and S. Maddison (eds), *Silencing Dissent: How the Australian Government is Controlling Public Opinion and Stifling Debate*, Allen & Unwin, Sydney, 2007. Republished in *Papers on Parliament*, no. 52, December 2009, pp. 151–2.



of the Senate, he certainly managed to upset governments of all political persuasions which one would expect of someone who wrote:

One of the principal functions of a legislative assembly is to ensure that the holders of the executive power are accountable, that is, that they are required to explain to the legislature and the public what they are doing with the power entrusted to them. This requirement is an essential safeguard against mistake and malfeasance in government.<sup>7</sup>

Given such views expressed by Harry both privately and publicly, it is probably not a coincidence that Harry will be the last Clerk to serve twenty-one years given that the Howard Government introduced a ten-year non-renewable term limit in 1999. Harry, however, was in good company as he himself pointed out when quoting Professor, later President, Wilson:

Unless [the legislature] have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless [the legislature] both scrutinise these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct.<sup>8</sup>

An excellent example of this occurred in 1999 when the then Howard Government refused to release documents on the purchases of magnetic resonance imaging machines. Harry provided advice that the government's reasons for refusing were novel and lacking in cogency. This damning advice together with the subsequent Senate estimates committee hearing led to the release of the documents which, in turn, led to an Auditor-General's report concerning serious administrative deficiencies.

The paper from 2007 from which I have already quoted probably puts Harry's views most succinctly with the title of the paper being 'Having the Numbers Means Not Having to Explain: The Effect of the Government Majority in the Senate'.<sup>9</sup>

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<sup>7</sup> Harry Evans, 'The Senate, accountability and government control', paper for the Australian Research Council Project on Strengthening Parliamentary Institutions, Australian National University Parliamentary Studies Centre, 2007, p. 1.

<sup>8</sup> Woodrow Wilson quoted in Harry Evans (ed.), *Odgers' Australian Senate Practice*, Department of the Senate, Canberra, 2008, p. 12.

<sup>9</sup> Harry Evans, 'Having the numbers means not having to explain', *op. cit.*

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## Traditionalist

This approach to accountability by Harry flowed through to a wide range of other issues connected to the continuation of what he saw as the Senate's unique role. While Harry's arguments often relied upon historical precedent, it would be wrong to think of him as a traditionalist in the normal sense that we take that word. He was not. Whilst he did speak up for the maintenance of tradition, he only did so when that tradition contributed to the furtherance of what he saw as the Senate's role to maintain accountability within our federal structure.

In 2004, Harry made this very clear when he gave an address at the 35th Conference of Australian and Pacific Presiding Officers and Clerks making the telling point that all reform must be considered and gradual but reform is nevertheless necessary if people are going to continue to have faith in the system.

In a submission by the Senate department to the House of Representatives Procedure Committee on the ceremony of the opening of parliament the following constitutional anomalies were pointed out:

- (1) The appointment of justices of the High Court as deputies of the Governor-General is contrary to the separation of legislative, executive and judicial functions entrenched in the Constitution, and a violation of the principle that judicial officers exercise only judicial functions.
- (2) The Governor-General's opening speech, which sets out the government's program, involves the Governor-General, who is otherwise supposed to be a politically neutral head of state, in speaking as if he or she were the actual head of government and in making contentious and partisan political statements.
- (3) The Governor-General purports to direct the two houses as to where they are to meet, which is not authorised by the Constitution.
- (4) The Governor-General attends in the Senate chamber and summons the House of Representatives to attend there, as if the Governor-General had some particular relationship with the Senate as distinct from the House of Representatives, analogous to the relationship between the monarch and the House of Lords. There is no such relationship under the Australian Constitution, which provides for two elected houses as co-equal participants in the legislative process.<sup>10</sup>

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<sup>10</sup> Harry Evans, 'The traditional, the quaint and the useful: pitfalls of reforming parliamentary procedures', 35th Conference of Australian and Pacific Presiding Officers and Clerks, Melbourne, July 2004. Republished in *Papers on Parliament*, no. 52, December 2009, p. 146.

One can see Harry's hand here in that the second and third points in particular rely upon British precedents to get traction. Unfortunately, the committee did not take up this submission and such strange throwbacks continue. In the 1980s, I remember being told by colleagues that when speaking about a point of order that arose during a division that I ought to hold a piece of paper over my head. It seems that this came from the House of Commons where one remained seated wearing one's hat during such points of order. The idea that the presiding officer could see a senator sitting as others entered the chamber while the bells are ringing—whether they were wearing a hat or not—is clearly silly. Harry pointed out that this piece of nonsense had been dealt with by one of his predecessors, J.E. Edwards, in 1938 but it still continued.<sup>11</sup>

This quaint practice, however, illustrates well what Harry was about when he sought reform. His concern was that such exercises could bring the serious legislative operations of parliament into ridicule. One had only to listen to Harry hold forth on what he called the 'unhealthy obsession with the Mace' to know that he had a point. He became particularly concerned when anyone said that the mace was a symbol of the supremacy of parliament since he saw such a statement as not only silly but also a dangerous misrepresentation of the constitutional position of our parliament. Harry tellingly went on:

When we get to the level of maces having to be covered ... in the actual presence of royalty, we enter a realm of magic which even the most determined obscurantist finds hard to defend. Then the radical arrives to denounce it all as mumbo jumbo, and [we] are then in danger of losing procedures which may be traditional and quaint but which are also useful.<sup>12</sup>

### **Not a Westminster system**

As I have indicated, Harry's objection to many practices was based on the need for constitutional propriety. Hence one often in discussion with Harry got taken to one of his other areas of interest—the federation debates and the ideas underpinning the final form of the Australian Constitution. (I understand that he was behind having the Convention debates put online at the Senate website.<sup>13</sup>) These underpinning ideas to our Constitution were crystallised for him in the notion of the continuing talk about the Westminster system. I quote from his powerful paper in *Reform* in 2001:

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<sup>11</sup> A discussion on points of order during a division can be found in chapter 18 (SO 103) of Rosemary Laing (ed.), *Annotated Standing Orders of the Australian Senate*, Department of the Senate, Canberra, 2009, [www.aph.gov.au/About\\_Parliament/Senate/Powers\\_practice\\_n\\_procedures/aso](http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/aso).

<sup>12</sup> Harry Evans, 'The traditional, the quaint and the useful', *op. cit.*, pp. 145–50.

<sup>13</sup> The Convention debates can be found at [www.aph.gov.au/About\\_Parliament/Senate/Powers\\_practice\\_n\\_procedures/Records\\_of\\_the\\_Australasian\\_Federal\\_Conventions\\_of\\_the\\_1890s](http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Records_of_the_Australasian_Federal_Conventions_of_the_1890s).

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A related misconception is that Australia was intended to have a system of government basically similar to that of the United Kingdom. This misconception is embodied in the frequently heard statement that we have a ‘Westminster system’. On the contrary, the framers of the Constitution explicitly and deliberately departed from the British model.<sup>14</sup>

Of course, once we note that this idea of the Westminster system—referred to by many even in 2015—is highly supportive of the notion of an all-powerful cabinet then we see where Harry is coming from. The government in power—and in particular prime ministers—have a real interest in talking up this idea and acting as though this was the actual state of our federation. This idea has also leached out into the mainstream media where one finds journalists constantly railing against the Senate when it is not under government control as though this was a ‘Westminster system’. Unfortunately for them, as Harry often reminded us, the House of Representatives is not the House of Commons and the Senate is not the House of Lords.

Harry discussed this idea in more depth in a paper entitled ‘Hobbes Versus Madison and Isaacs Versus Baker: Contrary Theories and Practices in Australian Democracy’.<sup>15</sup> As Harry points out, the political theories of Hobbes which sought to centre all power in a cabinet according to the British model had contended in the Constitutional Conventions with those of Madison which looked to a dispersal of power with a variety of checks and balances more along the American model. This debate eventually became distilled in a proposition that no law should come into force in Australia unless it was supported by a majority of voting Australians and a majority of voting Australians in a majority of states. This became to be seen as the essence of federalism. When it came to operationalising this idea in concrete proposals within the Constitution, there were often uneasy compromises particularly with the installation of a powerful government on the one hand and near equal powers for the two houses of the parliament on the other.

A good example of this involved the absolute control of finances that the House of Commons had gained over time. Thus we see in section 53 of the Constitution the compromise in stark relief. The Senate can’t amend some money bills but is able to request amendments to these bills. Of course, there is a merging in practice between the passing of an amendment and the passing of a request for an amendment since the Senate is able to keep insisting on such amendments until such time as the House

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<sup>14</sup> Harry Evans, ‘The role of the Senate’, *Reform* (Australian Law Reform Commission), no. 78, Autumn 2001. Republished in *Papers on Parliament*, no. 52, December 2009, pp. 94–5.

<sup>15</sup> Harry Evans, ‘Hobbes versus Madison and Isaacs versus Baker: contrary theories and practices in Australian democracy’, *University of New South Wales Law Journal*, vol. 24, no. 3, 2001. Republished in *Papers on Parliament*, no. 52, December 2009, pp. 111–17.

agrees to these requests. As a consequence, Harry believed that the constitutional battles leading up to 1901 are still being fought because of the subsequent rise of a rigid party system. The Madisonians' concerns with the Hobbesians' powerful prime ministers and almost total cabinet control over the House still resonate in almost every attack on the Senate and in every debate about how to alter the Senate voting system.

Having been in the Senate under governments of different political persuasions, I must say that I agree with Harry's view when he wrote that the:

... arrival of organised political parties and the presence of the same parties in the Senate as in the House of Representatives did not end the ideological divide, but perpetuated it in a different form. Parties simply change sides according to whether they are in government or in opposition. The party in power tends to support the prerogatives of the executive government and the exclusive rights of the House of Representatives, while the party in opposition tends to support parliamentary checks and balances, and they adjust their theoretical positions accordingly.<sup>16</sup>

I noted time and again that the most ardent supporters of Senate rights had in the previous parliament been amongst its most vehement critics—and they didn't even blush while doing so. As Harry again noted, it was the arrival of proportional representation in 1949 that saw the Senate emerge as more representative than the House of Representatives since the political parties' seats in the Senate are generally closer to their share of the overall vote than are the numbers in the House. Interestingly enough, there is almost nil attention paid to the unrepresentative outcomes produced by the House of Representatives electoral system since it is in the interests of the major parties to ignore such issues.

In 2015, we have moved on somewhat from the constitutional debates at least in terms of the formulation of the issues. Thus the fight between the Hobbesian and the Madisonian theories is most often now played out over the notion of a 'mandate'. As Harry sagely put it:

We have not heard the last of the mandate ... It is sure to re-emerge whenever there is an election which a government can claim to have won. And whoever is then in opposition will no doubt be impressed with the requirement for checks and balances.<sup>17</sup>

And Harry wrote this 14 years ago!

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<sup>16</sup> *ibid.*, p. 114.

<sup>17</sup> *ibid.*, p. 116.

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## Conclusion

What I have sketched out of Harry's activities today merely scratches the surface of his contributions to the Senate and to parliamentary democracy in Australia. His intellectual and organisational skills provided the Senate with an operational system that has served it well in the difficult times it has had to traverse in this building. He was never one to wilt under attack but, rather than engage in polemic or personal responses, he remained focused on the argument of the case and invariably the strength of his argument was recognised if not accepted. His was a highly focused contribution to the furtherance of the work of the Senate. In everything he did, Harry worked to ensure that rationality won out over baseless assertions, integrity won out over expediency and the future needs of our federation won out over partisan gains of the present.

It was a privilege to have known Harry Evans and to have worked with him to implement many of the ideas that he held so dear. Here was a great man of whom we rarely see the like.

## Appendix 1: Chronology of the *Parliamentary Privileges Act 1987*

This brief chronology illustrates well the timeframe that it takes to institute reform.

- The Joint Select Committee on Parliamentary Privilege met first in 1982 and extended its hearings over two parliaments until 1984 when it reported.
- Two select committees occurred in 1984: Conduct of a Judge—established 28 March 1984, reported 24 August 1984 and Allegations Concerning a Judge—established 6 September 1984, reported October 1984.
- 25 March 1985—President informed the Senate that he had made arrangements for counsel to appear before committal proceedings in respect of Murphy J in the NSW Local Court (*Journals of the Senate*, p. 122).
- 28 March 1985—President made a statement to the Senate about inaccurate media reports of matters raised by counsel for the Senate (*Journals*, p. 140).
- 16 April 1985—President informed the Senate that he had made arrangements for counsel to appear before committal proceedings in respect of Judge Foord in the NSW Local Court and tabled a petition from solicitors for Judge Foord asking the Senate to waive privilege in respect of Foord's evidence to the first select committee. The Senate resolved not to accede to the petition (*Journals*, pp. 153–4).

- 23 April 1985—Senator Alan Missen moved unsuccessfully to have the decision on the petition reconsidered (*Journals*, pp. 192–3).
- 28 May 1985—Senator Gareth Evans gave notice of motion to brief counsel to seek leave to represent the President in forthcoming trials of Murphy and Foord as amicus curiae, agreed to 29 May 1985 (*Journals*, pp. 342, 344–5).
- 3–4 June 1985—Counsel for the President made submissions in the NSW Supreme Court.
- 5 June 1985—Justice Cantor gave reasons for rejecting the submissions.
- 11 September 1985—President made a statement on the outcome of the resolution to brief counsel of 29 May, and tabled judgments, submissions and transcripts. Debate ensued (*Journals*, pp. 440–1).
- 18 March 1986—Counsel for President made further submissions to NSW Supreme Court in respect of the trial of Murphy.
- 8 April 1986—Justice Hunt gave reasons for rejecting the submissions.
- 9 April 1986—President made a statement informing the Senate that he had made arrangements for counsel to appear in the Supreme Court of NSW to make submissions on parliamentary privilege prior to the retrial of Murphy J (*Journals*, p. 869).
- The *Parliamentary Privileges Bill 1986* was introduced into the Senate on 7 October 1986 by the then President of the Senate, the Hon. Douglas McClelland.
- This bill was passed by the Senate on 17 March 1987.
- The bill was introduced by the Speaker and then passed by the House of Representatives on 6 May 1987 before being signed into law by the Governor-General.



**Question** — I wonder what Harry Evans would have thought about some of the remaining anachronisms in parliamentary procedures including the religious kowtowing to one particular religion in a multicultural society?

**Michael Macklin** — I never put that to Harry in which case I don't know what he stood for on it because as I said in my address he was a person who had to walk a very fine line. He would respond and respond enthusiastically providing I put the question and then he had the answer much to the chagrin of the government in the House of Representatives particularly when we did things like the flow of business between the chambers. All of that was on paper, in his desk, but I had to ask the question.

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**Rosemary Laing** — I do remember a new officer to the Department of the Senate who had taken courage in his hands and asked Harry how he felt about going through prayers every morning when the Senate kicked off and he said something like, ‘Oh well, I just close my eyes and mutter pagan intonations’, which I don’t think says anything about his belief system, but it was a perfect answer. Whatever he thought, you weren’t going to find out.

**Michael Beahan** — When I took on the position of President of the Senate I was challenged by that because I am an atheist and I didn’t want to read out a prayer of one particular religion when there were several represented. I took the matter up with Harry but I canvassed support around the senators also. Harry was actually very supportive and encouraged me to do it but I couldn’t get the support.

**Rosemary Laing** — And the support hasn’t been there since that time either.

**Tom Wheelwright** — I can certainly give you a real insight into the importance of prayers. When I was in the Senate I was advised by one of the Liberal senators, being a Labor senator, that I should go to prayers every day because we had to actually appear in the chamber if we were going to get paid and a good way of doing it was to turn up to prayers in case you forgot!

I would like to raise a more serious point and that is that I think all of us have seen in the media and from various sources that the country has become ungovernable because of the Senate because the government doesn’t control the Senate. You are a better historian than I am but certainly I can’t remember a time when a Labor government controlled the Senate and I can’t remember very many times, as you alluded to, when any other party controlled the Senate and yet here we are; it seems that we have existed quite well with that circumstance. Don’t you think it is going a little far?

**Michael Macklin** — My wife is in the audience so I had better be very careful because I get on my high horse about the media and its reflection on the parliament because I think much of it is done in ignorance. The operation during the time I was there, and that’s really what I know about, because I haven’t kept the figures since, is that we put more bills through the chamber than any previous parliament had done. I think in fact that each parliament has done something fairly similar. They may take longer, some of them may be knocked back, there may be more amendments. Quite recently when I was talking to a Liberal senator about this paper and the comments that Harry had made with regard to the government getting control of the Senate, he said ‘it was the worst thing that ever happened to us’. He said, ‘we lost, of course, the following election because we didn’t have the checks and balances’. I think that is a



rather interesting idea, that perhaps the slowing down bit mightn't be bad instead of the rush of blood to the head. I come from Queensland where a unicameral parliament operates and I think our previous government went out of office from a huge majority for exactly the same reason: absolutely nil checks and balances; it didn't have to listen to anybody and it didn't and the people spoke.

**Question** — Do either of you know where Harry Evans stood on the casual vacancies change made in the mid-70s?

**Rosemary Laing** — I don't know that I know the answer to this. I do remember fierce discussions between Harry and Anne Lynch, his deputy, about whether it was a good thing or not and I don't really remember which side Harry took. I do remember Anne thinking that it was not necessarily a good thing to allow political parties to be entrenched in the Constitution for the first time and for them to have the right to nominate a replacement for a retiring senator. The counter argument was that nobody wanted to revisit the events of 1975 and the actions by state premiers in that year in appointing people to casual vacancies not from the same party as the departing or deceased senators, but from a position that was designed to manipulate the current numbers in the Senate. So I don't know that we know the answer to that one.

**Michael Macklin** — Basically Harry was moving much more towards the second position rather than the first on the basis that as he saw it the democratic voice was more likely to be heard in the second than in the first situation. Again, a lot of that problem was caused by the then government in my state.

**Comment** — I thought that it might be appropriate to use this occasion to acknowledge Harry's great contribution to the Democratic Audit of Australia, on the topic of course of executive accountability to the legislature. He could always be relied on to attend a workshop or read a paper and so on and afterwards of course he also did a wonderful chapter for the book *Silencing Dissent* on the same subject.

**Rosemary Laing** — One thing you have highlighted in your lecture, Michael, is the breadth and depth of Harry's writing, much of which is accessible through the Senate website through *Papers on Parliament* including a special edition in number 52 which does contain that immortal paper on parliamentary reform, 'The Traditional, the Quaint and the Useful: Pitfalls of Reforming Parliamentary Procedures'. It is an absolute gem to read and I commend it to all of you. But I think that all of you are here tonight because of a respect for Harry and admiration for his work as a great parliamentary officer. Michael, in your lecture you have brought out many of the issues which concerned him, which he was able to contribute to public debate through the agents of senators such as yourself and others who came after you. You did an

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awful lot to bring the Senate into the modern age to make it a relevant and useful chamber, an absolutely essential check on governments of all persuasions, and one that remains a fantastic place to operate and to work. So on behalf of everybody here tonight I thank you for that inaugural Harry Evans lecture. I think it was a wonderful account of the relationship between you and Harry and what you were able to achieve together. But also, I think, a portrait of a terrific parliamentary officer and one who lives in our hearts.