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Alfred Deakin
A centenary tribute[*]

Stuart Macintyre

One hundred years ago, in the seat of national government in Melbourne, two men were wrestling with difficult choices. Edmund Barton, the Prime Minister, was seeking reassurance that his decision to resign and take up a post on the High Court was justified. It would give him greater financial security, respite from onerous responsibilities and more time with his family in Sydney. But he had held the national leadership for fewer than three years. 'Can I persuade myself to leave politics and take the second place?' he asked the Governor-General.

His colleague Alfred Deakin faced a choice of similar difficulty. He and Barton had worked closely to bring the new Commonwealth into existence. When the first federal government was formed it was clear that the leadership would go to a representative of the leading state. The contenders were the truculent premier of New South Wales, William Lyne, and Barton, who was the head of the federal movement in that state. Deakin was instrumental in ensuring that Barton was commissioned the first prime minister and Deakin served as his deputy.

Now, with Barton's departure, he thought that Lyne should have his turn and offered to stand aside and support him if the members of the Liberal Protectionist Party wanted Lyne. Lyne tested his party support and found it wanting. Deakin, meanwhile,

[*] This paper was presented as a lecture in the Department of the Senate Occasional Lecture Series at Parliament House on 22 August 2003.

went to see his friend and mentor, David Syme, the owner of the *Age* newspaper. 'D.S. says take P.M.', Deakin noted in his diary on 21 September 1903, and that is what he did. Three days later he was sworn in as the country's second prime minister.

He would serve just six months in his first term, then three and a half years more from 1905 to 1908, and finally for a further ten months in 1909 and 1910. For all but the final ten months he governed without a parliamentary majority and relied on the support of the Labor Party; to achieve the last term he merged his own Liberal Protectionist Party with the rival Free Traders and was hardly less constrained in his actions.

Yet Deakin, more than any other statesman, turned federal government from a constitutional framework into a living reality. He fashioned its distinctive institutions: the High Court that was the keystone in the federal arch; the Immigration Restriction Act that determined the nation's ethnic character; the Court of Conciliation and Arbitration that kept industrial peace; the federal tariff that protected local industry and the New Protection that linked the development of the economy with the maintenance of living standards; the imperial preference that affirmed trade links with United Kingdom, and the armed forces that safeguarded the country within the imperial defence umbrella.

Together these arrangements constituted a coherent policy that was designed to provide security, growth, harmony and purpose. Deakin laid the foundations of a national policy that persisted, with various modifications, for much of the twentieth century—so much so that when Paul Kelly wrote the story of the 1980s as a watershed marking *The End of Certainty*, he traced the old order back to Deakin's original design and described it as the Australian Settlement.

Deakin was self-effacing. He refused any official honours for his public service. As prime minister he either cycled or caught a tram from his private home in South Yarra to the Commonwealth offices in the city. Barton had lived in an apartment within the Parliament House and it was Deakin's successor, a Labor man, who arranged for an official car.

Following Deakin's death in 1919 the family commissioned Walter Murdoch to write what he called a biographical sketch. Murdoch, who had been part of Deakin's circle of younger admirers and had free access to his voluminous papers, produced an affectionate and perceptive portrait. Next, the family persuaded John La Nauze to work on Deakin. La Nauze published two of Deakin's own accounts of episodes in his career, and also wrote a superb biography. Since then there have been illuminating studies of Deakin's inner and family life. His name has been attached to a university in Victoria as well as a suburb in Canberra, and Deakin University has been pursuing a digital archive in conjunction with the National Library, which holds his papers.

Deakin's political legacy is more ambiguous. The present-day Liberal Party, which bears the same name as the party he led, claimed him in various statements and an annual lecture; but since the 1980s it has distanced itself from his form of communitarian liberalism and state activity. He occupies a lesser place in the Liberal pantheon, which is dominated by Robert Menzies. From a different perspective, Deakin is an unsympathetic figure in Manning Clark's *History of Australia*. He

appears in the fifth volume where the millennial hopes are dashed and radical nationalist fervour is lost as 'The People Make Laws'. He is presented as Mr Deakin, a figure of bourgeois rectitude, and is the foil for Henry Lawson, in whom the gale of life blows strongly. Other scholars have identified Deakinite liberalism as a distinctive strand of Australian political philosophy, sometimes approvingly and sometimes regretting its influence.

But these exercises have little impact on public awareness. The moral purpose that animated him and which he sought to realise in national life is so far removed from our own values as to be unintelligible. From time to time a newspaper hits on the idea of ranking the country's political leaders, and Deakin's name usually appears on the lists suggested by the experts, though usually below those of Curtin, Chifley and Menzies.

Deakin himself, the most striking and enigmatic of our public figures, has largely faded from public awareness. This was a man who did not want to be a politician and set little store by his political achievements. 'Last Day, thank God', he recorded in his journal upon leaving office for the last time. 'Thoroughly exhausted, but oh such an immense release and relief.' He possessed a warmth and vivacity of manner, a courtesy and sympathy that earned him the nickname of 'Affable Alfred', and yet there was an inner reserve that few penetrated. 'What truth can there be in history when a leader is a puzzle to his contemporaries?' asked one who served under him.

The anonymous reports on Commonwealth politics he wrote for an English newspaper throughout his premiership kept up this mask. Small wonder that he confessed to himself, 'I act alone, live alone, and think alone.' He maintained the highest standards of probity and enraged others with his expediency. 'Judas, Judas, Judas!' shouted William Lyne when Deakin joined with the Free Traders in 1909.

I cannot claim to solve the mystery of Alfred Deakin, but this occasion marking the anniversary of his elevation to the highest office provides a good opportunity to reflect on a man of remarkable distinction. I shall concentrate on particular episodes in his life that reveal aspects of his values and impulses.

The first of them comes in the late 1870s when he entered politics. He was then just 22, a restless young man with little idea of his future. He had been born in 1856 in Melbourne, the second child and only son of improving English immigrants. The family moved while Alfred was young from Fitzroy to the more salubrious South Yarra, so that from the age of eight he attended the nearby Melbourne Grammar School, where he was a gifted, dreamy pupil. At the University of Melbourne he studied law, but his principal interests were literature and spiritualism. He was admitted to the Melbourne bar in 1877, and took chambers, but secured few briefs and spent much of his time writing poetry, essays and literary criticism, while continuing his spiritual experiments and conducting Melbourne's spiritual Sunday school.

At this time he met David Syme. Syme was 50, and had just acquired a majority ownership of the *Age*, the Melbourne daily newspaper he had been directing for nearly twenty years and which he built up to the largest circulation in the country. He used it to impose his brand of advanced liberalism on Victorian politics, one that espoused a strong democracy and extensive government action to maximise the

benefits of progress. Syme was a dour Scot and a notoriously shy, suspicious, misanthropic and grim tyrant, yet after he took Deakin on as a contributor to his paper, the young man became his houseguest and constant companion.

Deakin's vivacious intensity evidently filled some inner need for intellectual and emotional companionship that the older man usually concealed behind a taciturn unapproachability. It was their habit to take long walks together during which Syme encouraged Deakin to indulge his enthusiasm for literature and religious speculation so that he could play the tough-minded sceptic.

When the Victorian liberal organisation consulted Syme to find a candidate for a parliamentary by-election (as it habitually consulted him on any matter of consequence) he nominated his 22-year-old protégée and threw all of the resources of the *Age* into securing his election. There was a price. Deakin had to surrender his attachment to free trade (free trade, was after all, the basis of nineteenth-century liberalism) in favour of Syme's hobbyhorse, government protection of local industry.

As the younger man recalled, they were walking over Princes Bridge and back to the *Age* office when Syme convinced him he had 'crossed the fiscal Rubicon'. The classical conceit could hardly disguise the nature of the submission. By his own acknowledgement, Deakin had become 'the pet of the proprietor'. As he established his career he was often taunted with being Syme's lapdog, and eventually felt the need to establish his independence. But he was and remained a protectionist, and a state interventionist, and this was the mould that formed the Commonwealth.

On his entry to politics there was a further telling incident. Deakin narrowly won the by-election but it was disputed because the supply of ballot papers had run out at one of the polling stations. In his maiden speech he startled the members by resigning to allow another by-election. This time he was defeated by fifteen votes, and he lost again in the general election of 1880 before the house was dissolved and yet another general election was held. He embarked on a parliamentary career that would last 30 years with a reputation for quixotic gallantry.

Deakin had not wanted to be a politician; writing in 1900 about these events, he said he became one by 'sheer force of circumstance' and the occupation became congenial to him only by degrees. He would have preferred a literary career. His entry into politics coincided also with marriage to Pattie Browne, whom he met through spiritualism. The marriage was a cornerstone of Deakin's domestic life, and he would describe it as a 'sacred circle' within which he 'rested and recuperated' was 'reinforced, encouraged, solaced and soothed to sweet content'. The separation of the public and the private, the impersonal world of affairs and the domestic circle of purity, is a commonplace of the nineteenth-century masculine sensibility. It is fundamental to Deakin's.

Once launched on his career, Deakin advanced rapidly. He was a commanding orator, an energetic administrator, and an innovator in public policy. By 1886 he had become leader of the Victorian Liberals, and joint leader of a coalition government until 1890. As Chief Secretary he represented his colony at the 1887 Imperial Conference in London, where he affronted the British representatives by pressing local interests in the Pacific region. It was at this conference that he was offered and refused a

knighthood. Aged just 30, he was the most assertive of the delegates, a native-born colonial nationalist and an independent Australian Briton.

My second episode comes with the breaking of the long boom and the severe Depression that brought Marvellous Melbourne undone. Deakin left office late in 1890 when growing concern for the state of Victorian finances resulted in the passage of a no confidence motion. The ensuing crash cost him his own and his father's savings. It also revealed a pattern of collusion between politicians, company promoters and bankers in extremely dubious practices.

Deakin's hands were not clean. He was chairman of several land companies. He was complicit in the special bankruptcy laws passed by the members of the Victorian legislature to allow debtors to make secret compositions with their creditors and protect themselves from ruin and disgrace. He did not use the special laws himself, but made good his fortune at the bar, appearing on behalf of the chief villains. And he also filled his pockets by appearing for his former patron, David Syme, in the great libel case brought by the dodgy Commissioner of Railways against whom the *Age* conducted a long vendetta. The Sydney *Bulletin* delighted in the spectacle of Alfred Deakin, lawyer, assailing Richard Speight, Commissioner, of being importuned by various politicians, including the Hon. Alfred Deakin MLA!

This second episode, then, sees the first great setback to his career (he remained out of office for a decade) and his repute.

There was another moment in the crash when Chief Secretary Deakin was not at his best—the Maritime Strike of 1890. This was the great confrontation between the employers and the newly formed union movement, triggered by the shipowners' dismissal of the maritime officers for affiliating to the Trades Hall Council, and it brought the ports and the economy to a standstill. Deakin proclaimed his sympathies with the workers, for if a choice had to be made between 'a little flesh and blood with much capital' and 'a great deal of flesh and blood with little capital', then surely 'the living and thinking weight must carry our sympathies.'

But once the strikers picketed the landing of supplies and especially when they stopped the gas supply on which public lighting depended, his sympathy gave out. A city without light! What opportunities would that give 'the worthless and ill-disposed persons in any city' to pillage innocent citizens? Hence he called out troops to break the strike. 'The question', as he saw it, 'was whether the city was to be handed over to mob law and the tender mercy of roughs and rascals, or whether it was to be governed, as it had always been governed, under law in peace and order.'

Deakin was a friend of labour and a champion of social justice, but he was fearful of combinations and the use of force. Reason had to control the passions. He could not comprehend the tribal loyalty mobilised by the labour movement or the class divisions that hardened as a colonial society turned into a modern industrial one. His career spanned the rise of the Labor Party, which would eat away at his own base of support and eventually force him into an alliance with the conservatives.

For the next decade Deakin was a backbencher and preoccupied with the federal movement. We might regard this as an act of penance for his earlier profligacy. He

saw it as an act of service and duty, as nothing less than a sacred mission. From the very beginning he was the champion of the federal cause in his own colony of Victoria, which in turn was its principal stronghold. He did not seek national leadership of the movement, for he appreciated that this role had to be performed by a statesman from New South Wales, which passed Victoria in population during the early 1890s and was far more divided over the merits of the federal scheme. So his life of devotion to federation required what he described as 'self-suppression in public coupled with continuous activity in private.'

Deakin's liberalism channelled his aspiration for a democratic Commonwealth that would unite the Australian people in a fully representative national government. At the same time he was conscious that the less populous colonies required safeguards, and behind the scenes he facilitated the necessary compromise between the majoritarian principle embodied in the House of Representatives with the claims for equal representation of states in the Senate. As a federalist he accepted there must be a division of powers between the Commonwealth and the States, but sought to ensure that the national government had adequate powers.

Once these arrangements were hammered out by the second Convention in a draft Constitution, Deakin defended it with all of his power. He personally persuaded David Syme to accept the accommodation and end the criticism of the *Age* newspaper, which imperilled its acceptance. His passionate speech at a dinner of the Australian Natives Association in Bendigo in 1898 rallied support against those more advanced democrats who thought it gave too much away to the conservative localists. This was the speech in which he quoted the words of a local poet, William Gay:

> Our country's garment
> With petty hands unfilial we have basely rent,
> With petty variance our souls are spent,
> And ancient kinship under foot is trod:
> O let us rise,—united,—penitent, —
> And be one people,—mighty, serving God!

My third moment comes, then, in January 1901 when the Commonwealth was proclaimed and Deakin rejoiced that his sacred duty was fulfilled.

Or was it? It was clear from the outset that Deakin would transfer from state to federal politics, that he would lead the Liberal Protectionists in their Victorian stronghold, serve under Barton and try to give a more progressive cast to the ministry. Barton's retirement in 1903 therefore gave him the opportunity to direct national policy. It was not an opportunity he welcomed—hence his equivocation over the succession—but one he saw as a continuation of duty.

By this time he was beginning to feel the strain of long parliamentary sittings, onerous administrative duties and frequent travel. He slept poorly, suffered gastric disturbance and was susceptible to colds. Still, at the end of the year, he went down to the family holiday house at Point Lonsdale and turned once more to his notebooks. On Christmas Eve he prayed:

> Let me march straight to the goal whatever it may be in the superficial sphere in which I live and upon which I seek to work. As my opportunities are great, grant me strength, guidance, consistency, confidence, sincerity, patience and absolute personal abnegation.

The episode from this first Commonwealth Parliament that challenges us most is probably the passage of Immigration Restriction Act. The new nation institutionalised racial discrimination through the adoption of the dictation test to keep out all non-Caucasians. The measure attracted the crudest and ugliest expressions of race prejudice, though that was not the basis of Deakin's support of the White Australia policy. He was rather what we would now call a cultural relativist, who appreciated the achievements of other civilizations.

He was also a social Darwinist who believed that these civilizations were competing for supremacy. During the debate on the Immigration Restriction Act he argued that the Japanese had to be excluded from settlement in Australia precisely because of their high abilities: he said 'the Japanese most nearly approach us, and would therefore be our most formidable competitors.' This fear in turn rested on a belief in racial purity, a conviction that a mingling of races would result in conflict (as in the United States) and miscegenation. He did not apologise for the White Australia, he proclaimed it: 'The unity of Australia', he insisted, 'means not only that its members can intermix, intermarry and associate without degradation on either side, but implies one inspired by ideas, and an aspiration towards the same ideals.'

And what of those Australians who were not white? As Colonial Secretary in 1886 Deakin had introduced legislation that tightened the administration of the Victorian Aboriginal reserves. These small vestiges of land had been set aside for the protection of the Indigenous people on the assumption that they were incapable of surviving outside them; but the signs of successful adaptation confounded those expectations of imminent demise. The new law provided for the removal of those of mixed descent, who were to be absorbed into white society and expunged of their Aboriginality.

The passage of the Immigration Restriction Act in 1901 thus marks a fourth moment in the lifework of Alfred Deakin, and an aspect that runs through his life project. White Australia, he stated in 1903, 'is not a surface, but it is a reasoned policy which goes to the roots of national life, by which the whole of our social, industrial and political organisation is governed.'

Central to that national organisation was his doctrine of the New Protection, which linked tariff protection for local industry to the maintenance of Australian living standards. Deakinite liberalism set limits on the operation of the market to nurture a particular kind of nation-building social solidarity that would promote both equity and efficiency in a prosperous and true commonwealth.

The first tariff duties were principally designed to raise revenue but during Deakin's second ministry the government extended the protection of local industry with an additional twist: henceforth it was available only to employers who provided 'fair and reasonable' wages. The determination of a fair and reasonable wage was the task of the Commonwealth Arbitration Court, which had been established in the previous year.

Thus in 1907 it fell to Deakin's old friend Henry Bournes Higgins, whom he appointed to the presidency of the Arbitration Court, to ascertain the meaning of a fair and reasonable wage in a case concerning a large manufacturer of agricultural machinery. Higgins determined that such a wage should be sufficient to maintain a man as a 'human being in a civilised community'; furthermore, since 'marriage is the usual fate of adults', it must provide for the needs of a family. There was a successful High Court challenge to the decision and it took some years to extend the standard it set (which became known as the basic wage and was regularly adjusted for changes in the cost of living) across the Australian workforce, but the principles of Higgins' Harvester judgement became a fundamental feature of national life and one in which Deakin took pride. The Harvester judgement provides a fifth episode in the public career of Alfred Deakin.

The sixth episode came in the following year. The formation of the Commonwealth had coincided with (and was partly stimulated by) increased competition among the major European powers as they scrambled for overseas territories, and as Britain's naval supremacy came under threat. Hence the Australian alarm at the presence of France and Germany in the south-west Pacific. Deakin took a keen interest in the administration of Papua, which the Commonwealth had assumed from Britain. He pressed the British to annex the New Hebrides and was angered by its inept and secretive agreement with France for joint control.

Meanwhile, the Japanese destruction of a Russian fleet signalled a new danger to Australia's north. Deakin went to the 1907 Imperial Conference in London with a proposal for an imperial secretariat that would give self-governing dominions such as Australia a voice in foreign policy, and was rebuffed. He wanted to renegotiate the agreement whereby Australia contributed to the cost of the Royal Navy yet was denied consultation in its disposition, and was again rebuffed. He responded by inviting the American 'Great White Fleet' to visit Australian ports in 1908, and began preparations for the creation of an Australian navy. He also introduced legislation for compulsory military training.

We see here themes that have persisted ever since: the anxiety about regional security, the reliance on great and powerful friends, the attachment to empire and the insistence on an independent capacity.

These final measures coincided with a marked deterioration of Deakin's physical and mental powers. His loss of memory was a particular torment. He stayed on as party leader for three years after the electoral defeat but was a mere shadow of his former self. As he prepared for the general election of 1910 that would result in his final loss of office, he set down a reckoning of what he had achieved:

> I am saddened not with these prospects but with the sense of opportunities missed or ignored ... saddened because I can achieve so little more and have accomplished so little in the past—also because everything in Australia (and in the world) is so obviously imperfect, inchoate, confused, stained and wickedly filled with false antagonisms, coarseness and incapacity, that the promised land of humanity still lies far out of sight ... Such is the public end of A.D.

He retired from public life in 1913. The final years were a torment of sleeplessness, declining health, and severe, incurable aphasia. His last public meeting was a conscription rally at the Melbourne Cricket Ground in 1917, an inauspicious place for one who had recoiled from crowds at sporting events with their base passions. Those passions found violent expression on this occasion as anti-conscriptionists hurled stones and bottles at the bellicose little prime minister, Billy Hughes, on the platform. Deakin wanted to speak but was unable to do so, and his message was published:

> Fellow Countrymen—I have lived and worked to help you keep Australia white and free. The supreme Choice is given to you on December 20th. On that day you can say the word that shall keep her name white and for ever free.
>
> God in his wisdom has decreed that at this great crisis in our history my tongue must be silent owing to my failing powers. He alone knows how I yearn, my fellow Australians, to help you say that magic word ...

They did not. Instead of voting Yes, they voted No. He lived in a twilight until death provided merciful release in 1919.

His achievements remain, and they deserve to be appreciated more widely. On the eve of the anniversary of his accession to national leadership I am delighted that the Senate lecture series provides an occasion to remember him and I hope that there will be further recognition. He was man of his time in his prejudices, but he was a man who transcended his times in his breadth, his gravity, his sense of duty and nobility of purpose. In his vices as well as his virtues he was touched with greatness.

Question — In your reference to the 'Great White Fleet', I wonder if you could elaborate more on what was involved in bringing that about?

Stuart Macintyre — Deakin thought that the War Office in London took Australia for granted. As the British came under more pressure, through the race to build Dreadnoughts and the increasing strength of the Germany Navy in particular, the British were being forced to withdraw more of their fleet to the home waters to guarantee the protection of Britain, and were thereby running down their Pacific fleet. And Deakin believed—and this was demonstrated 35 years later when Singapore fell—that the Far East would be dispensable if there was to be a national emergency. Australia at this time was providing finance for the building and the maintenance of the Royal Navy. Deakin wanted, in return, clearer guarantees about those ships being in Australian waters should they be needed, and he was told that he couldn't have that guarantee. So he had the idea of the invitation to the United States, which was a strictly irregular one, and horrified people in Whitehall because it represented a Dominion conducting an independent foreign policy.

The invitation was essentially to show to the British that there was more than one friend that Australia could call on. And if you read the public coverage of it, there

was a strong notion of the United States as a friend across the other side of the Pacific, and there was also a strong racial element, as they were from the same Anglo-Saxon descent. The visit from the US fleet was very popular, but it was meant to be flying the flag and suggesting to the British that if they didn't do something, Australia might transfer its friendship elsewhere. There was never any danger of that, and if you look at the correspondence between London and Washington, they were both aware of what Deakin was up to.

Question — Was it an actual formal invitation, in writing?

Stuart Macintyre — Yes, indeed.

Question — Regarding the Australian and British issue, do you think Deakin remained equally Australian and British?

Stuart Macintyre — It stretches our imagination, doesn't it, to think that someone can be a strong Australian nationalist and a strong British nationalist, but Deakin was. I suppose an analogy would be that you can be a strong Queenslander and also a strong Australian, and generally you don't see any contradiction between those loyalties. That's very much the way that Deakin thought of these, as one loyalty nestled within the other, with a very strong idea of Australia as an offshoot of an older parent society and inheriting both its institutions and its ideals, and in some ways realising its ideals in a way that they were not being realised in the home country.

When Deakin first went to London in 1887, and even more strongly when he went back in 1900 to negotiate the passage of the Commonwealth Constitution through the British Parliament, he was very critical of British society, particularly high society. He was horrified by the slums and the vice, but he was also horrified by the ruling class, which he thought were showing signs of imperial decay. But he was always a strong imperialist. He was an imperial federationist. The idea that he proposed in 1907—that you could have a secretariat that would co-ordinate the dominions—is an example of that. So his loyalty to Britain was loyalty to an ideal as much as it was an admiration of a society that actually existed.

Question — He obviously felt tension between the two, even though they reinforced each other. I just wondered whether his unease, his inability to keep the two together, ever really bothered him, or whether he just accepted it.

Stuart Macintyre — There were certainly signs of annoyance with the British politicians and civil servants whom he dealt with, but I don't think it ever strained his fundamental loyalty to the Empire, and that's the distinction I think he was drawing. He thought of this often in familial terms, and his was a loyalty based on blood and ideas and sentiment and everything else; the fact that a member of the family was misbehaving did not alter the relationship that you had with them, so to speak.

Question — You made no reference to his position on the First World War. Was he strongly involved? Was he detached?

Stuart Macintyre — He had retired from Parliament by the time the First World War broke out. He had surrendered the leadership of the Liberals, as they were called—the

fused party—although he supported the war effort. And his attempt to speak at the meeting on the second conscription referendum demonstrated his belief that it was a war in which Australia had to be involved, but by that time his capacity to make a public statement was pretty limited.

Question — Did the idea of a bill of rights originate with Deakin?

Stuart Macintyre — I don't think so. I can't think of any particular statement by him on it, though he did take a keen interest in the American Constitution. He was very much an upholder of the British Constitution and constitutional principles, in which codification of a bill of rights was unnecessary. I am not aware that he was ever attracted to the idea of a separate bill of rights, though someone may be able to correct me on this.

The High Court and the Parliament
Partners in law-making or hostile combatants?[*]

Michael Coper

The question of when a human life begins poses definitional and philosophical puzzles that are as familiar as they are unanswerable. It might surprise you to know that the question of when the High Court of Australia came into existence raises some similar puzzles,[1] though they are by contrast generally unfamiliar and not quite so difficult to answer. Interestingly, the High Court tangled with this issue in its very first case, a case called *Hannah v Dalgarno*,[2] argued—by Wise[3] on one side and Sly[4] on the other—on 6 and 10 November 1903, and decided the next day on a date that now positively reverberates with constitutional significance, 11 November.[5]

* This paper was presented as a lecture in the Department of the Senate Occasional Lecture Series at Parliament House on 19 September 2003. I am indebted to my colleagues Fiona Wheeler and John Seymour for their comments on an earlier draft.

1 See Tony Blackshield and Francesca Dominello, 'Constitutional basis of Court' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia,* South Melbourne, Vic., Oxford University Press, 2001 (hereafter '*The Oxford Companion*'): 136.

2 (1903) 1 CLR 1; Francesca Dominello, '*Hannah v Dalgarno*' in *The Oxford Companion*: 316.

3 Bernhard Ringrose Wise (1858–1916) was the Attorney-General for NSW and had been a framer of the Australian Constitution.

4 Richard Sly (1849–1929) was one of three lawyer brothers (including George, a founder of the firm of Sly and Russell), who all had doctorates in law. He later became a judge of the Supreme Court of NSW.

5 Michael Coper, 'The Dismissal Twenty-Five Years On' (2000) 11 *Public Law Review* 251.

The case began, as many cases do that raise important or interesting legal issues, in humble circumstances. On 9 August 1901, just eight months into the new Commonwealth of Australia, Robert Hannah was driving his hansom cab along Elizabeth Street in Sydney, when a Commonwealth telephone wire that was being repaired fell across an electric tramline and electrocuted the horse, damaged the cab, and injured Hannah. Hannah sued James Dalgarno, Deputy Postmaster-General for NSW, as a nominal defendant representing the Commonwealth, and was awarded £200 in damages in the Supreme Court of NSW (which was exercising federal jurisdiction under the *Claims against the Commonwealth Act 1902*). Dalgarno appealed to the Full Court of the Supreme Court of NSW on the ground that there was no evidence of negligence, but the appeal was rejected on 20 August 1903.

Five days later, on 25 August 1903, the Commonwealth's important *Judiciary Act*[6] came into force, implementing the provisions of the Constitution of 1901 for the establishment of the High Court and providing for the appointment of a bench of three Justices. The long gestation period reflected some scepticism about the need for the High Court, notwithstanding Deakin's powerful advocacy for it when introducing the second reading of the Judiciary Bill on 18 March 1902.[7] On 5 October 1903, the first three Justices were appointed—a fascinating story in itself[8]—and the Court, comprising Griffith, Barton and O'Connor, held its first sitting the next day, a ceremonial sitting in Melbourne, on 6 October 1903.

Dalgarno, *ex parte*, obtained special leave to appeal to the High Court nine days later on 15 October, and the case was argued in November on a motion by Hannah to rescind the grant of leave. Sly, for Hannah, argued that there could be no appeal to the High Court because the Court did not exist when Hannah secured his final judgment from the Supreme Court of NSW. Wise, for Dalgarno, argued that the Constitution brought the High Court into existence on 1 January 1901, and that an appeal could therefore be brought as soon as the Court was constituted by the Parliament. Chief Justice Griffith, speaking for the Court as he so often did in the early years, thought the question to be 'one of difficulty and importance',[9] but managed to avoid having to decide whether it was better, as it were, to be Wise or Sly on this occasion, instead rescinding the order for leave on the ground that the substantive issue in the case—whether there was evidence of negligence, and the extent to which such evidence was necessary—was not a question of sufficient public importance.

I do not mean, by raking over the coals of this once-burning question of when the High Court came into existence, to cast any doubt on the appropriateness of the High Court centenary celebrations that are about to erupt all over the country next month (although I should perhaps add, as one of the editors of *The Oxford Companion to the High Court of Australia*, that we timed our publication of that weighty tome for the centenary of federation). Nor do I intend, by beginning at page 1 of volume 1 of the Commonwealth Law Reports, to take you laboriously through the next 200 volumes, one by one. Rather, I start with the fascinating case of *Hannah v Dalgarno* to make

6 Anthony Mason, '*Judiciary Act*' in *The Oxford Companion*: 380.

7 For a particularly good account of this, see Zelman Cowen, 'Deakin, Alfred' in *The Oxford Companion*: 192.

8 See esp. Troy Simpson, 'Appointments that might have been' in *The Oxford Companion*: 23.

9 *Hannah v Dalgarno* (1903) 1 CLR 1, 12.

two points in the context of this lecture about the interconnections between the High Court and the Parliament, including the respective roles of these two institutions as law-makers.

First, whatever the resolution of the almost theological question of when the High Court came into existence, the case illustrates the interdependence between the Court and the Parliament. The Court could not operate until the Parliament legislated to give effect to the provisions of the Constitution (and the executive acted to appoint the judges). Yet once the Court was in place, the Parliament was subject to judicial scrutiny, and its legislation—including the *Judiciary Act*—was vulnerable to judicial second-guessing. I mention only by way of example (though it is one of my favourite examples), section 23(2)(b) of the *Judiciary Act*. In this section, the Parliament endeavours to provide a rule for resolving cases in the High Court where the Court is equally divided: other than in appeals from superior courts of sufficient status (in which case the appeal fails), a casting vote is given to the Chief Justice.[10] Is this a legitimate procedural regulation of the judicial branch, or an unconstitutional interference with the independence of the judiciary? The question is unresolved, but I must say that I lean to the latter.

The second interesting aspect of *Hannah v Dalgarno* is the way in which the Court was able to dispose of the case and yet avoid the difficult constitutional issue. One of the time-honoured techniques for the containment of judicial law-making is for a court to take the narrowest ground necessary to decide a case. Part of the criticism levelled at the Court by Justice Dyson Heydon in his outspoken *Quadrant* article earlier this year was that, in its 'activist' phases, the Court lost sight of this principle.[11] This is an interesting debate, to which I return in a moment.

So *Hannah v Dalgarno* is worth remembering, and not just because this is the year in which we are celebrating the centenary of the High Court, at least in its full incarnation. But, curiously, 1903 was itself the centenary of a much more significant case, the great American case of *Marbury v Madison*.[12] This was the case that established judicial review in the United States, that is, the power of the courts to declare invalid the legislation of an elected legislature. This is the ultimate example of the interplay between the High Court and the Parliament, and as my use a moment ago of section 23(2)(b) of the *Judiciary Act* as an example of Parliamentary vulnerability may have suggested, the power of judicial review was simply taken for granted by the time the Australian Constitution was being drafted in the 1890s.[13] This may surprise you, given our inheritance of British constitutional traditions and principles, including the notions of Parliamentary supremacy—which largely explains the absence from our Constitution of a Bill of Rights—and responsible government. But the framers of the Constitution were also familiar with the idea of judicially enforced limits on the powers of the colonial legislatures of the nineteenth century, and in addition to that, the American inheritance—especially of the notions of federalism, a written Constitution, and, at least by implication, judicial review—was

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10 See generally Michael Coper, 'Tied vote' in *The Oxford Companion*: 671.

11 Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' *Quadrant*, Jan–Feb 2003: 9; also published in (2003) 14 *Australian Intellectual Property Journal* 78.

12 5 US (1 Cranch) 137 (1803).

13 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262 per Fullagar J.

at least as important as the British.[14] So the High Court was born into a world in which its power to keep the Parliament within its constitutional limits, or in other words, to veto legislation that was judged to transgress those limits, was, although neither explicit[15] nor inevitable, uncontroversial.

The politics of *Marbury v Madison*—the brilliant political strategy adopted in the case by Chief Justice John Marshall to establish judicial review in the face of a hostile Congress and President—are fascinating, but that is another story.[16] Today we simply accept that the High Court will have the last word on the constitutional validity of legislation and executive action (or, strictly speaking, the penultimate word, as in theory we can amend the Constitution, if only we could bring ourselves to vote 'yes' at constitutional referendums).[17] Moreover, Marshall's logic seems unanswerable: constitutions impose legal limits, and it is simply the duty of the courts to line legislation and executive action up against those limits and to declare what the law is. Yet there were at the time other views that challenged what we now perceive as the inexorability of Marshall's logic and the inevitability of his assertion of judicial review. His great rival Thomas Jefferson, for example, held a view of the separation of powers in which each branch of government would authoritatively interpret the Constitution in its own sphere.[18] But Marshall's view prevailed, and the stage was set for the High Court, in Australia and a century later, to become the policeman of the Constitution and, potentially, a combatant with the Parliament in the law-making process.

The story of the separation of powers, and how that notion emerged historically, is also a whole other story in itself.[19] We are used to thinking these days in terms of a coherent, tripartite division of governmental functions amongst separate and coherent institutions—the legislature, the executive, and the judiciary—but, historically, the judicial function separated only gradually from the all-embracing power of the British monarch to make laws, execute them (and sometimes his or her loyal subjects as well), and dispense justice. Even today the idea of separation that we sometimes over-intellectualise or over-theorise is modulated—not necessarily compromised but certainly modulated—by a whole web of interconnections, interconnections relating to personnel, to mutual impact or interference, and to overlapping or intersecting functions. For example, and only by way of example, members of the executive are also members of the legislature; the executive appoints the judiciary; the legislature regulates, or purports to regulate, aspects of the exercise of the judicial function (as in the case of the *Judiciary Act*) and appropriates the funds necessary to its operation; the judiciary tells us what legislation really means, and, in some cases, whether it is

[14] Michael Coper, 'Currents, Cross-Currents and Undercurrents in the Turbulent Waters of Constitutional Interpretation in the High Court of Australia' (2003) 77 *Australian Law Journal* 673, 677.

[15] James Thomson, 'Constitutional Authority for Judicial Review: a Contribution from the Framers of the Australian Constitution' in Gregory Craven (ed.), *The Convention Debates 1891–1898: Commentaries, Indices and Guide,* Sydney, Legal Books, 1986: 173.

[16] Michael Coper, '*Marbury v Madison*' in *The Oxford Companion*: 453.

[17] Michael Coper, 'Amendment of Constitution' in *The Oxford Companion*: 17.

[18] See generally Richard Ellis, *The Jeffersonian Crisis: Courts and Politics in the Young Republic,* New York, Oxford University Press, 1971.

[19] Fiona Wheeler, 'Separation of powers' in *The Oxford Companion*: 618; M.J.C. Vile, *Constitutionalism and the Separation of Powers*, New York, Oxford University Press, 1967.

constitutionally valid; and all three branches of government engage in law-making of one kind or another. It is the law-making function of the High Court,[20] and how that compares with the law-making function of the Parliament, that is the main focus of my remarks to you today.

Before I turn to that, and in deference to the centenary of the High Court, I just want to say a little more about the interesting interconnections between the High Court and the Parliament in terms of personnel.[21] It is nearly 20 years since we have had on the High Court a judge who has also been a member of the Parliament (that is, not since Lionel Murphy died in 1986), or who had some other kind of similar political experience. Yet all five of the original Justices were in this category: Griffith, who had been Premier of Queensland, and Barton, our first Prime Minister, O'Connor, Isaacs and Higgins, who were all members of the first federal Parliament. Overall, 13 of the 44 Justices to date, or around 30 per cent, have served in state or federal parliaments, including five out of eleven, or just under half, of the chief justices (Griffith, Knox, Isaacs, Latham and Barwick) and six who have served as Commonwealth Attorney-General (Isaacs, Higgins, Latham, Barwick and Murphy, as well as Evatt, whose term on the Court, somewhat unusually, preceded his move into federal politics). This all now seems a long time ago; it is nearly 30 years since Murphy was appointed to the Court, and there are currently no cross-overs of this kind.

I do not propose today to enter into the debate about the merits or otherwise of having High Court judges with prior political experience, or indeed into the broader question of the desirable attributes of a High Court judge and the range of acceptable criteria for appointment.[22] Some say that prior political experience injects into the Court an element of realism and pragmatism that enables the Court to better understand how government really works. Others say that the mindset of the politician is incongruent with the mindset of the judge and that it inhibits a full transition from one kind of law-making to the other. One thing is clear, and that is that there is as much diversity of opinion on the Court amongst the subset of former politicians, including the five founding fathers, as there is amongst the judges generally. In other words, it is not easy to discern a ready translation of political experience or political views into the resolution of particular disputed questions in the High Court.

I touch on the cross-over of personnel between the Parliament and the Court only to observe how much we abstract our thinking about institutions from the earthier question of who populates these institutions. We should never lose sight of the latter, but the former is a mark of the sophistication we bring to bear on our governance arrangements, especially in a federal system, which always adds another dimension of complexity. Understanding those governance arrangements, particularly the law-

[20] See esp. Anthony Mason, 'Law-making role: reflections' in *The Oxford Companion*: 422; and Harry Gibbs, 'Law-making role: further reflections' in *The Oxford Companion*: 424, as well as the further reading cited therein.

[21] See generally Simon Evans, 'Appointment of Justices' in *The Oxford Companion*: 19; and Francesca Dominello and Eddy Neumann, 'Background of Justices' in *The Oxford Companion*: 48.

[22] See Simon Evans, ibid, and the further reading cited therein; Michael Coper, *Encounters with the Australian Constitution*, North Ryde, NSW, CCH, 1987: 118–132.

making part, does require us to think about the roles of institutions in the abstract—leavened a little by the *realpolitik* of the human element in making these institutions work, but underscored by the very fact that we do reasonably expect the individuals who cross over to make some kind of transition from one mode of decision-making to another.

Let me return, then, to the advertised focus of my lecture: how does law-making by the High Court sit with the law-making responsibility of the Parliament? Is it legitimate, and does it complement or counteract the role of the Parliament? Is the High Court—to use what has become quite an emotive label—too 'activist'?[23]

For those of you who are not schooled in the jurisprudential debates of the last one hundred years or so, I really should pause to justify the proposition, rather than simply take it for granted, that the courts make law. It was once believed, and, in many ways, it remains convenient to believe, that the courts simply declare what the law is; that when the law is unclear, the courts hear argument about what the law really is and, with strict logic and high technique,[24] resolve that dispute with an authoritative declaration. The corollary of this position—once described by Lord Reid in the UK as a 'fairytale'[25]—was that any change in the law should be left to those who are elected to do that job and who are accountable for it, namely, the legislators. But the resolution of disputes about the law is more an act of creation than of discovery, and it is now well-accepted, and relatively uncontroversial, that in exercising the wide choices that are characteristically presented by the tangled skein of legal argument,[26] the judges are making the law rather than simply finding it. So I will not pause to justify that proposition; I rather take it as my starting point.

Having said that, the assertion that the role of the judges is simply to declare what the law is, is probably more fairly described as a half-truth rather than a total falsehood. Or, to approach the issue from the other end, the proposition that the judges make law would be misunderstood if it were taken to imply that this awesome power is unconstrained, or that the judges have some roving commission to make the world a better place, or that judicial law-making is indistinguishable from legislative law-making. The truth is that there are many constraints,[27] and a different kind of accountability, and it is more productive to engage with those more particular questions than to deal in the stereotypes of the two extremes.

I did say that in many ways it remains convenient to believe in the myth of judicial automatism. It has always been at the core of supporting the legitimacy of the judicial role to talk up the objectivity of finding the law and to downplay the subjectivity of exercising the personal choices that go into creating it. And the idea of just applying

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23 Ronald Sackville, 'Activism' in *The Oxford Companion*: 6.

24 My use of this phrase, famously adopted by former Chief Justice Owen Dixon (see Owen Dixon, 'Concerning Judicial Method' in S.H.Z. Woinarski (ed.), *Jesting Pilate*, Melbourne, Law Book Co, 1965: 153, quoting the English legal historian F.W. Maitland) is not necessarily to equate Dixonian legalism (as to which see below) with a simple declaratory theory of law.

25 Lord Reid, 'The Judge as Lawmaker' (1972) 12 *Journal of Public Teachers of Law* 22.

26 See generally Julius Stone, *Legal System and Lawyers' Reasonings*, Sydney, Maitland Publications, 1964.

27 See esp. Kenneth Jacobs, 'Lawyers' Reasonings: Some Extra-Judicial Reflections' (1967) 5 *Sydney Law Review* 425.

the law lies at the very heart of Chief Justice John Marshall's justification for the very power of judicial review, so eloquently and so successfully asserted two hundred years ago in *Marbury v Madison*.[28] The real challenge lies in how the power is exercised and how the choices are made. In meeting this challenge, the judges have to steer a tricky course between the unpersuasiveness of totally self-denying automatism and the invidiousness of unbridled creativity.[29]

This dilemma is not absent for courts in the hierarchy below the High Court, but it is greatest for the ultimate court in the hierarchy, which the High Court has been since appeals to the Privy Council were abolished successively in 1968, 1975 and 1986.[30] Moreover, the dilemma arises in slightly different ways across the three main areas of High Court endeavour: constitutional law, statutory interpretation, and the common law. In the arena of the Constitution, the High Court fixes the limits of the Parliament's law-making, and the Parliament is stuck with it; in statutory interpretation, the Court tells us what the Parliament really meant, and the Parliament can correct that if it believes the Court to have misconstrued its real intention; and in relation to the common law, the Court has the field to itself, although subject, as in the case of statutory interpretation, to legislative correction, revision, rationalisation or supersession.

If one were pushed to answer definitively the question posed in the title to my lecture—are the High Court and the Parliament partners in law-making or hostile combatants?—one would have to look separately at these three areas. The area of statutory interpretation is particularly fascinating,[31] as the Parliament can endeavour to capture its collective intent in an appropriate form of words as many times as it likes and the Court can still purport to say what Parliament must really have intended. As Bishop Hoadly said in 1717, 'whosoever hath the power to interpret the law hath the power to make it.'[32] Although complicated by a considerable constitutional dimension, the interplay between Court and Parliament in relation to Parliament's attempts to exclude the courts from reviewing administrative decisions is a good example.[33] All kinds of techniques are available to convert judicial submissiveness into robust assertiveness that sometimes even succeeds in being persuasive rather than merely sophistry.

It is in relation to the common law that the issues of judicial law-making come into sharpest focus.[34] The task of constitutional and statutory interpretation is shaped and

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28 5 US (1 Cranch) 137 (1803).

29 Michael Coper, 'Interpreting the Constitution: a Handbook for Judges and Commentators' in Tony Blackshield (ed.), *Essays in Honour of Julius Stone*, Sydney, Butterworths, 1983: 52.

30 *Privy Council (Limitation of Appeals) Act 1968* (Cth) (abolishing appeals in federal and constitutional matters), *Privy Council (Appeals from the High Court) Act 1975* (Cth) (abolishing remaining appeals from the High Court), and the *Australia Acts 1986* (UK, Cth & States) (abolishing remaining appeals direct from state courts); Tony Blackshield, Michael Coper, and John Goldring, 'Privy Council, Judicial Committee of the' in *The Oxford Companion*: 560.

31 Dennis Pearce, 'Statutory interpretation' in *The Oxford Companion*: 641.

32 See Julius Stone, *Social Dimensions of Law and Justice*, Sydney, Maitland Publications, 1966: 687.

33 Ian Holloway, 'Privative clauses' in *The Oxford Companion*: 559; *Plaintiff S157/2002 v Commonwealth* (2003) 77 ALJR 454.

34 Gerard Brennan, 'Common law' in *The Oxford Companion*: 117.

bounded by the need to ascertain the meaning of a text, and the question of adherence to earlier judicial precedent,[35] although significant (and occasionally quite dramatic), is accordingly overshadowed—especially in constitutional law, where the Parliament, being bound by the Constitution and its judicially revealed meaning, lacks the power to correct perceived judicial error. The High Court will generally feel less constrained, therefore, in correcting its own perceived error in decisions on the Constitution than in doing so where Parliament can change the law, and can do so prospectively. The common law has traditionally developed from precedent to precedent, with the application of existing rules to serially unique fact situations, the adaptation of existing principles to new circumstances, and incremental rather than abrupt change, with wholesale change being left to the legislature. A classic example of this, and one that is constantly cited by critics of the alleged activism of the Mason Court from the late 1980s to the mid-1990s, sometimes evidently in an endeavour to embarrass Justice Mason, is the case of *State Government Insurance Commission v Trigwell*,[36] decided in 1979. In that case, a majority of the Court (Justice Murphy dissenting) held that the long-standing common law rule that absolved property owners for liability in negligence for damage caused by their animals straying on to an adjoining highway should be affirmed, notwithstanding how anachronistic that rule might seem in modern conditions. Justice Mason, as he then was, observed that the Court was 'neither a legislature nor a law reform agency' and that its facilities, techniques and procedures were not adapted to the functions of those bodies.[37]

Yet the law reports are replete with examples of modernisation of the common law by the High Court, largely, though certainly not wholly, since the High Court could no longer be second-guessed by the Privy Council, and particularly, though certainly not exclusively, by the Mason Court, that is, the High Court of which Sir Anthony Mason was Chief Justice from 1987 to 1995.[38] I have time today only to mention a few examples: contraction of the doctrine of privity of contract;[39] expansion of the doctrine of promissory estoppel;[40] abolition of the distinction between money paid under mistake of law and money paid under mistake of fact;[41] abolition of the rule that a husband could not commit rape in marriage;[42] reformulation of the general law of negligence to subsume many of the earlier special rules;[43] and, of course, the recognition in *Mabo* of native title.[44]

Interestingly, *Mabo* became the most controversial of all of these decisions, partly in its own terms and partly because many of the other decisions appeared to concern technical 'lawyers' law', notwithstanding their immediate impact on the parties

35 Tony Blackshield, 'Precedent' in *The Oxford Companion*: 550.

36 (1979) 142 CLR 617.

37 (1979) 142 CLR 617, 633.

38 Michelle Dillon and John Doyle, 'Mason Court' in *The Oxford Companion*: 461; Cheryl Saunders (ed.), *Courts of Final Jurisdiction—The Mason Court in Australia*, Sydney, The Federation Press, 1996.

39 *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107.

40 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

41 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353.

42 *R v L* (1991) 174 CLR 379.

43 *Rogers v Whitaker* (1992) 175 CLR 479, *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520.

44 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

concerned and their potential impact on many others. Yet it has always seemed to me an overstatement to regard *Mabo* as having wrought an abrupt change in the law. The question had never arisen in the High Court for final determination as a part of Australian law, there were powerful precedents in other jurisdictions, and attitudes and values had developed considerably, nationally and internationally, in the 200 years since colonisation. *Mabo* perhaps disturbed settled expectations about the state of the law, at least in some quarters, rather than changed the law itself.

Mabo illustrates two further points about judicial law-making. First, this law-making is always in the context of settling a particular dispute between particular parties, and however broadly the Court may formulate the rules for the resolution of that dispute—that formulation being the quintessential part of its law-making role—they are unlikely to provide a comprehensive code for the future regulation of all of the incidents of the dispute. Whatever one thinks of the aftermath of *Mabo* and the developments in native title over the past decade,[45] it was no surprise that the Parliament acted in 1993 to introduce a detailed legislative regime for the recognition and handling of native title claims. Given the interaction since of legislation and judicial decision, one might well draw the lesson from this area that the courts and the Parliament are inevitably partners in the law-making process, but, like all partners, are not always in perfect harmony.

The second point I want to make about *Mabo* and the law-making process is how complex and varied are the issues that arise in the High Court under the general rubric of ‘the common law’. Some of the examples I cited of radical change can be seen, on closer examination, to have elements of continuity with the past, and the extent and implications of the change may be open to debate; in other words, the line between incremental and moderate change and abrupt and more radical change is not always easy to draw. Conversely, over time the common law has developed considerably in any event, as an inevitable consequence of the application of the law to new circumstances, and the art—and it is an art—of ‘distinguishing’ earlier precedents. Indeed, it is this subtle blend of continuity and change that has been regarded as the genius of the common law. In all but cases involving the most routine application of existing principle to familiar facts—cases of a kind now most unlikely to come to the High Court—the courts are, as I indicated earlier, regarded as making law. But sometimes issues arise that are quite novel, and really underline the Court’s law-making role, rendering the label ‘activist’ even more unhelpful than usual.

One of these arose just two months ago in the case of *Cattanach v Melchior*,[46] the case in which the High Court had to decide whether damages were recoverable by parents for the cost of raising a healthy child born after a failed sterilisation procedure involving negligent advice on the part of the surgeon. The Court decided by a majority of four (Justices McHugh, Gummow, Kirby and Callinan) to three (Chief Justice Gleeson and Justices Hayne and Heydon) that damages of this kind were recoverable. The separate judgments in the case run to a transcript of over 150 pages, so there is no way that I can do it justice here today. It is sufficient to say that the majority saw its decision as the logical consequence of the ordinary principles of negligence, whereas the minority saw that view as either an unwarranted extension of

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45 Peter Russell, ‘*Mabo*: political consequences’ in *The Oxford Companion*: 450.

46 (2003) 77 ALJR 1312.

those principles (especially in the area of economic loss,[47] the recovery of which the law has traditionally contained) or as contrary to public policy[48] (because it treated the birth of a healthy child as harm or damage rather than a blessing; to do so, so it was said, was contrary to the parents' duty to nurture their children, and indeed could damage the child and the parent-child relationship).

The decision occasioned considerable comment, and some trenchant criticism from members of the Australian Parliament. The critics clearly agreed with one of the views amongst the minority judges that there was something repugnant, even morally repugnant, about allowing the recovery of damages for the cost of raising a healthy child. For a politician to take this essentially result-oriented stance is entirely understandable—that is what politicians do. For a judge to do so raises more difficult questions for the nature of the judicial process. Indeed, if there is merit in the view that the opinion of the majority in the case was more consistent with the existing principles of negligence, then there are two criticisms that might be levelled at the minority: that not only did they arguably implement their own personal social values, but in doing so they were the stronger candidates for the label 'activist'.

Justice Callinan, in the majority, made an interesting comment:

> I cannot help observing that the repeated disavowal in the cases of recourse to public policy is not always convincing … it would be more helpful for the resolution of the controversy if judges frankly acknowledged their debt to their own social values, and the way in which these have in fact moulded or influenced their judgments rather than the application of strict legal principle.[49]

Similarly, Justice Kirby, also in the majority and long an advocate of the transparent recognition of policy considerations in judicial decisions, observed that judges, although responsible for developing the common law

> have no authority to adopt arbitrary departures from basic doctrine. Least of all may they do so, in our secular society, on the footing of their personal religious beliefs or 'moral' assessments concealed in an inarticulate premise dressed up, and described, as legal principle or legal policy.[50]

The truth is—and this is evidenced by the striking diversity of judicial opinion on the issue all around the world—that *Cattanach v Melchior* could have been decided either way, on reasonable grounds. The majority view, though equally with the minority grounded in policy, is arguably more consistent with existing legal principle, yet the law of tort in general, and of negligence in particular, has always had to set boundaries to the extent to which a wrongdoer must make reparation. These boundaries are rarely to be found in legal principle; indeed, it is the logical consequences of legal principle that so often challenge the boundaries. The boundaries are to be found in policy. If the policy commands sufficient support, and is

[47] See the judgment of Gleeson CJ.

[48] See the judgments of Hayne and Heydon JJ.

[49] (2003) 77 ALJR 1312, 1369.

[50] (2003) 77 ALJR 1312, 1339.

asserted sufficiently successfully, it may be celebrated and legitimated as 'public policy'. If it fails to command support, it is liable to be castigated as 'judicial policy'. But whether it has a veneer of objectivity, or a patina of subjectivity, it is judge-made law, and it is heavily influenced by the judge's own social values.

So who should be making this kind of law, the courts or the Parliament?

Parliaments have, as you would know, made all kinds of incursions into the law of tort, especially recently. In some jurisdictions, such as New Zealand, the common law has been supplanted by statutory schemes for compensation. Justice Kirby observed in *Cattanach v Melchior* that legislation setting the boundaries of tortious liability, especially in relation to caps and exclusions, was apt to be arbitrary and dogmatic, and that the case-by-case and incremental nature of the judicial process was better adapted to this task.[51] Be that as it may, there will always be areas of law that fall to be developed primarily by the judges, and questions of law that turn primarily on policy considerations. *Cattanach v Melchior* posed a novel question for the High Court, and accordingly was perhaps as transparent a case of judicial law-making as one can get, but it would be misunderstood if it was thought to be different in kind rather than different in degree from the law-making task characteristically presented to the High Court. The Court cannot avoid and grapples as best it can with policy considerations,[52] which are fed into the judicial meat-grinder and extruded as legal principle.

Where the Court is presented with a clear choice between maintaining an existing rule that is thought to be no longer appropriate and abandoning it in favour of a new rule, there are many arguments in favour of maintaining the existing rule, especially those arguments that turn on the values of certainty, stability, and respect for precedent, as well as arguments that question the capacity of the judges to frame a new rule that takes account of interests not represented in the litigation. Yet the implied call here for legislative intervention to change the rule is a double-edged sword. It can also be called in aid to correct the consequences of judicial misadventure, if that be how an instance of overt judicial change is perceived. As obvious and as strong as the arguments are for the judges to maintain the status quo, there is also much to be said for the judges in an appropriate case to unmake as well as make the law, safe in the knowledge that their efforts may be second-guessed by the Parliament if they miss the mark. In either case—in the case, that is, either of legislative intervention to compensate for judicial quiescence or legislative correction of judicial misadventure—it seems to me that the Court and the Parliament may be regarded as partners in law-making. The real issue, it seems to me, is, when is it appropriate for a court to take one course rather than the other? It would be doctrinaire to lay down a single rule always disavowing or always embracing change. It would be more profitable to try to tease out the relevant factors that might impinge on the choice: for example, the likelihood of Parliamentary interest in the rule at issue, the clarity and contestability of the proposed new rule, the likely impact of the change on the community generally, and how that impact might be best assessed. Sir Anthony Mason has frankly admitted the difficulty of making the choice.[53]

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[51] ibid.

[52] Anthony Mason, 'Policy considerations' in *The Oxford Companion*: 535.

[53] Anthony Mason, 'Law-making role: reflections' in *The Oxford Companion*: 422 at p. 424.

I would not be surprised if, at this point, many of you were thinking that I have made things rather over-complicated, that I posed some pretty simple questions to lure you into this lecture and have given you some pretty complicated answers. The fact is that judicial decision-making is a complex and subtle part of human endeavour, especially in the highest court in the land. The common law can throw up questions that might be viewed as involving the extension of existing principle to new circumstances, or the overthrow of existing principle, or the creation of a new principle to cater for an entirely novel situation, with disagreement not only over the resolution of questions within these categories, including disagreement over the nature and formulation of the existing principle, but also over which of the categories is apt to describe the dispute in question. The law of the Constitution adds another dimension altogether, but with similar conundrums about the inconclusiveness of legal principles and yet our unease, in terms of legitimacy, about the judges going beyond them.[54]

This, as I hinted earlier, is indeed the dilemma for the High Court in its law-making role. The proponents of what is sometimes called 'legalism'[55] face the criticism that, at least in the High Court, answers are rarely compelled by legal considerations, but in truth turn on choices between competing policies.[56] The proponents of what might be termed, in opposition to legalism, 'pragmatism', face the criticism that policy considerations are for the legislative process to weigh and balance. So legalism is inadequate and pragmatism is invidious. And worst of all, many would claim, is the judge who uses legalism as a cover for pragmatism, or, in other words, who is in truth pragmatic but not openly so.[57] The legitimacy sought by adherence to legalism is, so the critics would say, a spurious and shaky kind of legitimacy if its foundation is in dishonesty.

Unsurprisingly, given the activism of the Mason Court, Sir Anthony Mason has been a critic of legalism. In an address earlier this year, he said that legalism

> is an incomplete and inadequate approach to judicial methodology. It conceals rather than reveals the reasoning process. While this may divert attention away from what are the more debatable aspects of judicial reasoning, thereby possibly lessening the prospect of criticism, the judicial obligation is to state the reasons and that means to state them fully.[58]

Yet in the same address, Sir Anthony said of former Chief Justice Sir Owen Dixon, with whom the methodology of legalism is most often associated, that 'he was and remains Australia's finest lawyer.'[59] To me this contrast says two things. First, it

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54 Michael Coper, *Encounters with the Australian Constitution*, North Ryde, NSW, CCH, 1987: 400–422.

55 Stephen Gageler, 'Legalism' in *The Oxford Companion*: 429.

56 Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5(2) *Constitutional Law and Policy Review* 21.

57 See, eg, Greg Craven, 'The High Court and the ethics of constitutional interpretation: honesty is the best policy' (2003) 28(2) *Alternative Law Journal* 52.

58 Anthony Mason, 'Centenary of the High Court of Australia' (2003) 5(3) *Constitutional Law and Policy Review* 41.

59 ibid.

suggests that Dixon is misunderstood if he is taken to be some cardboard cut-out or one-dimensional adherent to the purity of legal reasoning. Secondly, it suggests that the notion of legalism itself is misunderstood if it is too easily identified, even equated, with the judicial philosophy and methodology of Dixon. In truth, judicial decision-making contains elements of legalism and pragmatism, and can be neither wholly one nor the other.

I am not suggesting that this is necessarily a resolution of the dilemma; indeed, it may only compound it. If Sir Anthony Mason's criticism of legalism is correct, and I think it is, then we must develop a more mature understanding of the task confronted by the High Court, especially since 1984 when the *Judiciary Act* was amended to ensure that appeals could come to the Court only by special leave, thus making it likely that almost every case coming before the Court would be at the cutting-edge of legal development and would require difficult choices.[60] What, then, would that mature understanding entail?

In my view, it would entail at least an understanding and acceptance of the following:

1. In the various senses already explained, the High Court makes law: unavoidably, endemically, and not inappropriately.
2. As the highest court in the hierarchy, it has a responsibility not only to resolve the dispute before it but also to frame general propositions of law that will guide lower courts, legal advisers, and the community generally.
3. In making law and in framing these general propositions, it is rarely compelled by legal principle but faces hard choices between competing principles and their underlying policy considerations.
4. The need for certainty, stability and adherence to precedent is itself a policy consideration, but it competes with other policy considerations related to the justice, wisdom, practicality, or other substantive merits of the competing outcomes of the case at hand or of the principles at stake in the case.
5. In weighing all of the considerations in a case, different judges may reasonably differ, including on whether a particular development of the law is better undertaken by the Court or the Parliament.

A mature understanding of what the High Court does, based on these five simple propositions, still leaves many unanswered questions. In fact, it probably generates more than it answers. If the judges are to grapple transparently with policy, how should they ascertain what the relevant policy considerations are? Are counsel up to the task of arguing transparently in these terms? When the Court opts for or vindicates a particular policy, why should that persuade those who would prefer a different policy? How is the Court accountable?

The answer to the last question is not as hard as it looks. Accountability is not simply a matter of electoral recall; indeed, that would be the antithesis of the pivotal notion in our system of government of judicial independence. The accountability of the High

60 *Judiciary Act 1903* (Cth) ss 35, 35A; David Jackson, 'Leave to appeal' in *The Oxford Companion*: 425.

Court[61] lies more in the superficially mundane fact that it performs its work in open court and publishes its reasons for decision. This makes these reasons open to scrutiny, debate, appraisal and criticism. They have to be persuasive in the marketplace of ideas. Open dialogue about these ideas is, in my view, the cornerstone of the very justification of judicial review in a democracy—not, dare I say it, the justification grounded in legalism first offered by Chief Justice John Marshall in *Marbury v Madison*,[62] however instrumental and politically savvy that justification was in establishing judicial review and however much the notion of legalism, though far from the whole story, contains a kernel of truth.

If we are to have a proper dialogue about the merits of High Court decisions, certain conditions need to be observed. It would be useful, for example, if the critics read the decisions first. On the other hand, it would also be useful if the Court facilitated that obligation by keeping its audience in mind and not making unreasonable demands on the reader. This is a call neither for joint rather than separate judgments,[63] nor for pitching to the lowest common denominator, but for clarity, transparency, avoidance of undue repetition, and avoidance of undue length.

There are many interconnections between the High Court and the Parliament. It would have been fascinating, for example, to explore with you not only the impact of the Court's work on the products of the Parliamentary process, but also the law relating to intervention of the courts in the process itself.[64] I have confined this lecture to the respective law-making functions of the High Court and the Parliament, and made a plea for better understanding of the former.[65] The Court and the Parliament are indeed partners in the law-making process, although their respective roles can bring them into conflict. In particular, they act as a brake on each other, the Court interpreting and even invalidating the legislation of the Parliament, and the Parliament modifying and even abolishing parts of the common law when it finds the Court to have been too bold or not bold enough. The interaction of these two great institutions, the constant confluence of independence and interdependence, has all the hallmarks of a complex political ecosystem.

In the cycle of life all things return from whence they came, and I conclude by returning to the occasion of the High Court's debut in 1903, the humble but instructive case of *Hannah v Dalgarno*.[66] You will recall that the Court managed to avoid the more difficult issue thrown up by the litigation. The courts undoubtedly make law, as I have said repeatedly in this lecture, but judicial law-making is different from parliamentary law-making, and sometimes discretion is the better part of valour. The High Court makes law in the context of particular disputes, and whether a particular dispute is judged to be an appropriate vehicle for a sweeping proposition or grand decree can be a chancy thing. The Court's law-making is intermittent, and, as the lawyers love to say, interstitial. Yet it is a great power, the exact nature of which

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[61] Michael Coper, 'Accountability' in *The Oxford Companion*: 3.

[62] 5 US (1 Cranch) 137 (1803).

[63] Michael Coper, 'Joint judgments and separate judgments' in *The Oxford Companion*: 367.

[64] Gerard Carney, 'Parliamentary process, intervention in' in *The Oxford Companion*: 523.

[65] See generally Patrick Parkinson, *Tradition and Change in Australian Law*, 2nd ed., Pyrmont, NSW, LBC Information Services, 2001: 178–199.

[66] (1903) 1 CLR 1; Francesca Dominello, '*Hannah v Dalgarno*' in *The Oxford Companion*: 316.

has exercised many minds over many decades, if not centuries. If we have a serious interest in the nature of democratic government in Australia, as I deem all of you to have by your very presence here today, then my message to you is that the law-making role of the High Court deserves to be better understood.

Question — What about the vexed issue of the representativeness of the judges of the High Court? We have no women judges, for example.

Michael Coper — The short answer is that the judges are not there as 'representatives' in any capacity. They are there to perform an independent and supposedly objective function, notwithstanding what I have said about the subjectivity of the process. But they are not there as representatives of any particular interest. However, having said that, I think many would concede these days that there is a case for the community to feel as if there is some participation in the operation of the highest court in the land through a spread of expertise and background, and that applies to geographical considerations, as much as to gender. So you have this argument on the one side between those who say it is simply a matter of merit and legal ability and capacity, and those on the other who say that is a fiction, because, as I've said today, it is not simply legal considerations that affect the outcome of cases, and amongst the best lawyers, there are those with diverse characteristics, including where they come from and what gender they are. I think the balance of opinion today would be that there is a strong case for the court not to be representative, but to be more diverse.

Question — When you say that judges may differ legitimately, do you think that in *Cattanach* the cost of raising a child should be able to be seen more uniformly as either harm or damage? And which of the judges do you think was correct in that case? Were any of them correct? If none of them could come up with a simple answer about whether or not the costs of raising a child were damages or harm in the common law, do you think that there is a fundamental problem in the making of the law and the transparency, if something as fundamental as the legal obligation of paying for a child couldn't be at least agreed on? Not whether public policy determines it, but the fact that there wasn't even a clear majority on where it fell in terms of the principles and elements?

Michael Coper — I have to say I'm not an expert on the law of torts. But I would say that, first of all, the whole idea of reparation in damages is an uncertain thing, because you can't exactly quantify or compensate for the loss that has been suffered. It is always going to be difficult, whether it is personal injury or anything else. Putting a monetary amount on it is difficult and elusive, and 'second best' to the injury not occurring in the first place. Looking at it in that context, it is not surprising that there might be disagreement or difficulties in quantifying what the nature of the loss was following the negligence of the doctor in relation to the sterilisation operation.

It does seem to me that the majority view in *Cattanach v Melchior* was the view that was more consistent with existing legal principle, although it is a time-honoured technique to come up with reasons to contain the logical consequences of existing principle. It's just that I think the majority were saying the minority were not persuasive in the reasons that they came up with.

Although it can be seen somewhat emotively—in terms of a child being regarded as 'harm or damage', rather than a blessing—I think that is just a misleading way in which to frame the question.

Question — I meant 'harm/damage', versus 'damages'. Not just the difficulty of quantifying the damages, but the characterisation of the type of damages, for example, was it economic loss? They didn't seem to frame it in terms of her capacity to earn income, whether or not other cases might have.

Michael Coper — There was a lack of agreement in relation to that as well, whether it was pure economic loss, or economic loss following from other kinds of physical events. I think in this area of the law there are always different ways of framing the facts and framing the question, and that's what influences the outcome. It is not surprising that the judges disagree.

Question — In your earlier remarks you referred to both the American and the English antecedents for the High Court of Australia. Would it be reasonable to say that the instances of judicial law-making in Australia are somewhere between those two, up to the present time? Or is that an over-simplification?

Michael Coper — That is a good observation, because the United States Supreme Court is certainly much more openly pragmatic and openly prepared to engage in debate on policy considerations. The British courts traditionally have been much more legalistic. I say 'traditionally', because things are always in a state of change, and the introduction of a Human Rights Act in the UK may compel the judges to take a somewhat different approach. But I think your observation is valid—the High Court has struggled to fit somewhere between those two ends of the spectrum, with different judges at different times being closer to one or the other.

I was talking mainly today in terms of the Court as a whole, but if you drill down and look at individual judges, of course you'll get a much broader range and difference of opinion. If you compare the style of Justice Lionel Murphy on the one hand, with many of the more legalistic judges on the other, it becomes more complicated. So yes, I think the High Court is somewhere in between those two, but I wouldn't say necessarily that the Supreme Court of the United States or the British courts are really at either extreme. The Supreme Court of the United States will recognise the relevance of doctrine as well as policy considerations, and the British courts will also, of necessity, for the reasons I have given, need to take into account policy considerations. So it's all a matter of balance, I think.

Question — Regarding the relationship between the executive and the judiciary, do you think attacks by the executive on certain High Court decisions—focussing often on particular judgments—is just part of the debate between these two arms of

government? Or do you think it undermines the independence and separation of powers between the courts and the lawmakers?

Michael Coper — If there is to be debate and dialogue, there has to be criticism. We all would prefer criticism to be fair criticism, but that doesn't always happen, especially in the political arena. It does give rise to questions about the extent to which the judges should respond in the debate to answer criticism or just be content for their judgment to be out there and to speak for itself. And we've seen over the past few years different views on the role and responsibility of the Attorney-General in relation to defending the judges—the current Attorney taking the view, consistently over a long period, that it is not the job of the Attorney-General to defend the judges. Others take a different view.

But if there is to be debate, there has to be pretty free-wheeling criticism. It would be nice to develop a set of ground rules, such as I stated in my lecture—for example it would be good for people to read the decisions before they criticise them. But the High Court doesn't make that easy. I wouldn't be surprised if many of you today think that *Cattanach v Melchoir* sounds like an interesting case, but it is a big read with 150 pages of transcript and a lot of unnecessary repetition. But the judges are discharging their individual responsibility as they see it, to be true to their judicial oath and to state their own view of how they would answer the question, and not necessarily collapse it into a uniform or multiple joint view of the Court.

So whether it is the executive or anybody else, people should endeavour to be responsible in their criticisms, but that doesn't always happen, so we have to then think about how the criticisms are handled and responded to. And that brings in academic commentary, and it brings in the media. The various aspects of the media need to take an interest in these debates, and that's happening more and more. So, the short answer is that criticisms are inevitable, and are sometimes inappropriate, but need to be responded to.

Question — I refer to your central question of whether law-making by the High Court complements or counteracts that of the Parliament. You made observations about former members of parliament who have been appointed to the High Court. Could you let us know whether we are likely to see more former members of parliament, or members of parliament, appointed to the High Court, and whether or not that has made it a closer working partnership or indeed widened the gulf?

Michael Coper — It is always hard to predict, but certainly over the last 20 or 30 years the fashion has been to gravitate towards those who already have judicial experience, especially in state supreme courts. It is hard to pin down a single reason for that, there are so many factors that go into judicial appointments. The appointers would say that they want the best person for the job—the person of the highest calibre, whether they are in Parliament or not—and it is a little superficial to think of it that way because there are so many competing characteristics of good judges. Gender and all of those other considerations that I mentioned before come into it as well. It is very hard to predict, but the trend has certainly been more toward people with a traditional lawyer's law background rather than those with a parliamentary background.

Question — Given that the key institutions of democratic government—the Parliament, the executive and the judiciary—are actually institutions not designed for democracy but pre-dating it, and that the idea of the institutions being built on the real foundation of democratic principle—the equality of all human beings—is just a distant vision, what things do you think we can do to make the High Court better understood? And when the law-making function does become better understood, how do we avoid problems like the huge backlog of applicants to the registry, especially unrepresented applicants? It seems to me that quite a widespread reform is necessary.

Michael Coper — To answer your question on how the courts handle the volume of litigation, one thing that's worth remembering is that you have to have a pretty exceptional case to get into the High Court. The High Court, although it is the highest court in the hierarchy now, really doesn't deal with cases unless there is some special reason to take them beyond the full court or the court of appeal of the supreme courts. I referred to the special leave provisions, whereby you can't get a case to the High Court unless the Court recognises it as raising some exceptional point or principle. For most purposes it is the Supreme Courts or the Federal Court of Australia that is the end of the line for most litigants, unless there is some exceptional principle at stake.

This technique that the High Court has to control litigation is not unlike the way other courts have to process people who are entitled to knock on the door, and that is that they can pick and choose the cases they take. That is the same in the United States Supreme Court, as well. As I hinted in the paper, that has brought quite a dramatic change to the way in which the High Court approaches these questions and sharpens the focus on the law-making function of the High Court quite considerably, because the series of difficult cases is unrelenting.

Having said that, there are, amongst the litigants before the High Court, a fair proportion of unrepresented litigants, and the High Court has to deal with those in a fair and equitable way, in the same way it deals with any other represented litigants. That has been a particular issue for the High Court. But again, the unrepresented litigant has to get through the hurdle of special leave, like any other litigant does. So the short answer to your question is that most courts face the problem of controlling and dealing with the volume of litigation but it is a peculiar problem in the High Court because they only take a narrow range of cases to start with.

On the broader question of understanding the Court, I think it is just a matter of working on a number of fronts at the same time, and this goes to the question of public or popular participation in how our democratic institutions work. The Senate sponsoring lectures like this is one fragment of the activity that goes on in bringing the discussion to the public.

But I think there is a range of things that we need to work on simultaneously. The media has an important role to play. Newspapers have gone hot and cold over the years on their interest in things legal and especially the High Court, sometimes running special supplements or sections on the law and sometimes not. There will be a flurry of activity in the next few weeks on the centenary of the High Court, but that will come and go.

We wrote the *Oxford Companion* specifically to bring understanding of the High Court to a broader audience.

Question — We can challenge politicians for the laws that they make. Do you think we should be able to question and challenge judges over the laws that they make?

Michael Coper — Well we do, and that is done in a variety of ways, not least in commentary in the media and in academic articles and journals. I only referred very briefly to this idea of dialogue about decisions being a key part of the courts' accountability, but of course it only works if it is sustained and the court listens, and it has some role to play. And if you look at things empirically, I can think of examples where sustained criticism has led to a change in the law, with the Court eventually seeing the merits in the criticism that was being made.

A good example of that is an area close to my heart, and that is section 92 of the Australian Constitution, which I think for many years went off the rails, but under sustained criticism both academically and in the courts from dissenting judges, the court changed its view. There are many other examples where it hasn't, and one can draw whatever conclusion one likes from that. One of the things to keep in mind that it is not always clear what the correct view is. In fact I shouldn't even use the language of 'right' and 'wrong' or 'correctness' and 'incorrectness', it is really a matter of which is the better view, having regard to all these difficult circumstances and factors. But people get disillusioned about having to read seven separate judgments in the High Court rather than a single statement through a joint opinion, especially because of the contrast to Parliament, which speaks only with once voice; one set of legislation is passed, not 150 different views on what it should be. But the Court operates in a different way, and one of the merits of that is the flow of dissenting opinion and diversity which allows for the dialogue to continue about which is the better view. It is not pre-empted for all time. I only sketched this in my talk, but I think the whole concept of having proper dialogue and debate about High Court decisions is the key to moving forward.

Constitutional Schizophrenia Then and Now

Exploring federalist, regionalist and unitary strands in the Australian political tradition*

A.J. Brown

‘Oh, for a Washington, or a Franklin!—But we may sigh in vain.’
Sydney Morning Herald constitutional correspondent,
26 August 1853

This year, 2004, is a fundamental year in Australian constitutional history. One hundred and fifty years ago, on 31 October 1854, Van Diemen’s Land (Tasmania) became the first Australian colony to formally accept the British offer of responsible government, consummated by royal assent in 1855 along with the British Parliament’s subsequent enactment of the New South Wales and Victorian constitutions. One hundred and fifty years ago, European Australians thus first proclaimed and achieved their effective political independence in terms of their own writing. This was the most momentous constitutional development since 1823, when Britain first legislated for the conversion of NSW from a military possession to a civilian colony, and placed Australia on the path that would see a twentieth and now twenty-first century nation governed by seven written constitutions, including the recently-celebrated federal constitution of 1901.

At the same time, we have to acknowledge deep popular scepticism, if not cynicism about what was achieved in all these constitution-making processes. Even 150 years ago, the plaintive editorial of the *Sydney Morning Herald*[1] conveyed a widespread

* This paper was presented as a lecture in the Department of the Senate Occasional Lecture Series at Parliament House on 19 March 2004. It is based in part on the forthcoming article ‘One continent, two federalisms: rediscovering the original meanings of Australian federal political ideas’, *Australian Journal of Political Science* (2004).

[1] ‘New constitution’, *Sydney Morning Herald*, 26 August 1853: 4.

feeling that there was something lacking in the constitutional efforts of NSW, the 'mother colony'. We can surmise that at the time, the correspondent was complaining of three things: a lack of commitment to democracy, or at least of any vibrancy in that commitment, among the conservative political elite still controlling the NSW legislature; a lack of nationalism and territorial political unity, in the failure of NSW leaders to foster a constitutional settlement that took in all the five colonies and the whole Australian continent; and overall, a lack of vision or statesmanship in the opportunity presented to 'constitute' a new political order, by comparison with the American founding. One does not need to have any artificial love of American politics, then or now, to recognise these as ongoing criticisms of Australian constitutional politics—sometimes in the form of wistful regrets, sometimes savage arguments.

This paper seeks to probe and better explain some of the hidden features of Australians' self-criticism of their constitutional structure. Rarely a week goes by without major, mainstream expressions of the desirability of massive overhaul to that structure—from suggestions that the federal government take over full responsibility for all roads, schools and hospitals to arguments that the states should be entirely abolished and political control over such services massively decentralised to local or new regional governments. Or a mixture of both. For example, recently the Business Council of Australia released its 'Aspire Australia 2025' report, including in one of three non-exclusive scenarios that falling trust in government could lead to a push for fundamental political reform, resulting not only in Australia becoming a republic, but adopting a new two-tiered system of government in which a 'strong but small' central government would work with 'regional' governments created by the combination of present state and local governments.[2]

There is actually nothing new about such scenarios, yet over the last twenty years, Australian political science and constitutional theory have been at something of a loss to explain them. A federal system of *some* kind makes sense for Australia, given that the idea of one central government controlling the entirety of public life across such a vast continent seems not only impractical but disastrous. We *have* a federal system; so why do we never seem happy with it, even *after* all the successes of collaborative/cooperative federalism? This is a question only sometimes acknowledged, and rarely addressed by Australian political scientists. For example Brian Galligan, one of our foremost federalist scholars, has resigned himself to the likelihood that as long as we have a federal system, there will also probably be some of us calling for its abolition. He captures something of our 'love-hate' relationship with federal ideas when he describes Australians being 'schizophrenic', governing themselves by a federal constitution but debating their politics as if what they really have, or want, is a unitary system.[3] In a unitary system, sub-national territorial units like states provinces or regions might still exist, but would have less or none of the territorial 'sovereignty'/'semi-sovereignty' provided by a constitutional division of powers, enforceable in a constitutional court. National legislative power would thus be comparatively unlimited, at least in a formal sense, on all questions of governance.

[2] M. Steketee, 'The shape of life to come', *The Weekend Australian* 13–14 March 2004: 20–21.

[3] B. Galligan *A Federal Republic: Australia's Constitutional System of Government.* Cambridge University Press, 1995: 53–62.

As many people find this scenario scary as others do attractive; and often people find it terrifyingly scary and irresistibly attractive at the same time.

The best explanation for this constitutional schizophrenia, to date, has been that Australians willingly adopted a 'dual constitutional culture' in the 1890s, when they took six unitary colonies, each involving their own copy of British responsible government, and married these under a North American-style federal compact.[4] Thus we have a system which has been described as a 'Washminster mutation', in which prime ministers continue to describe federal institutions like the Senate as havens of 'unrepresentative swill', and conservative and progressive governments alike seek to curtail the limited anti-majoritarian checks provided by Senate power. The problem is that Australians alone seem afflicted by this intense conflict, compared for example to the United States and Canada, close constitutional cousins who preceded us down similar, related political paths. They achieved much more settled territorial results—so what happened in Australia?

To understand this fundamental cleavage in political identity and values properly—let alone to live with it, manage it or resolve it—this paper suggests we need to substantially reappraise the history and content of our federal political traditions. If we were to ask:

- Did the Australians of the 1850s or 1890s really want *seven* constitutions setting out their rules of government?
- Or did they really want twenty or 30 or 50 constitutions, to reflect the number of states they would ideally *liked* to have had?
- Or did they only want *one* constitution, like any proper British nation?

then the true answer is probably 'all of the above'. Over the 180 years since the 'civilianisation' of the Australian colonies, our constitutional choices have always involved more territorial options than often today realised, and certainly more than have been given proper expression through our constitution-making processes.

The first part of the paper sketches three major, overlapping but distinctive strands of territorial tradition: not just 'federalist' and 'unitary' ideas but a 'pragmatic centralism' which is the best description of the ideas underpinning our present, unsatisfactory status quo. This categorisation flows from a doctoral study of territorial ideas in Australian constitutional history,[5] not all of which can be reproduced here. Its main lessons are that *neither* the federalist *nor* unitary strands of territorial thought introduced into Australian politics in the 1800s are as we have understood them in the last twenty years. Both contain instincts that remain alive today, and have never been given full expression in our constitutional life, because both seek fundamental political decentralisation.

Australian unitary tradition is only briefly sketched, not because it is unimportant or not still present but so it might be properly described elsewhere. Instead, the second

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4 B. Galligan, op.cit: 46–51; J. Warden, 'Federalism and the design of the Australian Constitution' *Australian Journal of Political Science* vol. 27, 1992 (Special Issue): 143.

5 A.J. Brown, 'The Frozen Continent: the Fall and Rise of Territory in Australian Constitutional Thought 1815–2003.' PhD Thesis, Griffith University, 2003.

part of the paper repeats in some detail the circumstantial evidence that Australia's original federal values, though now repressed, remain quite different to those that dominate discussion of 'federalism' today. Contrary to the historical stereotype of Australia having been subdivided into colonies before the federal idea arrived, leading inevitably if slowly to a federal nation in 1901, this reappraisal suggests that federal ideas began having their impacts as early as the 1820s, *before* any territorial subdivisions were made and indeed *informing* those subdivisions in a way that assumed Australia would be a single nation. This first federalism had a previously unappreciated level of support in British policy and drew on Benjamin Franklin's model of federalism as self-subdividing: a 'commonwealth for increase'. While this entrenches federalism's logic in principle, it reveals a dynamic style of federalism which, had it continued to unfold, would have been quite different and much more decentralised than the system we call 'federal' today.

The third part of the paper seeks to explain better how this early history contributes to ongoing constitutional conflict, by emphasising the historical distinctions between our 'first' federalism and the subsequent notion of federalism based on the union of six states we have learned to love/hate since 1901. Putting aside tensions between unitary and federal traditions, we find our later (present) idea of federalism did not succeed or replace the first but has always operated in conflict with it. Indeed we can question whether what we *call* federalism today is really federalism at all, by comparison with the original tradition, because the political ideas that underpin it are so majoritarian and centralist. Many political scientists and commentators lament the centralist character of the Australian system, but usually date this trend from the Australian Labor Party's use of defence and taxation powers to centralise fiscal control in the 1940s. The paper suggests that centralist trends became embedded in the elite politics of NSW, in particular, in the 1850s—a politics that was nationalist but anti-federal. One consequence in the 1890s was a form of federation that satisfied some of Australians' long-held desires for national unity but few of their ongoing desires for a more decentralised sub-national framework—irrespective of whether it might be called 'federal' or 'unitary' and its divisions called states, provinces, 'regions' or 'greater' local governments.

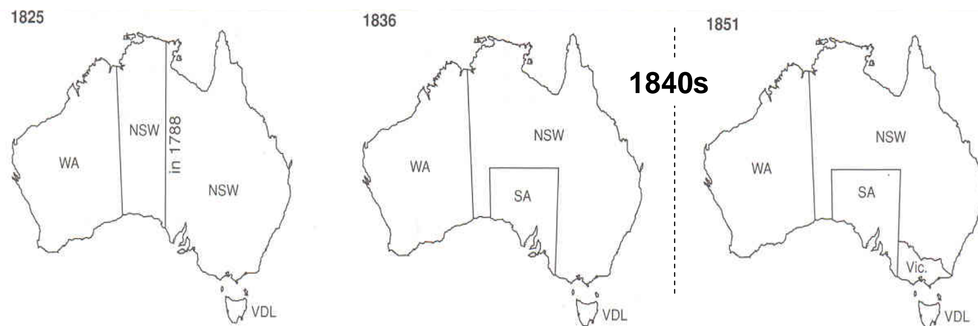
The paper concludes by suggesting that even if it is impossible to resolve the constitutional schizophrenia resulting from tensions between Australia's three main territorial traditions, it is vital to acknowledge it and better understand it. However, the perenniality of debate over alternatives suggests it may be worth going further, and examining in detail the real points of conflict and convergence between these traditions, all of which continue to give voice to major demands for reform. With this knowledge we may then be able to address the vexed question of how, politically, reform might be made more possible, even without a George Washington or Benjamin Franklin.

The Territorial Trio: federal, unitary and centralised traditions in Australian constitutionalism

The existing history of Australia's constitutional structure tends to paint our political development as a linear progression. On many stereotypes, we imagine a process in which in 1788, British authorities began founding a spread of colonial settlements

according to a mixture of strategic need and environmental and economic accidents, but quickly found it impossible to manage these using 'a single hierarchical governing structure'—a structure that however suitable for the 'early prison administrations and Crown control of land settlement, was quickly found to be quite unsuited' to Australian geography thereafter.[6] As a result, somewhat inevitably, new territories 'broke from the mother colony.';[7] As political scientists Holmes and Sharman put it, sovereign political authority was 'fragmented' between 'regional centres' in a 'movement away from a centralised and tightly organised society of administrative officers towards freedom and decentralization'. On this widely held view, territorial fragmentation can be seen as an inevitable reaction against an original centralised British preference and theory. By the end of the 1830s, there were four Australian colonial territories: New South Wales, founded in 1788; Diemen's Land, separated in 1825; Western Australia, added in 1829; and South Australia, separated in 1836. Victoria's European population was already greater than most other settlements, but the area south of the 36th parallel was still a mere 'district' of NSW (Figure 1).

Figure 1. Anglo-Australian boundaries 1783-1851



Source: D.N. Jeans, *An Historical Geography of New South Wales to 1901.* Sydney, Reed, 1972. See also M.H. McLelland, 'Colonial and state boundaries in Australia' *Australian Law Journal* vol. 45, 1971: 671–679.

Fragmentation brought other issues, however, and so from the early 1840s ideas about a more national, possibly federal constitutional structure began emerging in early colonial politics and policy. Some colonial leaders began seeking methods of rejoining the four colonies, at least for economic purposes. In 1842 the early NSW Legislative Council sought to pass a law preserving Sydney's role as the commercial hub by ensuring duty-free trade with Tasmania and New Zealand. British authorities disallowed this local legislation as beyond power, but the idea was followed in 1846 by an official proposal by the NSW Governor, Sir Charles Fitzroy, that a 'superior functionary' such as a Governor-General be appointed to ensure consistency in 'all measures … affecting the general interests of the mother country, the Australian

6 J. Holmes and C. Sharman, *The Australian Federal System* Sydney, Allen & Unwin, 1977: 12–14; and C. Sharman, 'Coping with the future', in M. Birrell (ed.), *The Australian States: Towards a Renaissance,* Melbourne, Longman Cheshire, 1987: 42–43.

7 H. Irving, (ed.) *The Centenary Companion to Australian Federation* Melbourne, Cambridge University Press, 1999: 2.

colonies, or their intercolonial trade.'[8] The originator of this proposal, NSW colonial secretary Edward Deas-Thomson, has been described by some as 'par excellence the Father of Australian Federation'.[9]

In London in 1846, the return of a Whig government also saw firm moves towards a formal intercolonial union, combining the need for colonial constitutional development with its policy of Imperial free trade. In 1847–1850, in the New Zealand and Australian Charters and Australian Constitutions Bill (No. 2*)*, Earl Grey's administration twice proposed the four colonies be joined in a national or 'general' assembly[10] However these early proposals for union failed, and we customarily assume it was because Australians were simply not yet prepared to think nationally.[11] Parochialism reigned, the people of Port Phillip were still intent on achieving Victoria's separation in 1851, as were the colonists of Moreton Bay, though delayed until 1859. Responsible government was granted in 1854–1856, and the colonies became 'quasi-sovereign bodies, politically independent of each other',[12] to unite in a federal style only later. When the momentum for unity finally built in the 1880s–1890s, it was 'hardly surprising, given the political history and geography of established self-governing colonies' that the nation took the form of a federation; thereafter, agitation for the reform of the federation began.[13]

Thus runs the conventional constitutional story. However, despite its great familiarity, this story raises several questions not answered by modern political science. It is too neat and linear—in fact, it remains typical of a teleological metanarrative or 'forced march' of Australian history as progress towards nationhood.[14] It provides little insight into the source of the federal ideas in the 1840s, much as it has never dealt with other possibilities—such as that federal ideas might have been locatable in indigenous Australia, among the continent's 'oldest political units' of Aboriginal and Torres Strait Islander frontiers and boundaries.[15]

There are also two major veins of Australian political debate that are typically downplayed, or entirely left out of this mainstream constitutional story. The first is the fact that movements for regional autonomy such as those of the Port Phillip and

8 Quoted by W.C. Wentworth, 'Responsible government in Australia: state constitutions and federal power', *Australian Quarterly*, vol. 28, no.2, 1956: 8–9.

9 K.R. Cramp, *The State and Federal Constitutions of Australia.* Sydney, Angus and Robertson, 1914: 123–126. See also Irving (ed.) *The Centenary Companion to Australian Federation,* op. cit: 3–4, 24, 357–358, 430.

10 Earl Grey, *The Colonial Policy of Lord John Russell's Administration.* London, Bentley, 1853: 317–323; 427–428; and H.E. Egerton, *A Short History of British Colonial Policy.* London, Methuen, 1893: 284.

11 M. McKenna, *The Captive Republic: a History of Republicanism in Australia 1788–1996*. Melbourne, Cambridge University Press, Melbourne, 1996: 59.

12 P.E. Joske, *Australian Federal Government.* Sydney, Butterworths, 1967: 34; and Irving, *Centenary Companion*, op. cit: 2.

13 B. Galligan, *A Federal Republic: Australia's Constitutional System of Government.* Melbourne, Cambridge University Press, 1995: 52–55.

14 J.W. McCarty, 'Australian regional history' *Historical Studies* vol. 18. no. 70, 1978: 104.

15 S.L. Davis and J.R.V. Prescott, *Aboriginal Frontiers and Boundaries in Australia.* Carlton, Vic., Melbourne University Press, 1992: xi; compare C. Morris, 'Constitutional Dreaming', in C. Sampford and T. Round (eds*), Beyond the Republic: Meeting the Global Challenges to Constitutionalism*. Leichhardt, NSW, Federation Press, 2001**:** 293–294.

Moreton Bay separation movements were not restricted to, and did not stop at, Port Phillip and Moreton Bay. Far from being magically satisfied at the point of responsible government in the 1850s, similar movements remained virulent in New England, the Riverina, western Victoria and south-east South Australia, central and north Queensland, and later the goldfields of Western Australia.[16] Separation movements had their own effects on the Federation process, as reflected in Chapter VI of the Australian Constitution dealing with 'New States', and continued to resonate through much of the twentieth century in the form of new state movements which often underpinned the very existence of the Australian Country Parties. The new state idea continues to resonate even today.[17] Here is a vein of debate suggesting there was something wrong or incomplete about the territorial subdivision of Australia even by 1860, let alone by 1901 or by the standards of today.

The other forgotten element of the modern story is provided by debates suggesting there should be not more states, but no states at all. While these ideas are typically rooted to unitary political traditions, recent political science has also tended to assume that they seek an even more centralised structure than achieved under current federalism, and are thus effectively a throwback to the British policy preferences abandoned by the 1820s. Centralist Labor policies of the twentieth century, tied to constitutional reform, tended to reinforce this assumption.[18] However, even if unitary, it is actually far from clear that these ideas have necessarily envisaged a more centralised structure; and their lineage is not always Labor.[19] Far from having been discarded early, and only reappearing since Federation, ideas about a decentralised unitary system have also always been with us. British introduction of local government systems from the late 1830s, although vigorously and successfully resisted by the NSW legislature in the 1840s, was central to a constitutional formula aimed at preventing Australia's further separation into multiple colonies.[20] The tortured history of local government in Australia has been a campaign for greater political decentralization on something akin to a traditional British model, even though colonial legislatures' antipathy to strong local government is rarely recognised

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16 J.M. Holmes, 'The "New States" idea and its geographic background' *Australian Quarterly*, 1932: 59–72; U.R. Ellis, *New Australian States.* Sydney, Endeavour Press, 1933; R.G. Neale, 'New States movement' *Australian Quarterly,* September 1950: 9–23; G.A. Kidd, 'New cities—an end to New States' *Australian Quarterly,* vol. 46, no. 2, June 1974: 57–68; J. Belshaw, 'Ulrich Ellis: journalist, political agitator, and theorist, public servant and historian', *Canberra Historical Journal* vol. 10, 1982: 16–22.

17 For example, G. Blainey, 'The centenary of Australia's federation: what should we celebrate?' *Papers on Parliament* no. 37, November 2001: 29–39; and. G. Blainey, 'Time to redraw the lines on the map.' *Courier-Mail* (Brisbane), 4 September 2001: 11.

18 L.F. Crisp, *The Australian Federal Labour Party 1901–1951.* Sydney, Hale and Iremonger, 1978: 23ff; B. Galligan, *A Federal Republic.* op. cit: 91ff.

19 I. Macphee, 'Challenges for 21st century Australia: politics, economics and constitutional reform' *Griffith Law Review,* vol. 3, 1994; and 'Towards a model for a two-tier government'; *Australian Federalism: Future Directions, Structural Change.* Centre for Comparative Constitutional Studies, University of Melbourne, July 1994; and R. Hall, *Abolish the States! Australia's Future and a $30 Billion Answer to our Tax Problem*. Sydney, Pan-Macmillan, 1998.

20 A.C.V. Melbourne, *Early Constitutional Development in Australia.* Brisbane, University of Queensland Press, 1963: 181–190, 231–274, 293–346.

as a significant constitutional saga.[21] Our constitutional history also tends to neglect the strange overlaps that have appeared between those pursuing 'new state' and 'anti-state' visions of Australian constitutional reconstruction, such as the position of Country Party founder Earle Page, who happily campaigned for both unitary and federal versions of territorial restructuring—the key goal being decentralization.[22]

Australia's Territorial Trio

	First federalism (decentralist)	**Unitary traditions (decentralist)**	**'Conventional' centralised federalism**
Period	**From 1820s**	**From 1830s**	**From 1840s**
Source and route of ideas	American federal experience, directly and via British colonial policy	'Pure' British unification theory boosted by Canadian experience	American federal, British unification and Canadian 'consolidation', via British colonial policy
Politics	British progressive	British universal	British conservative
Commencement locations	Hobart, Melbourne	Adelaide, Melbourne?	Sydney
Mobilisational orientation (King 1982)	Major decentralization followed by partial centralization	Decentralisation within centralised structure	Partial centralisation
Key manifestations	Colonial separation and new state movements; twentieth century federal reconstruction movements	Strong local government systems as alternative to territorial fragmentation; movements for state abolition	Australian federation/unification movements generally
Present at Federation?	Yes Constitution (Chapter VI)	Yes (Unification)	Yes (Simple compact)
Balance achieved?	Arguably not yet (no substantial territorial decentralization since 1859)	No (credible local/ regional governments never allowed to develop)	Arguably not yet (decentralization demands remain unsatisfied by centralised surrogates)

[21] J.M. Ward, *Earl Grey and the Australian Colonies 1846–1857.* Melbourne University Press, 1958: 41–42; F.A. Larcombe, *The Development of Local Government in New South Wales* Melbourne, F.W. Cheshire, 1961: 7–33; W.G. McMinn, *A Constitutional History of Australia.* Melbourne, Oxford University Press, 1979: 42; P. Finn, *Law and Government in Colonial Australia.* Melbourne, Oxford University Press, 1987: 79; M. Bowman, 'Local government in Australia', in M. Bowman and W. Hampton (eds), *Local Democracies: a Study in Comparative Local Government.* Melbourne, Longman Cheshire, 1983: 166; J. McNeill, 'Local government in the Australian federal system', in B. Dollery and N. Marshall (eds), *Australian Local Government: Reform and Renewal.* Melbourne, Macmillan, Melbourne, 1997: 18–19.

[22] E.C.G. Page, 'A Plea for unification: the development of Australia.' *Daily Examiner* (Grafton), 1 September 1917:382–383; and see A.J. Brown, 'Can't wait for the sequel: Australian federation as unfinished business' *Melbourne Journal of Politics* vol. 27, 2001: 49–70.

In recharting the history of these ideas, the result reached elsewhere[23] is a confluence of territorial traditions that involves not a single linear progression, but three parallel and interweaving veins of ideas whose relationships are characterised less by resolution than ongoing conflict. The table above seeks to summarise these traditions. Many departures from our stereotypical story are suggested here, which space does not permit all to be explained—particularly the early unitary story and many overlaps between decentralised unitary and decentralised federalist traditions. The clearest evidence of the deficiencies of our conventional 'federal' story lie in the fact that it has overlooked signals not just about the character, but even the date at which federal ideas appear to have begun impacting on Australian development. Rather than emerging in the early 1840s, and seeking only to unite existing separate colonies, federal ideas seem to have been vigorously present even before the first territorial separations and to have helped bring them about. This was not simply an earlier idea of federalism, but a different one to that which we usually associate with our contemporary federation.

The First Federalism: 'franklinesque', decentralised and repressed

What is the evidence that federalism arrived earlier and more forcefully in Australian constitutional history than we customarily assume? There are three major reasons for reaching this conclusion which, while at times more circumstantial than determinative, are at least enough to support a major new inquiry into when these ideas commenced. First, there is evidence of the role of federal ideas in British constitutional policy for the colonies in the 1820s, before and at the time that Australia's first territorial subdivisions came about. Second, there is evidence about the role of the federal idea in colonial political developments within the colonies themselves, particularly the separationist desires expressed in Tasmania, Port Phillip and elsewhere. Thirdly, there is the clear sense of would-be nationalism that permeates early colonial developments, quite against our later stereotypes. Together these point to a federal idea that not only arrives earlier, but which is quite distinctly different from that previously described.

The 'commonwealth for increase': British policy and territorial fragmentation

First, we challenge the stereotype that British authorities were originally inclined against Australian territorial fragmentation, but at something of a loss to prevent it. In fact British policy was not so blind, particularly given its education in the spatial dimensions of American colonial politics before, during and since the 1776 Revolution. After all, the loss of so many American colonies was 'a trauma the British could never forget',[24] and Australia was part of an ongoing colonial story still overshadowed by that experience. British supporters of Australian development commonly saw Australia's destiny as replacing the lost American opportunities, typified by Sir Joseph Banks' vision of 'empires and dominions which now cannot be disappointed … who knows but that England may revive in New South Wales when

[23] A.J. Brown, 'The Frozen Continent: the Fall and Rise of Territory in Australian Constitutional Thought 1815–2003.' PhD Thesis, Griffith University, 2003.

[24] R. Hyam, *Britain's Imperial Century 1815-1914: a Study of Empire and Expansion.* Cambridge, Palgrave Macmillan, 2002: 53.

it has sunk in Europe?'[25] In British policy, theories of territorial fragmentation and unity were alive and well, now that American federalism had revolutionised European concepts of nationhood with its 'first sustained and principled counter-argument' for local/regional 'legal life'.[26]

Viewed in historical perspective, it becomes unlikely that British officials charted a new constitutional course for Australia in the 1820s without reference to America. British authorities were not 'forced' by Australian conditions to abandon their preference for a single administration, but rather did so deliberately. The original centralist orientation in NSW administration reflected the British policy of only establishing new colonies under tight military law, circumventing questions of political representation and civilian rights.[27] This preference may have arisen with the Revolution, but it ended in 1817–1819 because the British government was resuming its colonial program after the Napoleonic wars, and returning to the political development of the post-Revolution possessions such as through the colonial policy inquiry of J.T. Bigge.[28] In 1823, the *Act for better Administration of Justice in New South Wales and Van Diemen's Land, and for the more effectual Government thereof*, simultaneously 'civilianised' the Australian administration and provided for its decentralization through formal separation of Van Diemen's Land, decisions fundamentally interlinked in the new British policy.[29] Against the Australian myth that Van Diemen's Land was legally separated once discovered to be an island, or its settlements difficult to manage, it had already been known to be an island for 24 years and its settlements had grown stably for almost as long.[30] Territorial policy and constitutional direction changed less because of Australian circumstances than the basic reorientation of British policy.

What was the influence of federal ideas in this reorientation? Much Australian history is dominated by an assumption that Britain looked with embarrassed distaste on the United States' post-revolutionary development—but in fact the British territorial strategy appeared to directly reflect North American experience, and particular respect for American federalism. The British authorities' new policy of territorial subdivision was fully consistent with a federal strategy. Whereas Britain's American colonies had emerged in a largely unplanned pattern, now divided into the federated United States and British North America, New South Wales provided opportunity to establish a new collection of civilising colonies with greater forethought and order.

25 1897, quoted in H.T. Manning, *British Colonial Government after the American Revolution 1782–1820.* Hamden, Conn., Archon, 1966: 287.

26 N.K. Blomley, *Law, Space and the Geographies of Power*. New York, Guilford Press, 1994: 114.

27 Manning, op. cit: viii, 287–299. See also H.E. Egerton, *A Short History of British Colonial Policy.* London, Methuen, 1893: 258–260.

28 Manning, op. cit.: 525–540.

29 C.M.H. Clark, *A History of Australia vol. 1* Carlton, Vic., Melbourne University Press, 1962: 341, 373–374; R.D. Lumb, *The Constitutions of the Australian States.* Brisbane, University of Queensland Press, 1991: 19, 33.

30 H. Melville, *The History of Van Diemen's Land From the Year 1824 to 1835 Inclusive.* Sydney, 1835 (1965 ed.): 18; C.M.H. Clark, *A History of Australia vol. 2.* Carlton, Vic. ,Melbourne University Press, 1962: 122–4; G. Blainey, 'The centenary of Australia's federation' op. cit: 76–77; L. Robson, 'Settling Van Diemen's Land', in P. Statham (ed.), *The Origins of Australia's Capital Cities.* Melbourne, Cambridge University Press, 1989: 84–94; A. Shaw, 'The founding of Melbourne', in P. Statham, ibid: 202–205.

British authorities were determined to prevent any more revolutions, but remained deeply interested in the 'Great Experiment', not only for the new republic's political lessons but because the countries remained 'intimately connected' in a 'single Atlantic economy'.[31] This interest included rapid development of the idea of colonial nationhood or 'dominion' status—the idea of sub-imperial nations, federal or otherwise, reputed to have only developed later in Australia. Loyal American elites had raised dominion status as a means of preventing the Revolution, without any intelligent British response.[32] British consciousness that its remnant colonial groups should be managed this way had since leapt to the fore, with British North America reconstituted as a 'national' group, albeit to bolster, not concede British sovereignty. Lord Dorchester, appointed as Canada's first Governor-General in 1786, affirmed that 'the Policy which lost those great [US] provinces can not preserve these scattered and broken Fragments which remain.'[33].

Even more important than a model for retaining British territories, were the advantages demonstrated by American federalism for colonial development. Post-revolution America was booming, and the territorial pattern under the new federalism was integral. By the early 1820s, the thirteen original United States had grown in number to 24, and the number was still growing as old territory was subdivided and new territory acquired. The roll-out of new state governments assisted the colonization and population of territory. Indeed like dominion status, the theory that continental union could work in support of this kind of territorial change was well established. In 1754 Benjamin Franklin's Albany Plan had identified the advantages of union as including a capacity to create new government administrations, thereby facilitating more efficient colonial development. Franklin wrote that whereas 'a single old colony does not seem strong enough to extend itself otherwise than inch by inch', an intercolonial union could work as a 'commonwealth for increase'.[34] A central government could grow the national wealth by securing the territory presently unusable by individual colonies, grant the land to settlers, organise new governments and ultimately admit them to the Union under what became Article IV of the 1787 Constitution. In practice this mechanism was not established as neatly as it appeared,[35] but the American trend from 1781–1783 followed Franklin's principles, making territorial dynamism, development and federalism synonymous.[36] British authorities recognised modern federalism's colonial lessons as spectacular. As late as 1852 William Gladstone described America as 'the great source of experimental instruction, so far as Colonial institutions are concerned', while the radical politician J.A. Roebuck was one of many to admire the American federalism's ability to self-expand by creating new states:

31 R. Hyam, op. cit: 54.

32 M. Jensen, *The Articles of Confederation: an Interpretation of the Socio-constitutional History of the American Revolution 1774–1781* University of Wisconsin Press, 1940: 108; and C. Rossiter, *Seedtime of the Republic: the Origin of the American Tradition of Political Liberty.* New York, Harcourt, Brace and World, 1953: 306–308, 339–341.

33 1793, quoted in Manning, op.cit: xiii, 36–37; A.B. Keith, *The Dominions as Sovereign States: Their Constitutions and Governments.* London, Macmillan, 1938.

34 Quoted in S.H. Beer, *To Make A Nation: the Rediscovery of American Federalism.* Harvard University Press, 1993: 155–158, 354–355.

35 Jensen, op. cit.

36 J. Bryce, *The American Commonwealth.* London, Macmillan, 1889: 343; and M.I. Glassner, *Political Geography.* New York, John Wiley & Sons, 1993: 155.

> The whole thing was like a well-made watch—it went from that moment [in the 1780s] and never ceased to go.[37]

In Australia in the 1820s, then, it becomes more understandable why British policy makers would decide not just to support new settlement, but create new colonial territories. The 1825 separation of Van Diemen's Land from NSW, as recommended by Bigge and enabled in 1823, was a conscious first step down a constitutional path. When the island's new Lieutenant-Governor, George Arthur, was despatched for his post in late 1823, this path was foreshadowed in advice from James Stephen, the colonial office counsel of 10 years' standing, main architect of the 1823 Act, and soon to be permanent under-secretary for the colonies. Stephen told Arthur to shape the new colony as:

> one branch of a great and powerful nation, which must exercise a mighty influence for good or evil over a vast region of the earth … Christian, virtuous and enlightened.[38]

Van Diemen's Land was to be not just another British colony, therefore, but the first of the necessary 'branches' needed to build the new nation. The intent for these branches to remain linked as a national group was confirmed by the legal form of Arthur's appointment. Though we customarily believe that Van Diemen's Land was made independent of New South Wales, and Arthur thereafter 'dealt directly with… London',[39] Arthur's commission was as constitutional junior to the new NSW Governor Sir Ralph Darling, who in turn retained commissions as 'Governor-in-Chief to the island of Van Diemen's Land' and 'Captain-General' of both colonies.[40] At least on paper, Darling was to Australia what Dorchester was to Canada—a Governor-General of the kind, on the orthodox story, supposedly first mooted twenty years later.

Together these features of the separation of Van Diemen's Land suggest a federal intent, because whereas an *ex post facto* nationalist grouping in Canada was elemental to retaining British North America, British Australia was a clean chart on which the first new territorial unit of a whole future nation had now been marked out. Australia was like the American west, or at least the romantic notion of the American west held by British officials—a landscape as yet undivided to British eyes, in which a territorial pattern of multiple colonies could now be established to join and grow in federal fashion. Only rarely has this possibility been canvassed in Australian political history, such as in Irving's remark that 'the idea of joining the unwieldy Australian colonies together had been in the minds of officials … even before the division of the colonies'.[41] Perhaps Irving meant only that the federal idea appeared before the

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37 1849, quoted in J.W. Cell, *British Colonial Administration in the Mid-Nineteenth Century: the Policy-Making Process.* New Haven, Yale University Press, 1970.

38 James Stephen 1823, quoted in C.M.H. Clark, *A History of Australia vol. 1,* op. cit: 373.

39 W.A. Townsley, *Tasmania: From Colony to Statehood 1803–1945*. Hobart, St David's Park, 1991: 37.

40 Melville, op. cit: 52; and Wentworth, op. cit: 8.

41 H. Irving, *To Constitute a Nation: a Cultural History of Australia's Constitution.* Melbourne, Cambridge University Press, 1999: 2.

process of colonial division *ceased*, in 1859–1861; but in any event we can now take these words literally, because it seems inescapable that federal ideas were influencing policy even before subdivision *began*.

Territory, federalism and colonial expectations

The second reason to see federalism as at work in Australia from this formative 1820s stage, is the evidence that in campaigning for 'separate' colonial territories, early Australian colonists also behaved in a consistent manner. The conventional argument that the fragmentation of territory reflected a 'movement towards freedom and decentralisation'[42] tends to assume that the early colonial support for subdivision was no more than parochial. Analysis of the strands of early colonial politics tends to leave this presumption untouched, noting debate over disposal of land but not over the allocation of territory.[43] On the conventional account, therefore, the federal idea only made its entry from the early 1840s in *response* to fragmentation, rather than being embedded in that fragmentation itself. But if American developments were naturally high in the minds of British colonists in early Van Diemen's Land,[44] then why would the settlers see new jurisdictions purely as separations and not also as steps towards a federal nation?

In fact there is evidence they *did* see the development thus, evidence which continues through subsequent divisions and becomes particularly clear in the Port Phillip campaign. In Van Diemen's Land, consistently with Franklin's idea of federalism as a 'commonwealth for increase', the separation reflected a 'bottom-up' process of political and economic self-identification, as well as 'top-down' ideas about colonial planning. The confidence with which the colonial office set about legal separation of the island was matched by colonist confidence in this political destiny. In April 1824, apparently unaware that Arthur was already en route with instructions for the separation, 'landholders, merchants and other inhabitants' gathered in Hobart and petitioned the King to 'elevate Van Diemen's Land into a separate and independent Colony' in the terms of the 1823 Act.[45] This 'independence' claim reflected the Vandiemonians' desires for a free economic hand, but almost certainly was also made with an awareness of how the federal system was unfolding within and across American territory. As Warden indicates, from the outset the Australian settlements were linked to the United States not only through British experience, but directly in a 'Pacific economy' dominated by American shipping, with Hobart particularly well-known as a summer (winter) base for New England fishing fleets. Given the many indications of American influence, it seems impossible that the Vandiemonians failed to relate their separation from New South Wales, as Australia's first new colony, to Maine's 1820 separation from Massachusetts as America's tenth new state.

In the next territorial decision, Britain's 1829 annexation of Western Australia, the constitutional intent is less clear. There was no pre-existing community of European settler interests, and the Swan River colonization project was 'almost accidental and

42 Holmes and Sharman, op. cit: 12–14.

43 L.J. Hume, 'Foundations of populism and pluralism: Australian writings on politics to 1860', in *Australian Political Ideas.* G. Stokes (ed.), Sydney, University of NSW Press, 1994: 28.

44 For example, J. Warden, 'The Colonies' Paths to Federation: Tasmania', in H. Irving (ed.), *The Centenary Companion to Australian Federation*, op. cit: 191-193.

45 Melville, op. cit: 20; Ellis, op. cit: 19–20; Clark, *A History of Australia vol. 1*, op. cit: 122–124.

largely unplanned'.[46] However in the creation of Australia's fourth colonial jurisdiction, there are again signs of a federal influence. South Australia's enabling Act of 1834 for 'a British province or provinces' not only employed the same sub-colonial term used in Canada, but implied there could be more than one new territory. These were terms drafted by South Australia's ready-to-depart settler community. As with Tasmania, formal links also remained with the parent territory which have since disappeared from historical view—such as the fact that even a decade later, official British descriptions of South Australia identified the province as still 'part of Our said territory' of the colony of NSW.[47]

In the foundational politics of Victoria, the character of the first federal ideas becomes clearest of all. In parallel to South Australia, the 'bottom up' political dynamic that founded Port Phillip (Melbourne) was substantially a replication of the separation of Van Diemen's Land. From the late 1820s, it was in Van Diemen's Land that pressure mounted for pastoral runs to be released on Bass Strait's northern shore, leading to the Henty family's founding of Portland in 1834 and the larger annexation of Port Phillip by John Batman's Port Phillip Association in 1835.[48] Batman's tactic of 'buying' 600 000 acres from their Aboriginal owners directly mimicked proven American frontier experience, thereby forcing an 'official' grant. Even more importantly for federal theory, the Port Phillip investors did not stop at formal recognition of their property rights, but from March 1836 also sought proclamation of a whole new colony.[49] The Port Phillip campaign for political territory was to last fifteen years, a period in which 'all other political ideas' took second place against the goal of territorial autonomy,[50] but in which it is *not* safe to assume that there was no federal instinct.

The nature of the federal idea in colonial politics at this time was twofold. Yes, colonial communities were now seeking territorial autonomy; but did so with an expectation that such autonomy accompanied the development of the nation. Like Van Diemonians and South Australians, Port Phillip leaders did not turn to ideas of intercolonial union *after* they achieved separation in 1851—rather they apparently saw colonial separation as the *path* to an Anglo-Australian nation. Awareness of America's growth remained strong in fora such as the early Melbourne Chamber of Commerce, reportedly dominated by Americans.[51] By the late 1830s, de

46 P. Statham, 'Swan River Colony 1829–1850', in C.T. Stannage (ed.), *A New History of Western Australia*. Nedlands, WA, University of Western Australia Press, 1981: 181–189; but compare S.R. Davis, 'The state of the states', in M. Birrell (ed.), *The Australian States: Towards a Renaissance.* Melbourne, Longman Cheshire, 1987.

47 M.H. McLelland, 'Colonial and state boundaries in Australia' *Australian Law Journal* vol. 45, 1971: 673; and P.A. Howell, 'The South Australia Act 1834', in D. Jaensch (ed.), *The Flinders History of South Australia: Political History*. Adelaide, Wakefield Press, 1986.

48 S.H. Roberts, *History of Australian Land Settlement.* Melbourne, Macmillan, 1968: 205–207; J. Greenway, *The Last Frontier: a Study of Cultural Imperatives in the Last Frontiers of America and Australia.* Melbourne, Lothian Publishing, 1972: 85–86; J. Kociumbas, *Oxford History of Australia: Possessions (volume 2: 1770–1860),* Melbourne, Oxford University Press, 1992: 119–123, 179–190; Shaw in Statham (ed.) op. cit: 207–213.

49 Melbourne, op. cit: 331–334.

50 McMinn, op. cit: 35; see also Melbourne, op. cit: 283–356; D. Garden *Victoria: a History.* Melbourne, Nelson, 1984; 63–68; and S. Priestley, 'Melbourne: a Kangaroo Advance', in P. Statham (ed.), op. cit.

51 Hyam, op. cit: 55.

Tocqueville's *Democracy in America* had appeared throughout the Empire, complete with its comparison of America's growing number of state governments to 'companies of adventurers, formed to explore in common the wastelands of the New World'.[52] Any doubt about the currency of this federal vision at Port Phillip is dispatched by the role of its future separationist statesman, Sydney's John Dunmore Lang.[53] In November 1841 Lang's first fundraising visit to Port Phillip found him regaling separationist audiences with his experience of a recent ten-week trip to the eastern United States, during which he had read de Tocqueville. Though not yet republican, Lang assured the people of Melbourne that their campaign accorded with the driving force of America's progress: its spontaneous internal subdivision into small democratic states.[54] With this strong justification for territorial autonomy backed up by federal political theory, Lang's popularity at Port Phillip was sealed.

Port Phillip's would not be the last such separationist campaign in Australia, as noted. But the important feature is that the tradition established by the early 1840s was not merely separationist, but explicitly federalist in character. These territorial units were seen by aspirant citizens as the building-blocks of the new Anglo-Australian nation. In a manner strongly resonant with Franklin's concept of a 'commonwealth for increase', separation was not a stand-alone idea but rather an integral part of the federal concept, with the granting of local autonomy, capacity for economic development and national union within Empire all working together.

Early colonial nationalism

The third key feature of this alternative early federalism is the evidence that Anglo-Australian colonists were conceiving themselves as the founders of a new British nation far earlier than usually assumed. On the conventional story, it was only select leaders who began to see a nation-in-waiting in the 1840s, and not until the 1880s–1890s that such a nation came to be properly, popularly 'imagined'.[55] This view is naturally central to our idea of Australian federalism, because the union then negotiated was inevitably federal in much of its form, implying that federal ideas must therefore also have previously been weak. Yet we have already seen signs that concepts of nationhood generally, and federal nationhood specifically, were embedded in the expectations of colonists from half a century earlier. Given the history of dominion concepts, intercolonial legalism and popular federalism, it becomes unlikely that the proposals for union in the 1840s failed to take hold because Australians were unprepared to think nationally. After all, the plainest single cause for failure of the 1849–1850 proposals was their rejection by an uncooperative House of Lords as a 'rash and perilous innovation'.[56] In Australian debates about responsible government in 1850–1855, the concept of a national constitution—as opposed to

52 A. de Tocqueville, *Democracy in America.* New York, Vintage, 1835: 295–297, 398; N.K. Blomley, *Law, Space and the Geographies of Power*. New York, Guilford Press, 1994: 120–121; Hyam, op. cit: 53; H. Patapan, 'Melancholy and amnesia: Tocqueville's influence on Australian democratic theory', *Australian Journal of Politics and History,* vol. 49, no. 1, 2003: 3, 6.

53 See generally Ellis, op. cit: 48, 57; and Irving, *The Centenary Companion to Australian Federation*, op. cit: 391–392.

54 D.W.A. Baker, *Days of Wrath: a Life of John Dunmore Lang*. Carlton, Vic., Melbourne University Press, 1985: 165–201, 290–343.

55 H. Irving, *To Constitute a Nation*, op. cit: 25ff.

56 Quoted in W.G. McMinn, op. cit: 46–47.

simply separate colonial ones—was routinely supported in principle, and popularly in substance. Continuing faith in nationhood was evident in Van Diemen's Land, where the *Hobart Town Courier* saw the Australian colonies as already 'States confederated'[57] and there was public support for a single constitution for this Australian 'confederation'.[58] The NSW Legislative Council maintained its call for a general assembly of the colonies.[59] As we saw at the outset, the *Sydney Morning Herald* was openly supportive of something substantially more, and went on to openly condemn responsible government for producing separate constitutions which simply encouraged 'huckstering notions of statesmanship', and ensured the colonies would legislate against each other 'like rival tradesmen competing for custom'.[60].

Against the noble standard of British constitutional norms, to have such a group of colonies *not* grouped as a nation already appeared strange to many, even in the 1850s. For example a group of Shoalhaven landowners also stated the obvious when they petitioned the NSW legislature for an intercolonial conference 'to prepare one Constitution for Australasia':

> [I]t appears to your Petitioners strange and unstatesmanlike, as well as a most unseemly and untoward system of patchwork legislation, that Australasia, comprising but four Colonies, Dependencies, not far distant from each other, peopled by the same race, British subjects too… shall be doomed to have no less than four Constitutions. The great study and aim of all practical British Statesmen is not only to have and preserve one British Constitution, but also to assimilate the local laws of England, Ireland, Scotland, and Wales, as being most conducive to [inter alia] the social and political harmony of the people.[61]

On some analyses,[62] the Shoalhaven residents were seeking a unitary system: a territorial unification. In fact what they sought could also easily have been a federation, almost half-a-century earlier than the one eventually achieved. The key point is that even if neither unification nor federation proved achievable in the 1840s–1850s, this does not mean that the nationalist prerequisites for a strong Australian federal consciousness did not exist. Even later, it is not necessarily accurate to assume that Australian nationalism had to be created or recreated over a short period. For the colonial legislators whose own power and interests were closely aligned with their jurisdictions, nationalism was clearly often a secondary consideration, and had to be negotiated into existence. However, later federalist leaders like Sir Samuel Griffith seemed to remain conscious that the only real role for the early subdivisions was as sub national units, for example when telling constituents that no individual colony could honestly claim its own permanent 'feeling of Patriotism' or expect to

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57 1853; see McKenna, op. cit.: 73.

58 'Constitution: summary of proposals.' *Sydney Morning Herald,* 6 Dec 1853: 4

59 'Report from the Select Committee on the New Constitution' *New South Wales Legislative Council Papers* vol. 2, 1853: 121–122; and Wentworth, op. cit: 7, 10.

60 *Sydney Morning Herald*, 1857, quoted in Ward, op. cit: 465.

61 'Constitution Bill: Petition from Shoalhaven' *New South Wales Legislative Council Papers* vol. 2, 1853: 726; *Sydney Morning Herald* 7 December 1853: 3.

62 For example, Cramp, op. cit: 128–129.

stand 'permanently distinct in the eyes of the rest of the world'.[63] The lack of excitement around Federation even in the 1890s perhaps had much to do with the fact that this idea was already well established in the public psyche. It took until the 1880s–1890s for formal territorial unity to be restored, but it seems the unifying as well as separating principles of federal sentiment had already been entrenched much earlier in colonial society.

The Second Federalism: conventional, pragmatic and centralised

Even if we accept that federalism may have had an earlier and more forceful entry into Australian politics, what it is the evidence that this first federalism was somehow qualitatively *different* to that which emerged not long after? Here we have a question of great importance today, because a simple adjustment of dates is not in itself that significant. More important are the signs that we seem to have neglected our 'first' federalism because it operated in conflict with the other ideas of a federated or united nation that then quickly followed. As we have seen, and emphasised in Figure 3, these ideas gained prominence not just at different times, but in different places and different circles. Our first federalism apparently dominated in Tasmania and Victoria, and the second emerged in Sydney and London. If we continue to contrast and compare the new story with the old, we rapidly identify other distinct differences. From a theoretical perspective, we can quickly identify that the first, 'Franklinesque' federalism was much more dynamic and decentralist than our customary assumptions about federalism as purely a unifying process; and if we continue this analysis we also find reason to doubt the extent to which Australia's second 'federalism' should even be considered 'federal'.

Australian federalisms' differing mobilisational orientations

To take the theoretical contrast first, it is not difficult to find avenues of comparative constitutional analysis that stress the difference of these federal ideas by analysing their different 'mobilisational orientations'.[64] On King's analysis orientation typically refers to intended levels of decentralization, centralization or 'balance'. Using this approach, Australia's conventional federal story is based—like many federal stories—on an orientation of partial centralization: from 1842, political leaders began to suggest that separate territorial units should unite while also preserving existing identities. This 'classic' orientation was present in American federalism, but also predated it, in concepts of territorial compacts often traced by Europeans back to Ancient Greece.[65] It is embedded in the standard definitions of federalism derived from the Latin terms *foedus* (treaty, agreement or compact) or *fidere* (trust) with

63 S.W. Griffith, 'Political geography of Australia' *Royal Geographical Society of Australasia Queensland Branch Journal* vol. 6, 1891: 72, 76.

64 P. King, *Federalism and Federation*. London, Croom Helm, 1982; R Watts, *Comparing Federal Systems in the 1990s,* Kingston, Institute of Intergovernmental Relations, Queen's University, 1996.

65 For example, E.A. Freeman, *History of Federal Government [In Greece and Italy].* London, Macmillan, 1863: 72; and B. Galligan, 'Federalism's ideological dimension and the Australian Labor Party' *Australian Quarterly,* vol. 53 no. 2, Winter 1981: 130; and S.H. Beer, op. cit: 223; and D.J. Elazar, 'Contrasting unitary and federal systems.' *International Political Science Review* vol. 18 no. 3, 1997: 249.

which separate communities share their power under joint constitutions.[66] The orientation is one of partial centralization because the focus at federation is on the nature and extent of powers to be relinquished by constituent governments to the central one.

However, a different mobilisational orientation can also be seen in the federalism imported into early colonial Australia, in Franklin's idea of the 'commonwealth for increase'. Franklin's theory saw union also concerned with structural decentralization, based on the principle that both mobilisational orientations—centralization *and* decentralization—could and should work together. Australian colonists who saw territorial separation and national union as one and the same, clearly adopted this principle. Examples include not just Lang, but the famous declaration by Queensland's colonial secretary, John Macrossan, to the Melbourne Federation Conference that 'the strongest separationists are the most ardent of federationists.'[67] The Central Queensland separationist, George Curtis, accurately summarised America's federal dynamic as a process of 'separating and federating the whole time'.[68] Indeed the full significance of the first federalism conceived pre-1842 becomes clear when appreciating the variation entailed by the transfer of the model. Franklin's combination of orientations involved a sequence of territorial centralization in order to then immediately begin a process of territorial *de*centralisation. But in Australia, the reception of federal ideas involved a slightly different orientation again: *decentralizing* first on the understanding that a federal union would naturally follow *later*. For the first time in European history, the Australian sequence tended towards the division of territory not to create new 'colonies' as in previous experience, but deliberate propagation of subnational units for a future nation. Never had Europeans tried this 'Franklinesque' idea of federalism from scratch. The fundamentally decentralist Australian orientation is therefore historically important in its own right—an experiment on an experiment, more significant than previously realised in the world history of federalism.

By contrast, while the ideas that emerged in the 1840s also envisaged a compact between existing territories, they did not recognise further or ongoing territorial decentralization as an objective. The Sydney and London ideas reverted to a singular mobilisational orientation of partial centralization. A significant historical tension thus arises from the fact that many colonial and regional communities always continued to see federalism as capable of jointly fulfilling both orientations, as testified by 'new state' activism.

Reviewing Australia's second federalism: how 'federal' is it?

Finally, the differences between Australia's first decentralist federalism and a second, more centralist 'compact' federalism suggests some need to re-evaluate the latter. When these ideas coincided in the 1840s–1850s, did their adherents even recognise each other as 'federal' and if so, with what associations and implications?

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66 D.A. Kidd, *Latin-English English-Latin Dictionary*. London, Collins, 1957; and W.H. Riker, 'Federalism', in *Handbook of Political Science*, F.E. Greenstein and N.W. Polsby (eds), Reading, Addison-Wesley, 1975.

67 *Official Record of the Proceedings and Debates of the Australasian Federation Conference, 1890,* 12 February 1890: 72.

68 *Queensland Parliament Debates*: Special Session—Federation Enabling Bill, vol. 81, 1899: 35.

Despite the conventional assumption that official 1840s proposals for intercolonial reunion were necessarily 'federal', it is important that rarely—if ever—did the major Sydney and London adherents of national union use the term 'federal' itself. Deas-Thomson's proposal for an intercolonial 'superior functionary' was directed not to the federal but 'general' interests of the colonies, and as a centralizing administrative strategy—without counterbalancing political institutions—it was scarcely federal by later standards. When Earl Grey suggested an intercolonial parliamentary body in 1847–1850, this too was styled a 'general', not 'federal' assembly, and was quite un-American in proposing the four provinces send delegates only in proportion to population.

These facts, combined with the proposed sweeping reach of (Sydney-controlled) 'general' powers over trade, tariffs, and control and sale of all public lands, make it understandable why the South Australian and aspirant Victorians were nervous in 1847–50.[69] Their nervousness lay not in inability to think nationally, but more probably in the fact that there was little 'federalism' in the proposals. Despite being conventionally regarded as comparable to later ideas of union, the 1842–50 reforms would almost certainly have entailed massive recentralisation of legislative and administrative control in Sydney, with the aim of a more politically and economically consolidated colony. British officials at home and abroad, it seemed, no longer wanted a federation as much as almost total territorial reunification.

What then of the colonial discussion about union that promptly followed, in the 1851–55 debates over responsible government? More historical light may be supplied by the current 150th anniversary of those debates, but there were significant differences in the way that union ideas were perceived in Sydney as opposed to the original 'federalists' in Tasmania and Victoria. Sydney legislators' aspirations appear to have been nakedly aimed at reversing their loss of political and economic control, and did not describe their ideal as 'federal' but rather associated that term with the trend to subdivision recently satisfied for Victoria, and still underway elsewhere. As much is indicated by a dramatic speech by W.C. Wentworth—lead parliamentary supporter of union on Earl Grey's model—in response to a Moreton Bay petition just as the new constitutions were being debated:

> [The northern representatives] assumed that the separation of the northern districts was a right, but he (Mr Wentworth) protested against the colony being split up into as many separate governments as people chose to imagine would suit their convenience. … [He] thought they had too many separations already. The only result of this miserable policy would be that a series of petty, paltry, insignificant, states would be created which would necessitate the creation of a federal Government and end inevitably in the overthrow of the British throne. … If he had had his way, that brilliant province of Victoria, which was growing up so democratic, would never have been separated at all. … Was this colony

[69] D. Pike, *Paradise of Dissent: South Australia 1829–1857*. Melbourne University Press, 1957: 414–416; Ward, op. cit:113–137, 179-182; McMinn, op. cit: 46–47.

> merely to be a sucking nurse to these young states till they could toddle alone, and take care of themselves, and then to part with them?[70]

Far from seeing his own idea as 'federal', Wentworth reserved that term for those following Australia's first federal tradition, and emphatically opposed it. Yet conventional political science and history have always assumed that the early Sydney notions of union provide the direct antecedents of the federal ideas that spawned the nation. If so, then the conventional notions on which present Australian constitutionalism remain based appear to have had their genesis in explicitly anti-federal soil. Wentworth's important 'sucking nurse' question recognised but vehemently rejected Australia's first and 'true' federalism. On the principles of Franklin's 'commonwealth for increase', continuing to play out on the Australian frontier, the correct answer to that question was 'yes', but Wentworth and his central district colleagues presumed it to be 'no'.

Even by the 1850s, the dominant conception of intercolonial union held by the Sydney political elite was opposed to the decentralist orientation embedded in federalist ideas elsewhere in the country. This tension was not merely tangential or transitory, but a deep schism that still demands careful scholarly and political attention. Moreover we do not have to go far today to find similar views of how national politics should work, inconsistent with the notion that centralist trends in federal thinking—so centralist that they basically become unitary—have somehow chiefly been the province of Labor governments or bureaucratic planners in Canberra. Indeed Wentworth would recognise these sentiments still, lying just across the Harbour. Consider the views of Tony Abbott MP, current minister for health, in his laments on 'feral federalism', the desirability of a centralised industrial relations system and recognition of the unitary system as something of an ideal, even if unachievable.[71] Or Irving's analysis of the attitudes implicit in the prime minister's decision to reside at Kirribili House for the past eight years:

> Although he had years to imagine himself in the [Canberra] Lodge, Howard has insisted on living in Sydney since he became Prime Minister. This choice simply disregards the significance of our constitution's requirement for there to be a neutral federal territory (and its prohibition on Sydney as the capital). Oh, Canberra? It is the 'national capital', Howard has said of his decision, but not 'the centre of Australia'. Sydney is, then?[72]

Conclusions: Resolving the Schizophrenia?

This paper has sought to throw light on only *some* of the conflicts that pervade Australia's constitutional traditions, and in a manner that tends to raise as many questions as it answers. We live under a dominant view of federalism that continues to be so antitheoretical in content and centralist in basic disposition that it remains hard to recognise it as 'federal' at all. Yet we deny the presence or wisdom of the

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70 'Legislative Council Debate: Moreton Bay.' *Sydney Morning Herald,* 27 August 1853: 3; but compare Ellis, op. cit: 54; and R. Fitzgerald, *From the Dreaming to 1915: a History of Queensland*. Brisbane, University of Queensland Press, 1982: 112.

71 T. Abbott, 'Responsible federalism', *AQ*, 2003: 754.

72 H. Irving, 'The buck stops elsewhere.' *Sydney Morning Herald,* 23–24 November 2002: 8.

unitary ideas that so clearly continue to run prominently through our constitutional values, in a territorial sense, even when they appear equally necessary to explaining our politics. Even without unpacking our alternative history of decentralised unitary ideas, by focusing on the earlier and different receipt of a uniquely decentralist trend of federalism in Australia, we can see that there is a lot more to be studied and understood about why so many Australians remain deeply convinced that there should be significant evolution in constitutional structure. Our basic ideas have been clashing and reclashing for almost the entirety of Australia's European history, locked in conflict around a frozen territorial structure which is widely regarded as delivering *neither* the level of national unity *nor* the serious political decentralization which many Australians have long desired.

Understanding the unresolved conflicts between constitutional traditions is one thing—another question is whether we can ever hope for more, such as some actual resolution or reconciliation. The scope is enhanced simply by the evidence that there is more than one federalism in Australians' own political experience, and more than one version of unitary ideas, forcing us to acknowledge that federalism and unitary values are not ideologically fixed but that rather, *either* can give rise to systems that might be either centralised or decentralised. Our first federalism retains a significant political potency should its dual orientation again be recognised, or should it ever be discovered—as I hope to do elsewhere—that decentralist federalism has frequently enjoyed a strong synergy with other non-federal theories of territorial reform. The uniqueness and diversity of constitutional traditions also challenges the convenient assumption that Australian politics has always only been fundamentally pragmatic, utilitarian and materialistic, typified by a federal Constitution drafted by leaders with 'little inclination for political theorising and little apparent need for it'.[73] In fact ours is a more interesting story in which theory and ideas have been important, dynamic and contested. The distinction between Australia's first and second federalisms offers a new point of departure for some vexed debates. Continuing tensions and overlaps between veins of regional political dissent become more complex, but more potentially rewarding to unpack and reconcile.[74] The fact that British colonial policy and Australian communities were dealing with coherent theoretical options for national constitutional development earlier than assumed, challenges us to revive and continue such traditions. From these lessons, we might hold out hope for our capacity to imagine continued evolution in our constitutional systems, rather than always assuming that the *status quo* represents the natural endpoint of the federal story.

[73] B. Galligan, *A Federal Republic*, op. cit: 46; and see also Warden, 'Federalism and the design of the Australian Constitution', op. cit: 143.

[74] A.J. Brown, 'After the party: public attitudes to Australian federalism, regionalism and reform in the 21st century' *Public Law Review* vol. 13, no. 3, 2002: 171–190; and A.J. Brown, 'Subsidiarity or subterfuge? Resolving the future of local government in the Australian federal system' *Australian Journal of Public Administration* vol. 61, no. 4, 2002: 24–42.

Question — In your survey, I don't think you got the answer to your first question: 'What do we think the system will be in one hundred years?' Do the majority think the system will be same in one hundred years as it is today?

A.J. Brown — OK, we can go back to that question with the audience here. What do you think the system will look like in one hundred years from now? How many think it will be same system as today? And how many think that there will be a three-tiered system and more states? Those who think there will be a two-tiered system with regional governments replacing the states? Those who believe that there will be a four-tiered system? And those who believe it will be completely different? So the answer is that it seems to be pretty evenly split, I think.

Question — Surely the problem is not theoretical, or it may become *only* theoretical, but is based on the difficulty of constitutional change? And on another point, I think that most people who tend to favour regional government think of that as a local government which is simply expanded, like in New South Wales at the moment.

A.J. Brown — Both of those points are practical political issues, and problems. The question then in terms of the feasibility of change depends on why you believe there have been so few changes to the Constitution put to the people through the twentieth century. It depends on why you believe those changes have not come about, and there is a lot of debate about that. In this discussion we are not talking about a change that is likely to happen overnight, although I notice that on Monday the Business Council of Australia released three scenarios for 2025, called *Aspire Australia 2025*, which is well worth looking at and is on their website. They are not exclusive scenarios, but one of them is that in 2021 there will be a referendum where Australia becomes not just a republic, but also basically votes to introduce a two tier system of government, such as most of you would presumably vote for. A particularly good reason for having a look at this scenario is the Business Council's description of the factors that would bring it about—the economic circumstances, and a combination of historical, economic and political developments that would be required for there to be a feeling that there was a significant enough body of change that everybody had to come to grips with and embrace and figure out a solution to, and then do it.

I think this is a very salutary description of the fact that, even if we all agreed that this should happen, it's not going to happen tomorrow. But I guess one of the values of sketching out some of the history of these ideas and the fact that they are with us and have been with us for so long, is that it becomes much easier to figure out (a) that they are all valid, and (b) that they are not going to go away, and (c) they are all based on real political and economic concerns and desires and instincts, all of which need to be accommodated in any system that is going work really well.

So, whether or not we will get onto the path that the Business Council described for 2025, all of those ideas that are embedded in our history and in the current attitudes we have towards our system are going to be relevant to figuring out what the best system is, whenever those opportunities for change eventuate.

Question — If we are talking about a two-tier system, what sort of two-tier system do we mean? Are we talking about one which is a regional government similar to a local government, which means that their power comes from the central government

and can be overridden, in the way that Kennett in Victoria totally changed the local government system? Or are we talking about a federal system, where the existence and powers of the second tier would be guaranteed by the Constitution? Because I think they are two completely different options. I note that the Whitlam regional system was the first thought, where the federal government would have all the overriding power. So what options did you have in mind?

A.J. Brown — The answer is: either, both or none of the above. I am a lawyer as well as a political scientist, as you may have realised. The key thing about the questions we asked in the survey was that we presumed that the system, whatever it was, would still be a federation—which implies that whatever the roles and the rights and the autonomy were of those regional units, they would effectively be locked in by a constitution in something that would be technically described as federal. We assumed that in order to see how people would respond to the question, and basically I don't think people care whether their system is called 'federal' or 'unitary' most of the time, depending on what the reality of how it works is going to be—which is the basis of your question. I think this is a debate that can, and should, go on and on, about the degree of constitutional security or protection or permanence the powers and the finances and the territorial autonomy of local or regional governing units should have. That is running through the whole New South Wales amalgamation debate, and any local government amalgamation debate. Those questions are vitally important.

We have just applied—with the support, I am happy to say, of the Australian Local Government Association—for some major Australian Research Council funding in order to do some more Australia-wide in-depth surveying on what people have in mind when they answer questions like this.

Question — You would be aware that over the last four years the *Australian* newspaper has been making in-depth analysis and research into structures of Australian governments and constitutional arrangements into the future. More particularly last Saturday, in the *Weekend Australian*, Mike Steketee was the senior writer of an article on scenarios. That was the *Aspire Australia 2025* Business Council article that you referred to earlier. As an extension of that, did you think that the prediction that Australia would be a regionalised republic, in that we would have a two-tier system of governance by 2015, was a plausible scenario?

A.J. Brown — It wouldn't be there if it wasn't plausible. The people who put those scenarios, like most Queenslanders, weren't necessarily incredibly radical and weren't about to turn Australia into a union of soviet socialist republics—this is the Business Council of Australia.

I think the interesting thing about the scenario is the description of the circumstances that those people perceive to be necessary to create the required groundswell for change. One of the reasons in the Business Council work for having those three scenarios was to indicate that a whole variety of things could happen. So the question is, how confident are we that any particular model is necessarily going to be the answer, given all the different things that could potentially happen and the variety of possible options for doing government business in a different way, that might lead to other options being available?

The whole idea of collaborative federalism or cooperative federalism in the 1990s—when there were heaps of ministerial councils all agreeing on what to do and a big focus on uniform legislation on whatever issue people could get their hands on, all being negotiated cooperatively between the federal government and the states—is that we can do it without having to go through this whole constitutional reform process. But the conclusion I draw—based on my growing understanding of basic Australian political values—is that Australians don't want stop-gap measures. They would like a system that they identify with and which they can have confidence in without worrying about it in the middle of the night, and without have to become a legal expert or an expert in government relations. A system in which they have confidence basically relates to the spatial dimensions of their communities and their interests, which they don't have at the moment. That doesn't really answer your question, but I don't think that those basic political instincts are going to go away, because they haven't gone away for the last 150 or 180 years.

Question — You chose America as an example of the creation of multiple new states. Most American states were actually made from territory acquired or conquered or annexed from Indians or Spaniards or whatever. Also, a lot of American state-making was driven by the need to match slave and free states in admission to the Union. There have only really been four American states which have been carved from existing mother-states, as opposed to overlapping territorial claims. Two of these were against the wishes of the mother-states—that is, Vermont and West Virginia. In Vermont's case they bought their way out of an unhappy union: in West Virginia, they used a civil war. Can you think of any precedents for the creation of Australian states either on the Vermont model or, more interestingly, on the West Virginia model?

A.J. Brown — Comparative constitutional history is great, because you get to deal with other places a long way away and you get to really indulge your imagination about what was happening in 1776 and 1780.

What you described there is not quite correct. In relation to the American west, it was a case of new territory so it could just be sub-divided. The fact that they wanted to do that as a means of creating a political structure was in itself significant. But Vermont is a very good example. West Virginia was created in the American Civil War and is a bit of a constitutional anomaly.

Vermont was effectively a region which was born because there was a regional independence claim there which was outstanding since before the American Revolution. The claim wasn't going to go away, and the area was contested between New York and New Hampshire. Basically it became easier to recognise Vermont's claim to be a state of its own rather than to fight it, particularly because they were on the frontier with British North America. And if you didn't keep everyone on the frontier happy, they had the option of jumping back to the British and becoming part of Canada. So there was a lot of pressure along that frontier to keep that from happening. Vermont was part of that.

Maine is a really interesting example. Maine was still part of Massachusetts, even though it was territorially separate from it right up until 1820, but they had been

agitating from the 1600s. Massachusetts only agreed to give it up as part of what were called the Mason Dixon Line deals. There were slave states below the Mason Dixon Line that were seeking statehood, and to keep the political balance in the Senate so that it wasn't controlled by slave states, everybody leaned on Massachusetts to let Maine go so that there was then an additional non-slave state. That was the key that finally got Maine its separation, even though Maine people didn't need to be told that they should have separation, they had been campaigning for it without interruption for 40 or 50 years at that stage.

But a lot of the other territories basically followed the model of what were called the Ohio River Territories, which were the north-west territories. The key event during the American Revolution was that Virginia claimed all those territories. There were landless states, like Maryland, that refused to sign the Articles of Confederation during the Revolution, because they didn't have any land and they thought the deal they were going to get in the Union was bad, so they refused to sign unless they got access to some of the land out west. Eventually New York rolled over and agreed to relinquish claims to territories to the west, in order to get states like Maryland to join the Union and help fight off the British, and to help stop the French from hassling and threatening to pull out of the fight against the British.

Virginia agreed to relinquish the territories to the west, not only to Maryland and other states, they also gave some of the territories to the federal government to deal with in the best possible way, on the condition that the federal government divided it up into new states, rather than just keeping it. Virginia, at that point, was the New South Wales of American federalism—populous, oppressive, threw its weight around, centralist, and looked after itself. So Virginia accepted that New York had shown the way, and agreed to give up their claims, but only provided—and this was locked in by law—that the federal government had to divide those territories into states when they reached a certain population.

That precedent having been set—and Benjamin Franklin's Commonwealth for Increase idea having finally, through political force, made it into the constitutional deal in the 1780s—other states like North Carolina, South Carolina and Georgia, who had similar problems with territory out west that they couldn't manage, then thought that it was good idea to have the federal government take over those territories, to develop and divide them up as well. So this idea of federalism as a decentralising force was really very central to American federation and to the American idea of union and constitution-making. However it had very specific and very dire political factors involved, like the American Revolution.

This is all a history which has never been told properly in an Australian context—for example it is a history that was largely unknown or misunderstood or ignored by Australia's constitutional draftsmen in the 1890s. They thought that they knew something about this history, but in fact—based on the federation transcripts—most of them were in fact quite wrong in their interpretation of this history and didn't really know what the American new state provisions would do in an Australian context. So all of these things are the reasons why it has become so complex to unpack it. But all of these things basically continue to me to point to a need to really take things back to first principles and say that all these ideas are still relevant, they haven't necessarily ever been given a proper run in what is actually a very short

constitutional history in Australia. It is really only yesterday that most of these things happened.

Question — I think you have shown from your research and illustrated again today that the political structure that we have in this country is not what most of the people would like to see. How much of the reason for this do you attribute to the fact that, although our founding fathers gave the people, and only the people, the right to change the Constitution by voting at a referendum, they didn't give the people the right to initiate such a referendum.

A.J. Brown — I think that if the founding fathers were around today, and if they had realised how the Constitution was actually going to work and how difficult it was going to be to change it, then they probably would have put in something that enabled the people to initiate changes to the Constitution. The bulk of expectation at the time, and the whole idea of even having a referendum and asking the people how the Constitution should be changed, let alone requiring that to happen, was actually still a very radical concept in the 1890s. In 1891 it got no guernsey in the first Constitution drafting sessions because it was to democratic and too radical. By the late 1890s people thought that it was the only way they were actually going to get a federation, by getting people to vote for it, because the politicians were so hopeless. But I draw from that that most of the constitution-makers expected constitutional change to be much easier than it proved to be, and they were simply inaccurate in their predictions, because nobody could have known. I think that some mechanism for citizens-initiated referenda is fully consistent with what most of the constitutional drafters would have had in mind at the time.

Eureka and the Prerogative of the People*

John Molony

In order to establish an argument consonant with the title of my lecture I trace the historical background, which sheds light on the nature of the diggers' grievances. The Charter of Bakery Hill and its origins in political thought are then examined. Finally, I make some observations on the prerogative of the people.

In and about a flimsy defence line called a Stockade on the Eureka lead at Ballarat, government troops massacred about fifty civilians at dawn on 3 December 1854. The day itself was chosen because the civilians, being of the Christian religion, did not expect to encounter work of that nature on a Sabbath. Yet, the government knew that it had to strike and do so quickly because, five days previously, the digger leader, Peter Lalor, had called for a meeting of the Ballarat Reform League. It was to take place in the Adelphi Theatre on Sunday, 3 December at 2pm. In the event, the chosen hour of 2pm was beyond the reckoning of many who had intended to be present on that afternoon. By 6am they had died beneath their flag, the Southern Cross. The Stockade was a smouldering ruin and Lalor's life was in jeopardy.

Unrest on the Victorian goldfields stemmed back to the first discoveries of gold in August 1851. Less than two months previously, on 1 July, that part of New South Wales known as Port Phillip had become Victoria. The Lieutenant Governor of the infant colony, Charles Joseph La Trobe, immediately decided that no citizen would be permitted to dig for gold without a licence. La Trobe appointed F.C. Doveton as the first Gold Commissioner for Ballarat who, on his arrival there on 20 September, said to the assembled diggers: 'I am not here to make the law, but to administer it, and if

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you don't pay the licence I'll damn soon make you pay for it.' As time went on, with thousands flocking to the goldfields from the British Isles, Europe and America, the government was hard pressed to fund the necessary services. Instead of turning to the squatters and the business community, the government looked to the diggers as the major source of finance.

In 1854 a new governor, Charles Hotham, took office. A former naval officer accustomed to unswerving obedience, he had been chosen by the Duke of Newcastle because he was a man who could be trusted to act unflinchingly 'if a critical moment should arrive'. Apparently, the possibility of a conflict between the diggers and local authority was anticipated. Although the Duke admitted that the imposition of a licence was `obnoxious', he told Hotham to enforce it. To that end Hotham was given an assurance that he would be provided with the necessary troops.

The licence fee was a tax on labour rather than on its fruits: gold. The fee fell indiscriminately on the successful and on the losers in the lottery gold digging entailed. The inspection of licences was brutally carried out. The gold commissioners were helped by the police and the military in the hunts by which they harried the diggers; eventually doing so twice weekly at Hotham's orders. The diggers were especially outraged at the presence of a standing army on the goldfields.

The population on Ballarat was far from being an unruly, reckless and improvident mob. There were about 15 000 diggers whose level of education was higher than that prevailing in the British Isles. They had some means, often slender, but had come to Australia without government assistance. To penetrate down to the deep leads often took months, hence they were called diggers. By 1854 many of them were building homes in Ballarat, which had all the signs of a peaceful and settled community.

To force such men to produce a licence at the point of a bayonet, followed by immediate arrest and incarceration were they unable to do so, was an outrage of human dignity and civil rights, against which they reacted with determination. Many of the European miners had witnessed the presence of a standing army amidst a civilian population in their countries of origin, which was especially the case in the wake of the revolutions of 1848. Understandably they were astounded when subjected to similar treatment in Australia.

The diggers had no civil status and were virtually non-citizens of Victoria, which meant that they were not permitted to stand for parliament or vote in parliamentary elections. Unsurprisingly it was not long before the old catchcry 'No taxation without representation' was heard on the fields. Moreover, it was evident that the gold would soon run thin and then there would be a need for another source of income. But the land was held by the squatters and the government refused to open it to the newcomers. In that way, their dream of acquiring land in this new country turned sour.

The accumulated impact of these factors resulted in widespread unrest on the goldfields, especially at Bendigo and Castlemaine, where an organisation for reform known as the Red Ribbon Movement was started in 1853. Nevertheless, throughout 1854 unrest never turned violent and Ballarat only became the focal point because the authorities there committed a series of ill-conceived acts starting on 7 October. The

owner of the Eureka Hotel, James Bentley, was not charged with the killing of James Scobie, a young Scottish digger, despite the widespread conviction of most of the digger community that Bentley was guilty, as was eventually proven by a verdict of manslaughter. John D'Ewes, the presiding magistrate at a judicial enquiry into Scobie's death held on 12 October, discharged Bentley. Bentley and D'Ewes were known to be friends and D'Ewes was believed to hold shares in the Eureka, the largest and most disreputable hotel in Ballarat. However, on 14 October, the new Gold Commissioner Robert Rede reported to Melbourne that the population of Ballarat, including 3630 women and 3420 children, was 'very orderly'.

A mass meeting with 10 000 present was held on 17 October at the Eureka hotel to protest the acquittal of Bentley. In the presence of police and military the meeting became riotous and, possibly by accident rather than design, the hotel caught alight and was burnt to the ground. Rede, who had been abused and pelted with eggs, reacted imprudently and three men, chosen indiscriminately from among the thousands, were arrested. At their trial in Melbourne, despite strong evidence of their innocence, they were convicted and imprisoned.

At the time other affairs were afoot with wider implications. The Ballarat Reform League was started in an embryonic form by September 1854 and therefore well before the events that had begun with the killing of Scobie. The timing indicates that the digger leaders, in a period of public calm, were already reacting to the maladministration apparent at Ballarat. It is also useful to establish that none of those leaders was Irish so as to indicate the groundless and gratuitous nature of later judgments of Eureka as little more than a drunken Irish riot, with a goodly sprinkling from the sixteen nations present who the authorities called 'foreigners' or 'aliens'.

The background of the League was the British Chartist movement. Made up principally of artisans, labourers and small business owners, and supported by thousands of women, the movement had wanted a thorough reform of the British political system and had specified the steps towards reform in the 'People's Charter' of 1838. It was a simple document asking for universal suffrage for adult men, annual parliaments, the payment of members and the abolition of property qualifications for members of Parliament, and a secret ballot voting system. The British Chartists wanted an extension of the rights of citizenship and the development of a healthy democratic system, but their Charter was a thoroughly political document making no reference to other matters such as wages, social conditions or the economy.

The movement attracted a wide following and the third petition to Parliament in 1848 was signed by at least three million people. By that year the movement had split into those who wanted to continue to use constitutional means to effect reform and those who, having judged such means as idle in the face of parliamentary intransigency, preferred to use some form of physical force to achieve their aims. As on several previous occasions, Parliament met the movement with brutal reprisals and the arrest of the leaders. In the wake of 1848, 102 Chartists were transported to Van Diemen's Land but none of them was in Ballarat in 1854.

There were many Chartists who had come as free men to Australia in the gold rush years and their contribution to the formation of the Ballarat Reform League was crucial. John Basson Humffray, law clerk and a moral force Chartist from Wales,

became the first president of the League while Thomas Kennedy, a Chartist of Scottish origin who became a Baptist preacher, was its secretary for a brief period. George Black and Henry Holyoake were former English Chartists whose involvement with the League from its origins was both public and noteworthy. No Irish digger was directly involved with the League in its early days.

Over a period of some days the Charter of Bakery Hill was drawn up by the leaders of the League although the principal author was probably Humffray. On 11 November 1854 in the presence of 10 000 people the Charter was adopted as the diggers' platform. The place chosen for this event was the 'old spot' at which the diggers held their meetings, Bakery Hill. From this small rise the diggers could look across the Yarrowee Creek below them to the government camp on the opposite hill.

The 'political changes' the League saw as necessary, but to be achieved over a period of time, clearly reveal the Chartist origins of the Ballarat document. Their first proposal was for 'full and fair representation' meaning that goldfield residents could stand for parliament. The others were manhood suffrage, no property qualifications, payment for members and a short duration of Parliament: a more realistic aspiration than the Chartist demand for annual parliaments. On a more local level the League wanted the immediate 'disbanding' of the Gold Commissioners and the 'total abolition of the diggers' and storekeepers' licence tax'. They also intended to issue 'cards of membership' of the League, divide Ballarat into districts within 'a few days' and to commence 'a thorough and organised agitation of the gold fields and the towns'. Whatever he made of the other matters set down in the Charter, Commissioner Rede was surely agitated when he heard of the immediate proposals of the League.

The major development of the Charter of Bakery Hill from that of the British Charter went to the heart of democracy and had strong republican overtones. The League claimed that every citizen had an 'inalienable right … to have a voice in making the laws he is called upon to obey' and that, because the goldfield communities had been 'hitherto unrepresented' in Parliament they had been subjected to bad and unjust laws and thus 'tyrannised over'. This led to their 'duty as well as interest to resist and, if necessary to remove the irresponsible power which so tyrannises over them.' Not content with a mere statement of the principles that underpinned their proposed future actions, the makers of the Charter moved to the ultimate source of their discontent—the British monarchy. The Charter spoke directly to Queen Victoria whom they warned of their intention to take firm action unless 'equal laws and equal rights' were 'dealt out to the whole free community' of the colony named after her.

The first action they proposed was to separate the colony from Great Britain, which they recognised as 'the parent country'. Separation as such need not have entailed a declaration of independence from the Crown, but the League did not hesitate to insist that it would take that step if 'Queen Victoria continues to act upon the ill advice of dishonest ministers and insists upon indirectly dictating obnoxious laws for the colony, under the assumed authority of the Royal prerogative.' The League reminded the monarch that there was another and higher source of power in a prerogative which was 'the most royal of all'. That prerogative lay with 'the people [who] are the only legitimate source of all political power.' They proposed to use that power if forced to do so and thus supersede the 'Royal prerogative' of the monarch.

The Charter was a document drawn up by men who had not composed it light-heartedly or on the spur of a passionate moment. They had thought through the meaning of their words and the implications to be drawn from them and there is no indication that they proposed to embark on the absurdity of using the prerogative of the people to set up a local monarchy in Victoria. They demanded the 'full political rights of the people', short of which they would not be satisfied even if the result was a republic.

In the previous two years there had been a good deal of republican sentiment among the diggers and in Melbourne. John Harrison came to the goldfields after a career as an English sea-captain and he received tumultuous applause when he said at a meeting in November 1852 that, if moral resistance proved ineffective in bringing about political changes in Victoria, no digger 'would hesitate to draw his sword in defence of his rights.' Throughout 1852, escaped convicts and ticket-of-leave men from Van Diemen's Land had flocked to the Victorian goldfields and their presence was deeply resented in a colony that had not been directly involved with the convict system. A Convict Prevention Bill tried to put a stop to the perceived evil by imprisoning the men in question and was passed by the Victorian Legislative Council late in 1852. To widespread outrage in Melbourne, the Victorian Act was rescinded in London and the outcry became greater when news came through that the 'Royal Prerogative' had been used to grant conditional pardons to the imprisoned escapees. A meeting of about 15 000 people heard strong republican sentiments expressed and the use of the 'Royal Prerogative' was rejected. David Blair, formerly a Chartist lecturer in England, said forcibly: 'the power of the Monarch was based on the opinion of the people, and on that alone.'

The Ballarat Chartists certainly knew that the principles they invoked were not mere creations of a passing moment. Aristotle explicitly held that citizenship involves an inalienable right to 'have a voice in making the laws' which the Charter reiterates. To the great Greek thinker of the fourth century B.C., the citizen was not defined merely by his enjoyment of legal rights within a state, but by his sharing in 'the administration and in offices of the state.' Over time, however, common sense dictated that representation was necessary within states in which direct involvement with civic affairs became increasingly difficult for most citizens. Furthermore, the concept of tyranny, defined as the unjust rule of one or more over unwilling subjects imposed by force, is also as old as Aristotle.

The other fundamental principle of the Charter that 'the people are the only legitimate source of all political power' is firmly knit into the development of political thought in the West at least since the *Corpus Iuris Civilis* of Justinian in the sixth century. There are traces of the origins of modern democracy in the *Corpus* that regards the power of the emperor as deriving from the Roman people who granted him the exercise of their sovereign authority. This ideal was temporarily lost with the development of the negative and exclusive concept of the divine right of kings. Thomas Aquinas would have rejected divine right out of hand had he foreseen it because he taught that the essential principle of authority resided in the people and Dante wrote: 'representatives exist for citizens and kings for peoples.'

John Locke held that the sovereign community, freely constituted by the people, was the depository of all authority, which they pass in trust to rulers. If the rulers act contrary to the trust granted to them, they lose their right to exercise authority and it returns to the people. Rousseau was not prepared to go as far as Locke and he held that sovereignty, meaning 'the exercise of the people's will', is inalienable. In 1642 a London Puritan lawyer, Henry Parker, declared that *salus populi suprema lex* [the well being of the people is the highest law] and that the Royal Prerogative is subservient to it because the people are 'the Authors and ends of all power'. Across the Atlantic in 1620 the pilgrim fathers from the *Mayflower* were content to blend the political theories of past centuries with the Old Testament when they decided to 'combine together in one body and to submit to such government and governors as we should by common consent agree to make and choose.' They thereby sowed the seeds of American democracy which quickly grew into popular sovereignty in the Newport Declaration of 1641 and 'The Concessions and Agreements' established through William Penn in 1677.

The writers of the Charter of Bakery Hill in 1854 had therefore a long tradition from which they drew their belief that the Royal Prerogative must be exercised only for the common good of those who possessed such sovereignty in the first instance—the people. To them, its current exercise in Victoria was tyrannical. In this instance the explicit prerogative singled out by the Charter was the appointment of ministers, including Governor Hotham and his ministers. Although undertaken on the advice of the British Prime Minister and Cabinet, such appointments were technically made under the prerogative of the Crown. By logical extension, the authors of the Charter held that anything done by Queen Victoria's ministers was indirectly her responsibility in that their power came from her. The Charter made it plain that, at whatever cost, the diggers would take such steps as they deemed necessary to put a stop to the use of the Royal Prerogative in Victoria unless the radical changes seen as absolutely necessary took place. The authorities were equally determined to ensure that no such eventuality would come to pass. To that end it was vital to prevent the Ballarat Reform League from meeting again.

Rede in Ballarat and Hotham in Melbourne darkened the events of the last days at Ballarat before Eureka with further government provocation. The governor refused to listen to the just grievances of a digger deputation sent to him and he scarcely looked at the copy of the Charter they presented to him, preferring to write 'Put away' on it. His response to the attempts at conciliation was to dispatch a strong force of 296 extra police and soldiers to Ballarat. Although Rede now had 435 officers and men in his Camp, he was deeply troubled. Another monster meeting was scheduled for the following day, 29 November, which had as its purpose the attainment of the objects of the League and Rede decided to send along a magistrate and his customary spies to report to him anything said or done at the meeting of a seditious nature.

Again there were upwards of 10 000 present at Bakery Hill and it soon became clear that there was disunity among the leadership. Humffray, Black and Kennedy tried to find excuses for the behaviour of the governor, to continue negotiations with him and to request concessions rather than demand rights. These proposals received a furious response from the great majority of the diggers, who then rejected as pointless Humffray's motion to again protest against the behaviour of the government and especially the use of military force. At that moment Humffray and those who stood

for moral force lost their standing with the diggers. Their ideals were high, their sentiments pure but their ability to judge the times was deficient. They had formulated the Charter with its demands and warnings, but they had not weighed up the consequences were the government to refuse to negotiate. They had good reason to remember how the British Chartists had been treated and how the hapless French Canadians had been put down in blood when they rebelled against the British less than twenty years before. When the time came at Ballarat, what other response from British authorities could the leaders at Ballarat realistically have expected?

The Chartists acted nobly by inspiring the diggers with democratic ideals and holding out the hope that they were capable of being achieved. To leave the diggers in the hour of their greatest need when the movement for reform either had to cease or the leadership had to change was another matter. That the leadership automatically fell to those among the diggers to whom moral force had little appeal is understandable. Nevertheless, that Peter Lalor, Timothy Hayes, Raffaello Carboni and several others who took over the leadership were men of prudence, intelligence and education is often overlooked.

Perhaps in an attempt to lift up spirits, Carboni asked everyone at the meeting, 'irrespective of religion, nationality and colour' to salute the newly-made flag of the Southern Cross as 'the refuge of all the oppressed from all countries on earth.' Then, perhaps sensing that the League's future was endangered and determined to prevent that eventuality, Lalor came forward for the first time. He moved the motion calling for the meeting on Sunday at the Adelphi Theatre when a new committee would be formed composed of representatives for each fifty members of the League. After that licences were burnt and Hayes asked all present to stand ready, to act and even to die, were they called upon to liberate any man taken to the lock-up for not being in possession of a licence. Carboni says this proposal was met with a 'deafening roar' of approval.

Captain Charles Pasley, English, young and only a year in the colony and one night in Ballarat, observed the meeting from the Camp and decided that it 'was in a position convenient for military operations.' He then advised Rede of the clear necessity to take steps that would 'bring the matter to a crisis.' Pasley knew that there would be 'serious resistance' but wanted a 'firm front' in order to provoke the diggers into taking up arms against the government. Rede therefore ordered a zealous licence hunt on the following morning, Thursday 30 November, which would be conducted by the police and supported by a strong military presence. During the hunt the military fired several times at the diggers and there was some return fire. There was no loss of life but a policeman and a digger were wounded and eight diggers arrested, or simply captured, and taken to the Camp. Humffray defended the diggers, who he said had done no more than 'defend themselves against the bayonets, bullets and swords of the insolent officials in their unconstitutional attack.'

It was now clear to the remaining digger leaders that resistance of a more positive kind than waiting to be arrested for the non-possession of licences was necessary. As Pasley had noticed, they could easily be surrounded and trapped on Bakery Hill, so about 1000 men followed the Southern Cross in divisions to the Eureka lead. It was a place where they felt they would be on their own ground. Lalor gave them his first order, which had nothing to do with rebellion, with rejecting the 'Royal Prerogative'

or even with rescuing their mates who were now in chains in the Camp. It was 'to defend ourselves among the holes in case the hunt should be attempted in our quarters.' Hotham, Rede, Lalor and the diggers did not know that after the events of that Thursday morning there would never again be a licence hunt in Victoria. Indeed there would never again be a licence to dig for gold in the old form they had known.

In the late afternoon the diggers went back to Bakery Hill hoping to win more recruits. Their flag was unfurled and Lalor led them in a solemn oath: 'We swear by the Southern Cross to stand truly by each other, and fight to defend our rights and liberties.' They returned to Eureka and sent a deputation to Rede asking him to put a stop to the licence hunts. Their leader, George Black, explained to Rede that the diggers objected to being forced to pay their tax 'at the point of a bayonet' and that 'Britons hated to be bullied by the soldiery.' Carboni went further and vastly irritated Rede by saying: 'We object to Austrian rule under the British flag.' Rede responded that the objection of the diggers to the licence hunts was 'a mere cloak to cover a democratic revolution' and refused to hear them out. The deputation came back to Eureka empty handed where no more could be done than wait for a sign that the government would relent and give an answer to their just demands.

By Saturday Rede had no answer of a verbal nature to give to the diggers, but he was even more convinced that it would be fatal to grant any concessions to them. To do so might indeed induce them to leave their Stockade and return to work, which would be a disaster. To Rede it was essential to come upon the diggers in the Stockade 'with arms in their hands' when he could legally 'crush them and the democratic agitation at one blow.' Having communicated these thoughts to Hotham, Rede spent the evening with his officers planning the attack on the Stockade.

On Sunday morning only about 120 unsuspecting diggers were left in the Stockade to face an overwhelmingly stronger force. No Royal Prerogative in the form of declaring war or even an emergency had been used and the Riot Act was not read. Civilians guilty of no crime other than resistance to a regime that had become increasingly tyrannical, that had affronted the human dignity of decent men and deprived them of normal civil rights, were killed by the British military in the name of Queen Victoria. In the aftermath, 117 arrests were made but only thirteen men were brought to trial on a charge of high reason which, if found guilty, would have sent them to the gallows. The trials were a legal and social farce and Melbourne juries acquitted all the accused.

The government at length embarked on some measure of reform. An export tax on gold was introduced and a digger could buy a Miners' Right for £1.0.0 which also entitled him to vote in elections. Manhood suffrage was granted in 1857, limited parliaments were introduced in 1859 and payment of members in 1869. At Bakery Hill on 14 July 1855, Carboni, with eight others, was elected to form the first local court that replaced the justly reviled Gold Commission. Peter Lalor and John Basson Humffray were elected as the first representatives from Ballarat to the Legislative Council in November 1855. Lalor lamented that the reforms granted tardily by the government had been baptized in 'a font of human blood' and in his first speech in Parliament he reminded his fellow members that King John had granted Magna Carta to the barons with arms in their hands and not in response to a petition from the people.

There are still anomalies and questions about Eureka that remain unresolved, such as the exact spot on which the diggers took their stand. That matter is of little moment because the whole ground where they died and suffered belongs forever to them and to the nation. It is more to the point that the Southern Cross, under which they died, is in the Art Gallery, which stands on the same ground as the government Camp in 1854. At that place, the police danced, spat and urinated on it when they returned from their work at Eureka. One day that flag, a true symbol of democracy, will return to its rightful home at the Stockade. Recognition of the Southern Cross in the form of registration under the Flags Act is slow in coming, as is the erection of a monument in the National Capital to commemorate Eureka. These things will come to pass, but there is one work that will never be fully done, one ideal that will always need revivifying. Democracy is much more than a system. It is an ideal and a spirit born day by day in those who believe in it. Eureka had its brief and bloody day 150 years ago. Eureka lives on in the heart and will of every Australian who understands, believes in and acts on the principle that the people are 'the only legitimate source of all political power.'

Question — To what extent was the royal prerogative seen by the diggers as used by the Queen herself or were they laying the whole blame for Eureka on Hotham?

John Molony — I wouldn't make any suggestion that Queen Victoria was even aware of Eureka. That is not the point. The point is that the people who exercised power in the British parliamentary system could advise Queen Victoria on certain issues—for example pardoning those ex-convicts from Van Diemen's Land. But the royal prerogative they were agitated about was of appointing those ministers who they regarded unfavourably. I don't think they would ever have thought Hotham was corrupt, however they certainly thought he was outrageous in the way he had conducted his term of office in respect of the goldfields. This was despite his initial reaction when he first visited the goldfields some months previously, when he regarded them as orderly and the people well-behaved.

Nonetheless, I think I ought to excuse him. Not on the grounds that the moral first Chartists did, but he was under enormous pressure from Britain—remember, it was during the period of the Crimean War. I think some historian ought to take up the whole question of what was done with the gold that came from the goldfields of Victoria in that particular period. Obviously, there was a great demand for finance, and certainly in Victoria itself, with that vast influx of people into a newly born colony, and they had to make roads and schools and hospitals and whatever else, and a vastly increased number of police were required. So where did you turn? You turned to the diggers, but remember as I said it was a tax on their labour, not on the product. And furthermore, the squatters were paying scarcely anything in the form of taxation, and yet they held the whole of the lands of the Port Phillip, particularly those wonderful lands in the Western District of Victoria, in their embrace. So that all I can say about the British government's involvement is that obviously Hotham was sent, or commanded, to make the diggers pay even if it came to the point of a fight. That's what he was told by the Duke. It came to a fight, but not much of a fight, was it? And we know who won. But we equally know that the blood those rights were baptised in

was not idly shed, and that's why I would hold very strongly that the origins of much of our democracy are there at Bakery Hill, where the blood was shed at Eureka.

Question — Why were the problems in Bendigo able to be resolved through the Red Ribbon League, without resorting to bloodshed? Bendigo I think thrived just as much as Ballarat did. So what was the story of the Red Ribbon League?

John Molony — The story of the Red Ribbon League is brief. It never formulated anything even moderately compared to the Charter of Bakery Hill insofar as rights were concerned. Had the conditions that applied in Ballarat after October 1854 applied in Bendigo and in Castlemaine, I think the unrest there would have been immediate and perhaps even more decisive than that at Ballarat.

But what happened at Ballarat was very simple. There was extreme provocation. There was one act of provocation that alienated the whole Catholic/Irish population at Ballarat. This was a gross violation of human rights, when the crippled servant of the young, highly educated Irish Catholic priest, who was much admired and loved by the people there, was thrown into the lock-up because he didn't have a licence, despite the fact that he wasn't bound by law to pay the licence. Furthermore, he was accused and legally charged with assaulting the arresting constable. I am saying that the conditions on Ballarat were so excessive, for example the way the licence hunts were being conducted there, with the strong force of military, and to a true-blooded Briton the very presence of a standing army amidst a civilian population was simply not acceptable. And that was the way the law was being enforced, by the presence of a standing army. It just was not acceptable. Consequently, Eureka.

And one can see of course that that was exactly what the government wanted. Carboni wrote his account of Eureka in the ensuing months. It was published on 3 December 1855. But for a long time I never really worked out what the title meant—it was *Eureka, or Some Consequences of Pirates on the Quarterdeck Wanting a Rebellion*. I wondered what in the name of Heaven this was, but it is very simple: the quarterdeck of course is the bridge of a ship. Well Hotham was a naval officer, and therefore Hotham and his pirates, on the quarterdeck, wanted a rebellion. And they got a rebellion. And why did they want a rebellion? To crush the democratic movement at one blow. It's there, they say it. And what was the democratic movement? A movement for human rights. If you want to talk about the origins of constitutional democracy in this country, then there is its heartland.

Question — These events happened 150 years ago. Today is 23 April, and 23 April 1904 was the date of the formation of the first Australian Labor Government, which is doubly interesting because it happens to also apparently have been the first Labor government anywhere in the world. So, do you know of any direct thread of connection between the events at Eureka and the formation of the Australian labour movement which, if there are any, would have significance for the formation of the international labour movement?

John Molony — It's a more a question of the spirit, than the matter. When the gold ran thin, and company mining was introduced, within an ensuing year or so, there was a very big movement of men from the Victorian goldfields. These men moved around the country, and many of them took the legacy of Eureka with them. The Eureka flag

was flown at Barcaldine, and that is the place of course which is regarded as the birthplace of the Australian Labor Party. Incidentally, there was a state Labor government for a few days in Queensland, prior to that first federal government, and I think that is regarded perhaps more justly as the first Labor government in the world. Nonetheless, the spirit of democracy, which you get in Lawson's work, for example the two old men who go out into the evening and talk in hushed tones about Eureka and when the diggers fought for their rights, is unquestionably there. If it is the case that you say (and I was not aware of the fact) that this is the anniversary of the formation of the first federal Labor government, then so much the better.

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John Quick
A true founding father of federation[*]

Sir Ninian Stephen

John Quick arrived in Victoria late in 1854 as a little boy of two whose father, like many other Cornish migrants, had come to Victoria in search of gold. John was born near St Ives in the far southwest of England. His parents settled in gold rush Bendigo but his father died from typhoid fever soon after arrival. His mother later married again and John, after a very few years of schooling, went to work as a ten-year-old in a foundry, later in a mine and later still, while in his teens, in the printing room of a Bendigo newspaper.

He graduated from newspaper print room to junior reporter on local Bendigo newspapers, moved to Melbourne and matriculated in his twenties, in 1874. Then, with the aid of scholarships, he graduated LLB at Melbourne University at twenty five and in 1878 was called to the Victorian Bar, at the same time heading the *Age* newspaper's parliamentary staff. Quick was a studious man and a devout Methodist; a lover of literature, he planned and began a guide to Australian literature, which was completed after his death. A student of Shakespeare, he was also a great admirer of John Keats' poetry. Astonishingly, in 1882 he graduated LLD by examination at Melbourne University, a rare distinction for a practising lawyer, and the following year he married Catherine Harris.

[*] This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House on 21 May 2004.

While still in his twenties he returned to Bendigo, became an active member of the Bendigo branch of the Australian Natives' Association and won the Legislative Assembly seat of Sandhurst (Bendigo) in 1880. That seat he retained for some nine years, at the same time practising law in Bendigo.

From the 1880's onwards Quick was an effective promoter of Australian federalism. He founded the Bendigo Federation League in 1893 and was for some years its president.

His great contributions to Australian law and lawyers were his two major works, the over nine hundred pages of the *Annotated Constitution*, which he and Robert Garran produced in 1901, and the study of the *Judicial Power of the Commonwealth* which he and Littleton Groom brought out in 1904. These two works were for many decades the outstanding legal texts on our federal system.

We have so long thought of ourselves as Australians, with over a century of nationhood behind us, that it is not easy to recapture the quite different colonial atmosphere of the Victoria in which John Quick grew up. The other Australian colonies then seemed distant indeed; only in 1883, when Quick was in his 30s, was the rail link from Melbourne to Sydney completed, and it was another 35 years before one could travel by rail all the way to Perth. Travel by road, before the days of the petrol engine, was slow and demanding and inter-colonial journeys were predominantly by ship. While the six Australian colonies shared language, loyalty and law, geography thus ensured relatively little communication between them. The colonies were initially more concerned with ensuring self-government for themselves and in pursuing conflicting policies of free trade or protection than with notions of union.

Earl Grey's early proposal in 1847 for a measure of Australia-wide cooperation in the enactment of laws for regulation of their common interests had met with indignation in Sydney, and when a subsequent committee of the Privy Council reported in 1849 on a proposed general assembly of the colonies with quite wide legislative authority, the colonial response was unfavourable and the proposal was substantially abandoned.

On into the 1850s and 1860s, during Quick's childhood, colonial proposals for some degree of federation had been explored, but met with opposition in Sydney and Brisbane. Henry Parkes, the then colonial secretary of New South Wales, advocated federation in 1867 at an inter-colonial conference held to consider postal communication overseas, and a federal council was proposed to that end but was abandoned. Even in the 1870s a union of the colonies remained a matter for much debate but little action; the fact that Sydney was resolutely free-trade and Victoria strongly protectionist did nothing to assist the progress of federation.

The federal movement did receive support in the 1880's, first through moves for agreement on uniform customs and excise duties, which, however, foundered on the conflict between free-trading New South Wales and protectionist Victoria; then more positively when, in 1883, concern grew in the colonies about German and French colonial activity in the islands to the north of Australia and, more generally, in what some saw as a threat of Asian invasion. These concerns led to a convention in Sydney of the governments of all the Australasian colonies and Fiji and to the enactment by

some of those governments of a Federal Council Bill. The British Parliament in 1885 enacted an enabling act and the resultant Federal Council first met in 1886; however, Sydney's abstention ensured lack of substantial progress for the time being towards federation. Over the next fifteen years the Council enacted several legislative measures but it lacked all executive power and the abstention of New South Wales substantially crippled it.

The need for something by way of joint action for adequate defence of Australia as a whole had been felt ever since the 1870s, with proposals mooted for a colonial fleet of cruisers and gunboats. By 1891 all the Australian colonies and New Zealand had legislated for this, confined however to naval defence—nothing was achieved for the meagre colonial land forces—the colonies each had their own separate military forces and inter-colonial defence cooperation was lacking.

In 1889 Sir Henry Parkes, concerned about the inadequacy of colonial defence measures and judging that the time had come for some definite action on federation, proposed a convention of the colonies to consider 'consolidating the Australias into one', following the model of the Canadian Dominion. From this initiative came the Melbourne Conference of 1890 at which all the colonies, including New Zealand, were represented by premiers or leading ministers. Sir Henry Parkes spoke there of how 'the crimson thread of kinship runs through us all' and urged a union of the colonies in place of the ineffective Federal Council. The outcome was the calling of the first National Australasian Convention, to meet in Sydney in 1891. When it met its drafting committee, for three days aboard the Queensland government's paddle steamer, the *SS Lucinda*, hammered out the substance of our present Constitution and federation became a real prospect.

There were by the 1890s economic factors favouring a union of the Australian colonies. By then it was felt that, especially in Victoria, federation—with its assurance of a common market within the Australian colonies—would assist in overcoming the economic depression of that decade; this was a sentiment especially strong in the towns along the River Murray. A wider view of the virtue of federation was expressed by John Quick when he wrote in 1898 that federation 'will transform a number of small states into a great nation.'

It had long been of real concern to Quick that there then existed between the colonies what he described in 1894 as 'a feeling of alienation—rapidly developing in each colony against persons coming from other colonies—regarded as strangers and intruders.' This was coupled with the acute rivalry between Sydney and Melbourne.

Yet in the mother colony, New South Wales, the quest for federation faltered; the union which federation contemplated was in that free-trading colony compared to a teetotaller contemplating keeping house with five drunkards.

It was not until mid-1893, at a conference in Corowa, on the Murray, that a plan of action emerged that led to federation. Quick was the author of that plan; as he said at the time, the aim was that the cause of federation should be achieved by the citizens of Australia and not merely advocated by politicians. As president of the Bendigo Federation League Quick was attending the 1893 Corowa Conference as a delegate from the Bendigo branch of the Australian Natives' Association. That association had,

in Victoria, become a powerful advocate for federation and in towns along the Murray Australian federation leagues were also formed to urge prompt action towards federation. It was at their invitation that the Corowa Conference was held, with strong representation from Victorian branches of federation leagues.

It was at the Corowa Conference that John Quick made his name as one of the outstanding fathers of federation; there too he first met Robert Garran, later the co-author with Quick of their *Annotated Constitution of the Australian Commonwealth.* Much later Garran described the experience of working on that volume with Quick, some fifteen years his senior, as being 'the junior partner of a steam-roller'. Quick he described as being 'like the mills of god grinding slowly and exceedingly small'.

At first the Corowa Conference had followed an all too familiar form, with the passing of resolutions in favour of federation but with little by way of action. It was only towards the convention's conclusion that John Quick, in response to cries of 'Can't we do something?' called A.J. Peacock and others aside and, after discussion, emerged with a plan of action which proved the true initiation of positive federalism. Sir Robert Garran later described Quick's proposal as 'like the striking of flint with steel to produce this new spark of inspiration.'

Quick's plan was for the election of representatives to a convention to draft and adopt a bill to establish a federal constitution which would then be submitted 'by some process of referendum to the verdict of each colony.' This plan the Corowa Conference unanimously adopted and Quick then lost no time; he drafted an Australian Federal Congress Bill on his return to Bendigo, and it became the basis for the enabling acts in each colony, which ultimately resulted in federation.

The key to Quick's plan was that the people of Australia 'should be asked to choose for themselves the men to whom the task' of establishing a federal constitution should be entrusted; the cause of federation should, he said, be 'advocated by the citizens and not merely by politicians.'

In early 1895 the six colonial premiers put Quick's plan into action. Meeting in Hobart, they resolved that federation should be regarded 'as the great and pressing question of Australasian politics'. Accordingly they determined that a federal constitution be framed and submitted to the electors; then, if accepted by referenda in three or more colonies, imperial legislation should be sought giving effect to federation accordingly. A draft bill was approved, the important concept of ultimate submission to the electors as a whole for their acceptance being adopted. It was passed in the South Australian and New South Wales legislatures in December 1895, in Tasmania and in Victoria by March 1896, and in slightly amended form in Western Australia in October of that year; only Queensland had failed by year's end to pass the enabling legislation.

Meanwhile, in November 1896, a well-attended people's federation convention was held in Bathurst which Quick attended; it received much publicity and served to inform the population at large about federation and how it might be attained.

With Queensland still standing apart, five of the six colonies in March 1897 proceeded to elect their conference delegates, Quick being the second of the ten Victorian delegates to be elected, preceded only by the premier. The momentous first meeting of the convention was subsequently held in March 1897 at which Quick was appointed to the convention's constitutional committee.

The convention, after lengthy debate in its committees, adjourned for some months to allow the colonial legislatures to consider the bill, after which the convention resumed in Sydney in September, considered the many amendments proposed by the various legislatures and again adjourned, Queensland still being absent, to sit again in Melbourne in January 1898. By March the convention had completed its task and was followed by referenda in the colonies. Quick composed and had published in a Melbourne newspaper a lengthy unofficial explanation of the constitution and partly thanks to it the constitution was approved by very large majorities in Victoria and Tasmania. It was also passed by a less substantial majority in South Australia and by a very slim majority in New South Wales, which, according to that colony's implementing legislation did not amount to acceptance of the proposal. A premiers' conference followed in 1899, which Queensland now attended. New South Wales conducted a further referendum, at which the proposed federal constitution was approved by an adequate majority, and Queensland finally joined the more southerly colonies.

Final voting for federation was passed in all colonies other than Western Australia between June and September 1899, the Commonwealth Bill was enacted by the imperial Parliament in the following year, Western Australia finally joining in the federation at the last moment and the Commonwealth came into being on 1 January, 1901. It was on that date that John Quick was formally notified that he had been awarded a knighthood in recognition of his services to federation and in particular as originator of the procedure adopted for the enabling legislation for federation, which he had initiated at the Corowa conference.

On the day of the inauguration of the Commonwealth Quick described the event as a great 'triumph of freedom and democracy'. At the first federal election John Quick was elected unopposed to represent Bendigo and continued in office as a federal member for a subsequent unbroken twelve years, including service as federal post master general. Subsequently and entirely appropriately, he was appointed to the bench of the Federal Arbitration Court in 1922, a court the creation of which he had originally urged in debate on the form of the constitution. He served on it as deputy president until his retirement in 1930. He died in 1932 in Melbourne and was buried in his beloved Bendigo.

John Quick was a considerable student of aspects of the law and published a number of notable works apart from the celebrated Quick and Garran and his work on the Commonwealth's judicial power. While still in his twenties he published a history of land settlement and policy in Australia and, later, a number of other significant legal texts, often in collaboration with another. However, his great achievement was his rescue of the long sought concept of federation from seemingly endless political debate and, by recourse to popular appeal, ensuring that on the first day of the new century the new federal Commonwealth would become a reality.

Alfred Deakin, who knew him well, wrote of him that: 'too earnest in his feelings and too sincere in his loyalty to do himself justice in debate, [he] watched over the [federation] bill in its infancy as if it had been his own child.' In fact he and his wife had no children and federation was his true child. He will long be remembered as one of that small band of true founding fathers of Australian federation.

Question — As Australia moved toward federation, what were the feelings in the British Parliament toward Australia's federation? Were they supportive or otherwise?

Sir Ninian Stephen — I think Britain was quite content for federation to occur, but distinctly disinterested. The British government took no leading part at all in any movement toward federation. As we have seen, in the middle of the 1800s there was a gentle suggestion that trade at least should be governed by some sort of uniform laws within the continent, but other than that it was left very much to Australians to determine for themselves—although they didn't really call themselves 'Australians' in those days—what the outcome should be. So it was essentially a home-grown movement, rather than one urged by what was then called the Home Government.

Question — You mentioned that New Zealand took part in some of the earlier meetings, and I have always found it strange that New Zealand didn't join the federation, and that Western Australia did. To this day, if you want to fly to Sydney or Melbourne it takes far less time from New Zealand than from Perth. In those days, using sea transport, it would have been easier to get to New Zealand than going around to Perth. I wondered what John Quick thought of New Zealand joining the federation?

Sir Ninian Stephen — Even now, there are slight suggestions that the links between Australia and New Zealand should be closer than they are at the moment. During the 1800s, I think New Zealand felt rather superior to Australia. It wasn't the home of convicts, and that was certainly a feeling that New Zealand cherished. Perhaps that was one of the reasons why New Zealand felt that it was quite capable of looking after itself—as indeed it has done successfully in all these years since. I don't know what New Zealand would think today about joining the Commonwealth. I suspect that there would not be unanimous support for that. New Zealand has long established itself as a well-respected nation, and—certainly in the 1800s, and also in the 1900s for that matter—there was little urge on the part of New Zealand to join Australia.

Question — The Constitution has proved remarkably robust, and the number of times that it has had to be altered is very small. Recently there have been attempts to bypass the separation of the judicial and parliamentary powers, both at the federal level and perhaps soon at the territorial level here in the ACT in regard to the Gungahlin Expressway. I am concerned about attempts to choke off the right of appeal to judicial and quasi-judicial review by parliaments of both persuasions in Australia. This appears to be something that Quick may well have had a view about, and you might also have a view.

Sir Ninian Stephen — I am a strong supporter of the need to keep bureaucrats—if you can use that term, although unfortunately it tends to be a hostile description, and I don't intend it as such—within their statutory bounds, and that can only be ensured if you have the availability of recourse to courts. So I suppose my view is that that situation should be retained and encouraged. I am not aware of the intricacies within this territory, but I suspect that there are some moves to confine appeal to courts, and if that is so, it is to be deplored.

Question — Is anything known of Quick's personal motives or circumstances which compelled him so strongly to advocate federation?

Sir Ninian Stephen — What I have read of him reveals only a deep-seated feeling that he was more than a Victorian—that he recognised the entity 'Australia' as meaningful. That view wasn't necessarily common in the Australia of that time. It was not common because of the curious divergence between free trade and protection, and the rivalry that was felt between New South Wales and Victoria—the upstart Victoria, which the discovery of gold emphasised, and the much longer established state of New South Wales, the original colony. There was a distinct difficulty in relations between the two states which certainly was something that Quick not only opposed, but of course very effectively took action in relation to. He was one of those Victorian self-made men, of great industry and studiousness, and with extraordinarily modest origins. He worked his own way up intellectually and in every other sense. Perhaps the fact that he was a Cornishman helped.

Question — You would know there was quite a debate about where the separation of church and state would stand prior to federation in the 1890s. Could you comment on where Quick stood on this question and why he didn't favour the United States style of strict separation of church and state.

Sir Ninian Stephen — Was our model really so very different from that of the United States? Quick certainly regarded Canada as the preferred model, but I haven't come across any particularly close study by Quick of the United States. It was to Canada that he looked and I suspect that in the 1800s, when Quick was formulating his ideas, the United States didn't present such a warmly accepted model of federation as the fellow dominion Canada. I think perhaps that the American features in the Constitution came from other people, like Clark and Baker and others.

Question — I'm reasonably familiar with Bendigo, and the name Quick never seems to appear anywhere in the Bendigo legend, and I wonder why?

Sir Ninian Stephen — I'm told, and I didn't know this until I came here this morning, that there is a Mr Quick who is a Member of the House of Representatives.. So you don't have to look only at tombstones in Bendigo for the name Quick. It is still living, and still living in this Parliament. Other than that, I don't think that many of our notable founders of federation are known or revered in the cities from which they came within Australia. Certainly in Melbourne, we don't think very much about anyone who originated there. We thought more in the centenary year about federation, but as if federation is something that we accept so readily as being a god-given right that we have, without thinking of the human intervention that in fact brought it about.

Question — May I ask you to reflect on your own student days. If you were studying medicine, you got a copy of *Gray's Anatomy*, and if you were studying the law, you got *Quick and Garran*. Was it because it was the only text, or because it was a seminal text, or just that it was as boring as anything else and you had to look at it?

Sir Ninian Stephen — Well, as a law student I certainly didn't have a *Quick and Garran.* My legal student days were spent as a five-year articled clerk. And the expense of a *Quick and Garran* would have been quite out of the question, but fortunately the firm I was with had at least two copies of *Quick and Garran*, and it was the universal bible for lawyers. That is no longer the case; I think it has been superseded. But it was an extraordinary manifestation of the dominance that *Quick and Garran* held for 70 years as *the* doctrine that one looked at on any constitutional matter. One of its great virtues was that it was uncontentious. Sir Robert Garran lent a great flavour to it—it was very far from Quick's sole authorship.

Question — Are you a federalist? A previous prime minister, Gough Whitlam, railed against too many parliaments in Australia. Do you revere our federal system, or not?

Sir Ninian Stephen — Yes, I think I revere it. I accept it. We've all grown up in a federal aura. We can all be from time to time irritated by state parliamentarians, but if we didn't have vigorous state parliaments, where would the federal legislature lead us? It's not a bad system. It has now worked, I think to general contentment, for a remarkably long time. We are one of the relatively few countries—there are maybe only three or four—that have constitutions as long-lasting as our own. That is, countries that have not changed to a new constitution. The fact that there have been relatively few amendments is an extraordinary tribute to the men of the 1890s and 1900s who established a workable basis for our federation. So, I'm content with our state parliaments. State parliamentarians look after our more local matters much more effectively than could be done from Canberra. And they need looking after.

Question — This is an observation on the first question, in relation to the extent to which England was encouraging or not encouraging towards federation. I recently read a book by Bill Hudson on Australian independence, in which it struck me that there was great agitation by England, especially since federation, to shake Australia off and tell it that it was independent, and a great reluctance on the part of many leaders in Australia to actually accept that. Can you comment on that?

Sir Ninian Stephen — In the years since federation, Australia has played a notable part when things have been looking grim as far as the UK is concerned. I am thinking of World War One and World War Two. I came originally from Scotland and only arrived here at the age of seventeen, but I think there is a very real feeling of affection—on the part of people in Scotland anyway—for Australia, because so many Scots have relatives here, and there are close links and connections. So I don't see any drifting apart, really. Australia has grown enormously of course, in world terms, in that period, and I would have thought Australia ranks much more significantly in English eyes than it did as a remote colony in the 1800s. It would be hard to determine or to analyse it, but I wonder whether the feeling towards Australia isn't as warm now, or whether it is warmer than it was in the 1800s.

Question — Do you see any sort of parallel between the events you have just described and what is now going on in Iraq?

Sir Ninian Stephen — No I don't. I don't see any of the symbols or any movement towards federation or anything of that sort. I don't think what I've been talking about really casts any light on the situation in Iraq, except of course for the fact that we have supplied a small number of troops in Iraq and that's a symbol of the fact our federation still has real links with Britain, but perhaps more interestingly, with the United States now, which is of course the dominant power in the intervention in Iraq.

Question — Why, when you go to Bendigo, is the name Quick not mentioned? And how far forward was Quick thinking, in relation to the strength of the position of the prime minister in England? There is no mention of the prime minister, the parties, or cabinet in the Constitution. In fact, the first mention of a party was following the referendum in the mid-1970s, which allowed that a retiring senator could be replaced by a member 'of the same party'. So can you comment on Quick's attitude to flexibility in the future for change, as well as his ignoring parties and prime ministers?

Sir Ninian Stephen — I think what you've been saying demonstrates a deeper knowledge of that particular question than I have. It is an interesting observation.

Question — Quick seems to have had a great deal to do with adopting the device of a referendum, which was quite alien to British customs, and was not much known in America either. The only place had referendums as a means of constitutional change was Switzerland. Was there something in his background that led him down that particular path?

Sir Ninian Stephen — I haven't come across any particular connection with Switzerland, but you are perfectly right—the appeal to the individual populous was well recognised as an appropriate device in Switzerland at the time when Quick was proposing a referendum in Australia. It seems a logical enough thing to do when you are seeking, from a relatively articulate populous, a new way of governing, and particularly governing within a federation where states would retain their individuality. How better than to ask the people whether they were content with this or not? And that is precisely what Quick did, and did successfully.

Rules, Regulations and Red Tape
Parliamentary scrutiny of delegated legislation*

Dennis Pearce

Introduction

Let me begin with an imaginary dialogue:

> 'I will only keep you for a second.'
>
> 'But, hang on a second, how long is a second?'
>
> 'Well I can tell you that it is: "the duration of 9 192 million 631 thousand 770 periods of the radiation corresponding to the transition between the 2 hyperfine levels of the ground state of the caesium 133 atom", because it is set out in the *National Measurement Regulations 1999* and is thereby the law.'
>
> 'But who said it was the Law?'
>
> 'The Governor-General.'
>
> 'But how can the Governor-General make the law? He is the head of the Executive. It is Parliament that makes laws.'
>
> 'The Parliament cannot make all the laws; there are just too many rules that have to be laid down if our society is to be properly regulated. Many are highly technical and do not need the attention of the Parliament once it has determined the policy that is to underpin the law.

* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House on 25 June 2004.

The definition of the second of time is a good example of this. It is based on international agreement. The Parliament could not have any useful input into its content. So it is better dealt with by an expert body that understands the detail of the world of weights and measures.

In cases like this, the Parliament authorises other persons to make laws. This is known as delegated legislation because the Parliament delegates its power to make laws to others—often the Governor-General but also ministers and various government officials.'

'And so the Parliament washes its hands of the legislation and leaves it to others to produce what they think should be the law?'

The answer to that is 'Not quite'. And it is what we are here to talk about today.

Parliamentary review of delegated legislation

One hundred years ago the Commonwealth Parliament considered the question: 'What oversight should be exercised by a Parliament in relation to legislation made by its delegates?'

The response of the Parliament was to enact the *Acts Interpretation Act 1904* and include in it a requirement that all regulations be laid before each House of the Parliament. Regulations were then the principal form of delegated legislation. The Act thereby ensured that the Parliament was apprised of the content of the law that its delegates were producing.

The Bill setting out the requirement for tabling regulations was introduced into the Senate by the then Attorney-General, Senator James Drake. However, the Senate amended the Bill by empowering any member of either House to move for the disallowance of a regulation that had been tabled. If such a motion were passed in either House, the disallowance had the effect of repealing the regulation.

This amendment was opposed by the government which said that this power should not apply generally but should be included on a case by case basis following an examination of the regulation-making power in each Bill as it came before the Parliament. This was what had been happening up until then. However, the senators claimed that there should be a uniform process rather than a debate each time a new Bill was introduced. As has frequently happened in regard to delegated legislation, the Senate had its way and the amendment was subsequently agreed to by the House of Representatives.[1]

A significant element of this disallowance power was that the power to initiate action was given to individual members of the Parliament. As importantly, action to disallow a regulation could be taken by the House in which the motion was moved. It was not necessary for the disallowance motion to be passed by both Houses of the Parliament. The proposal to include this power in the Act caused some consternation in the House of Representatives. Some members correctly foresaw that it would enable the Senate

[1] This power to disallow tabled regulations existed in some states at this time.

to set aside government regulations. However, the view of those more concerned with the need of the Parliament to be able to control executive action prevailed.

In addition to the inclusion of the power of the Parliament to disallow regulations, the Act provided that regulations were to commence on notification in the *Gazette* or such later day as the regulations provided. This prevented any backdating of regulations, but the provision was amended in 1937 to prevent only back dating that adversely affected a person other than the Commonwealth.[2]

The Bill passed all stages in the Parliament on 18 May 1904 and was assented to and came into force on 14 June 1904.[3] (It is not clear why a separate Act was made rather than amend the existing *Acts Interpretation Act 1901*. The two acts proceeded in parallel until they were combined in 1937.)

This mechanism for parliamentary oversight of delegated legislation established just over one hundred years ago has been maintained to this day. There have been a number of amendments to the procedures, some of which have been adopted to overcome executive attempts to undermine the system. However, the basic principle of tabling after making, with either House of the Parliament having a right to set aside the legislation, remains. It will apply also in the new regime for making and publishing of delegated legislation under the *Legislative Instruments Act 2003* that comes into force on 1 January 2005.

However, lest it be thought that the passage of the Acts Interpretation Act in 1904 exemplified a golden age of parliamentary enlightenment, it should be noted that the very next motion passed by the Senate was one recording its grave objection to the introduction of Chinese labour into the Transvaal.[4]

The tabling and disallowance regime

The principal features of the tabling and disallowance regime are:

(1) All regulations (now extended to a wider range of legislative instruments) have to be tabled within a certain time after making. Presently this is fifteen sitting days. This can be a considerable period, particularly if the Parliament is in recess, for example over the summer. The time for tabling legislation made say on 15 December is not likely to commence to run until mid-February. The Legislative Instruments Act will shorten this tabling time to six sitting days—still a considerable time.

Failure to table legislation initially led to its being a nullity with the consequence that anything done in reliance on the legislation was invalid. This necessitated the passage on occasions of an Act to validate action taken under delegated legislation where tabling had been overlooked. However, now the effect of

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2 *Acts Interpretation Act 1901*(AIA) s 48.

3 For detail of the background to the Act see Robert Walsh and John Uhr, ‘Parliamentary disallowance of delegated legislation: a history of the basic provisions in the Acts Interpretation Act’ *Legislative Studies Newsletter* no. 10, 1985: 11–20.

4 *Commonwealth Parliamentary Debates,* 16 March 1904: 553–585.

failing to table by the due date is that the legislation thereafter ceases to have effect.[5]

The significant feature of the fifteen day tabling requirement is that most delegated legislation comes into operation when it is made or on a date specified in it. It is thus likely to be in force when it is tabled. This can act as a constraint on disallowance as is discussed below.

(2) After tabling, any member may, during the next ensuing fifteen sitting day period, move a motion that the legislation be disallowed. As noted above, this disallowance power is directed to existing legislation, not legislation that is yet to commence operation. This is known as negative resolution procedure. The legislation is set aside after it has been operating and this could be for some months.

To disallow legislation after it has been operating for some time is a bold step as people will have conditioned their activities in accordance with the legislation. This is a constraint on the Parliament exercising its disallowance power. However, it has not proved, in practice, to present a total bar to the Parliament disallowing legislation.

The alternative approach would be for the legislation not to commence until the Parliament said that it could. This is described as an affirmative resolution procedure. It is seldom used in relation to Commonwealth delegated legislation but has greater use in England. The idea underlying it is to enable there to be public comment on the legislation and the opportunity for the Parliament to determine whether the legislation should be made. Whether this procedure should be given greater credence in Australia is returned to below.

(3) If a motion for disallowance is tabled, it must be passed, rejected or otherwise resolved within the next fifteen sitting days. If it is not dealt with, the motion is taken to have been carried.[6]

This is perhaps the most significant element of the regime as it obliges the government to take action. It cannot simply allow the disallowance notice to remain on the *Notice Paper* of the House in the expectation that it will lapse on the prorogation or dissolution of the particular Parliament.

The working of the regime

Despite what might be thought of as a relatively benign regime for the oversight of delegated legislation, the executive has at times tried to thwart the exercise of the disallowance power. In 1931 for a period the Senate would disallow a set of contentious regulations and the executive would remake them as soon as the Parliament was adjourned. The disallowance motion would again be passed when the Parliament resumed and again the regulations remade when it adjourned.[7] To overcome this defiance of the will of the Parliament (or at least the Senate) the *Acts Interpretation Act 1904* was amended in 1932 to prevent the remaking of a regulation

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5 AIA s 48(3); *Legislative Instruments Act 2003* (LIA) s 38(3).

6 AIA s 48(5) (inserted in 1937); LIA s 42(2).

7 See Walsh and Uhr, op. cit. at p. 16 for further background.

the same in substance as that disallowed within six months of the disallowance unless the disallowance resolution was rescinded.

Further amendments were made in 1988 to prevent the repeal and remaking of legislation during the period for tabling (with a view to avoiding the obligation to table the legislation) and during the period for disallowance after tabling (for the purpose of negating any motion to disallow).

Provisions have also been included in the Acts Interpretation Act to limit the ability of the executive to legislate by incorporating other material in regulations. Such other material may only be incorporated to the extent that it is in force when the delegated legislation is made. It cannot be incorporated on a from time to time basis. To act otherwise would allow another person, in effect, to make the legislation and it would not be subject to any parliamentary oversight.[8]

Until 1987 the tabling and disallowance regime applied only to regulations, so labelled, and to any other forms of legislation that made specific provision for tabling. Territory Ordinances and Rules of Court were so specified but very few other forms of delegated legislation. It was well known that there were many other instruments of a legislative nature: determinations, notices, schemes, guidelines and so on. Indeed, there is reason to think that these other forms of legislation were on occasions used to avoid the exposure of the instrument to the tabling and disallowance regime.

A major change occurred in 1987 with the inclusion of s 46A in the Acts Interpretation Act. That section established a category of what are termed ‘disallowable instruments’. These instruments are subjected to the same oversight regime as applies to regulations. It is now common practice for new provisions empowering the making of legislative instruments to designate them as disallowable instruments thus bringing them within the tabling and disallowance power of the Parliament. The Senate Scrutiny of Bills Committee requires an explanation if a legislative instrument is not designated as falling within s 46A.

The inclusion of this provision in the Acts Interpretation Act was a significant recognition of the need for the Parliament to be informed of the making of delegated legislation and provided with the opportunity to disallow it. The number of pieces of legislation falling within the description of disallowable instruments now exceeds the number of traditional regulations.

From 1 January 2005, the Legislative Instruments Act will widen the net still further by requiring all instruments of a legislative character to be registered on a publicly available electronic register. An instrument is of a ‘legislative character’ if ‘it determines the law or alters the content of the law, rather than applying the law in a particular case; and it has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.’[9]

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8 See AIA s 49A. At present there is no obligation to make incorporated material available to the Parliament but under the LIA, a House of the Parliament may require the incorporated material to be made available for inspection: see s 41.

9 LIA, s 5.

This is a major step in identifying delegated legislation and making it available. When I was conducting a review of certain action of a Department, I found in the middle of a general file, all duly registered, spiked and folio numbered, the legislative instrument on which the scheme that I was looking at was based. It is doubtful if it would ever have seen the light of day again. Certainly no member of the public would have been able to gain access to it and it would have presented difficulties for the Department if it had had to produce the original. It is to identify this sort of hidden law that the Legislative Instruments Act is directed.

Instruments on the Federal Register of Legislative Instruments must be tabled in the Parliament within six sitting days of registration and will be subject to disallowance[10].

With the commencement of this legislation, the Parliament will have finally moved to accepting responsibility for the oversight of all legislation whether it emanates from the Parliament itself or from a delegate of the Parliament.

Whether this means of reviewing delegated legislation is adequate is returned to below. First, it is necessary to consider the means by which the Parliament informs itself about the content of delegated legislation and whether or not it should be disallowed.

Regulations and Ordinances Committee

It is a valuable step in the process of oversight of delegated legislation for the Parliament to have all such legislation brought to its attention. However, it is unrealistic to expect parliamentarians to have the time or the expertise to examine each of the now nearly 2000 pieces of legislation that are laid on the table of the Parliament each year.

The Senate recognised this and on 17 March 1932 appointed the Standing Committee on Regulations and Ordinances. Senate Standing Order 23 presently provides:

(1) A Standing Committee on Regulations and Ordinances shall be appointed at the commencement of each Parliament.

(2) All regulations, ordinances and other instruments made under the authority of Acts of the Parliament, which are subject to disallowance or disapproval by the Senate and which are of a legislative character, shall stand referred to the committee for consideration and, if necessary, report.

(3) The committee shall scrutinise each instrument to ensure:

(a) that it is in accordance with the statute;

(b) that it does not trespass unduly on personal rights and liberties;

(c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and

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10 LIA, s 38.

(d) that it does not contain matter more appropriate for parliamentary enactment.

The Committee has usefully expanded this bare outline of its role by publishing a statement setting out, under the heads of review, the issues with which it will be concerned. This statement is included in the Committee's annual reports. It, and the reports, reveal that the Committee has concerned itself not only with the content of the legislation reviewed but also its manner of presentation to the public and the quality of its drafting.

Legislation can cause as much difficulty to the public from the obscurity of its requirements and its inaccessibility as from its actual prescriptions. Try to interpret the following:

> In the Nuts (Unground) (Other Than Ground Nuts) Order, the expression 'nuts' shall have reference to such nuts, other than ground nuts, as would but for this amending order not qualify as nuts (unground) (other than ground nuts) by reason of their being nuts (unground).

The Committee's acceptance of a role in requiring clarity in the legislation it reviews is a valuable aid to the quality of the statute book.

These matters have been recognised in the Legislative Instruments Act. Its principal purpose is to make legislation publicly available. However, it also makes reference to the need for quality of drafting and the publication of explanatory material.

The Committee has also insisted on the preparation of explanatory memoranda to assist in the understanding of what might otherwise appear to be questionable provisions. (It is hoped that one accompanied the Veterans' Entitlements (Special Assistance—Motor Cycle Purchase) Regulations 2001 which provide for a person to be entitled to assistance towards the purchase of a motor cycle if the person is a veteran who has lost a leg or both arms as a result of war-caused injury.)

Apart from it's concentration on these more technical matters, the Committee has overseen the need to protect personal rights and liberties through examining legislation to ensure that it does not impose retrospective burdens on persons; does not allow executive interference with accepted rights such as freedom from invasion of property and privacy; does not give a public official subjective discretions; and provides for rights of appeal on the merits against executive decisions.

The Regulations and Ordinances Committee has been one of the great success stories of the Senate. It has been replicated in many legislatures in Australia and in other countries.

Each year now the Committee examines just under 2000 legislative instruments against its terms of reference. It raises issues of concern in relation to about ten per cent of the instruments. The majority of these concerns are dealt with by way of an explanation from the relevant minister or by the minister undertaking to attend to the Committee's concerns when next the legislation is being amended.

Where there is a delay in dealing with the issues that the Committee has raised or an initial response has not satisfied the Committee, the Chair of the Committee will move a disallowance motion in the Senate. This has, in recent years, always produced a response. The Senate has not had to disallow a regulation on the initiative of the Committee since 1988. This is simply because, over the many years of its existence, the Senate has always supported a disallowance motion when moved by the Committee. The executive knows that it must reach an accommodation with the Committee or lose its legislation.

Early in its life, the Committee determined that 'questions involving government policy in regulations and ordinances fell outside the scope of the Committee'[11] Taken at face value, this self-denying ordinance would have resulted in their being little on which the Committee could report as the whole text of a regulation represents government policy. However, what the Committee means is that it will not examine the policy basis for the adoption of legislation—but it will look at the way in which that policy has been implemented.

So if, for example, a policy to require fruit growers to provide returns of production is given effect by permitting inspectors to enter the premises of a grower without a warrant, the Committee will regard that as breach of its criteria even though it is the policy of the government to permit such entry. However, the Committee will not look at the policy decision to require the provision of returns.

The effect of this approach has been to shield the Committee from party political differences and has produced an uncommon level of bi-partisanship in its work. It is this that has made the Committee so successful and which has persuaded the Senate to support it when there has been a show-down with the executive.

The existence of the Committee has also had an effect on the quality of legislation that is produced by the executive. The fact that the Committee will scrutinise legislation against the stated criteria has sent the message to the executive that legislation that offends is likely to be questioned and possibly disallowed—to the embarrassment of the minister concerned. This means that drafters of legislation have a powerful weapon to control over-zealous officials who wish to include powers that breach basic principles in their legislation.

The Committee has been ably assisted in its task by not only a dedicated secretariat but also a coterie of external legal advisers, the last three of whom I have been fortunate enough to have as colleagues at the ANU Law Faculty.

The Committee has had to contend with an ever-increasing workload since the creation of the disallowable instruments category of delegated legislation. The number of instruments scrutinised has more than doubled since the mid-1980s. The advent of the Legislative Instruments Act is likely to see a further increase, but of what size is not known because the whole point of the Act is to identify previously unacknowledged delegated legislation and subject it to parliamentary oversight.

[11] 4th Report para 5.

The Regulations and Ordinances Committee has been a key factor in the control that the Parliament has exercised over delegated legislation. It has served to highlight that this control is exclusively the province of the Senate. The House of Representatives has not adopted any role in parliamentary oversight of delegated legislation.

Is the present oversight process sufficient?

Sir Ninian Stephen said in *Watson v Lee*

> [The history of delegated legislation] reflects the tension between the needs of those who govern and the just expectations of those who are governed. For those who govern, subordinate legislation, free of the restraints, delays and inelasticity of the parliamentary process, offers a speedy and flexible mode of law-making. For the governed it may threaten subjection to laws which are enacted in secret and of whose commands they cannot learn: their reasonable expectations that laws shall be both announced and accessible will only be assured of realisation by the imposition and enforcement of appropriate controls upon the power of subordinate legislators, whose power, as Fifoot observed ‘requires an adequate measure of control if it is not to degenerate into arbitrary government’ (*English Law and its Background*, 1932).[12]

It was not until the enactment of the Legislative Instruments Act that it could be said the Commonwealth Parliament was doing all that it should in respect of the oversight of delegated legislation simply because there was a large body of legislation that was not being tabled. This shortcoming has now been remedied and at least the full range of such legislation will be publicly available and subjected to parliamentary scrutiny.

However, this is but a first step. Gary Banks, chairman of the Productivity Commission said in a paper entitled ‘Challenges in Regulatory Reform’:

> Regulation is essential to the proper functioning of a society. Whether through primary or delegated legislation, or more informal arrangements, rules create order and the basis for stability and progress. They shape incentives and influence how people behave and interact. And they can help societies deal with otherwise intractable economic, social and environmental problems.[13]

But he then went on to note that this goal can only be achieved through good regulation. Bad regulation undermines society’s capacity to deal with those problems. Good regulation he said should meet three tests:

- it must be the most effective way of addressing an identified problem;
- it must impose the minimum burden on those regulated; and
- it must cause the minimum amount of collateral damage to others.

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12 (1979) 155 CLR 374 at 394.

13 See Productivity Commission website: www.pc.gov.au. See also on that website: S. Argy and M. Johnson, ‘Mechanisms for Improving the Quality of Regulations: Australia in the International Context’, 2003, particularly the suggested checklist for assessing regulatory quality at p. 6, and the OECD checklist for regulatory decision-making, p. 14.

The question that must be asked is whether the Parliament is playing a sufficient role in ensuring that Commonwealth delegated legislation meets these criteria.

Tabling processes

If the Parliament is to play a useful function in overseeing delegated legislation it must be appraised of that legislation as soon as possible after it has been made. The time provided for tabling legislation started as 30 days, was changed to fifteen sitting days and from 1 January 2005 will be six sitting days. These time limits are all based on the time that it takes to print copies of the delegated legislation and physically deliver them to the Parliament for formal tabling.

As noted previously, the use of sitting days as the time frame for action to be taken means that the time within which action must be taken can be lengthy. It also has the effect that the executive can manipulate the time taken for setting the parliamentary review process in motion. Until the legislation is tabled, no motion for disallowance may be moved. A senator can, with the permission of the Senate, table the legislation him or herself but first it is necessary to obtain a copy of the legislation.[14] In the meantime it will be in force. This may be sufficient for it to achieve its purpose (for example, the recent excision of Melville and Bathurst Islands from the Australian Migration Zone).[15]

The present physical tabling process represents another era. We are about to enter a time when the authoritative version of delegated legislation will be that which is on the electronic Federal Register of Legislative Instruments. Yet the Parliament will still be functioning on hard copies that are brought to it from a printery (that is no longer government owned).

It seems to me that, after 1 January 2005, upon registration of an instrument on the Register, it should be immediately transmitted electronically to the Clerks of each House of the Parliament. The receipt of that version of the instrument should be deemed to constitute its tabling. It should then be sent on to each member of the Parliament in the same way as the printed copy is now. The instrument would then be available for parliamentary scrutiny and if needs be for rapid action to disallow it.

The Parliament is enabling the executive to call the tune on this issue of bringing legislation to its attention.

Commencement

The Parliament acted very sensibly in preventing the backdating of the commencement of regulations that would adversely affect a person other than the Commonwealth. This approach was carried through to disallowable instruments and will be applicable also to the new regime of legislative instruments.[16] The Regulations and Ordinances Committee has also looked very closely at legislation to ensure that persons are not adversely affected by any retrospectivity.

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14 Harry Evans (ed.), *Odgers' Australian Senate Practice*, 10th ed., Department of the Senate, 2001: 348.

15 And see Ernst Willheim, 'Government by regulation: deficiencies in parliamentary scrutiny?' *Public Law Review,* vol. 15, 2004: 5.

16 AIA s 48; LIA s 12.

However, the process whereby legislation comes into force prior to parliamentary review limits the effectiveness of the disallowance power. People will be affected even though the legislation may subsequently be disallowed or amended following Regulations and Ordinances Committee intervention. This limitation flows from the negative resolution procedure that is used in Australia. This could be overcome by a greater willingness on the part of the Parliament to insist on the inclusion of the affirmative procedure process in legislation. Under this, delegated legislation does not commence unless a formal resolution approving it is passed.

However, it is recognised that this approach makes an extra demand on already limited parliamentary time. For this reason alone it is resisted in all but exceptional cases.

An approach that is to be found in the *A New Tax System Family Assistance Administration Act 1999* is worthy of much wider use. Section 162 of that Act provides that instruments made under the Act do not take effect until the end of the period in which they can be disallowed by the Parliament. This gives full recognition to the review role of the Parliament without making any demands on parliamentary time. General use of such a provision should be encouraged.

If this is thought to be too radical, commencement could at least be postponed until the legislation in question is tabled. If the suggestion of electronic communication for tabling set out above were to be adopted, this would not be necessary. However, if the present practice is to continue, there seems no great reason why, in the majority of cases, the commencement could not await tabling. Urgent cases could be dealt with as an exception to the general rule but with an explanation being required in the explanatory statement which could then be checked by the Senate Committee. This approach would provide an inducement to the executive to expedite the tabling process. It would also ensure that the Parliament was more immediately involved in the legislation-making process.

Pre-making consultation

The *Rules Publication Act 1903*, when first enacted, provided for advance notice of 60 days to be given of the intention to make a rule. This was intended to warn the public of the proposed law and to provide an opportunity to make representations as to its content. The requirement was repealed in 1916.

The Administrative Review Council's Report 'Rule Making by Commonwealth Agencies'[17] which provided the stimulus for the Legislative Instruments Act proposed a formal requirement for notice and consultation prior to making an instrument. This recommendation was influenced by the experience in Victoria where mandatory consultation must be undertaken before a number of instruments are made.[18] In the United States, consultation, including public hearings, prior to making of rules is obligatory.

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17 Report no. 35, 1992.

18 *Subordinate Legislation Act 1994* (Vic), s 6.

Earlier versions of the Legislative Instruments Bill contained mandatory requirements in relation to consultation but these were omitted from the final version. Section 17 of the Act contains requirements to consult, particularly where business or competition is affected. However, the requirements are effectively only exhortatory as the only obligation is to describe the consultation processes in the explanatory statement for an instrument.

If delegated legislation is likely to affect business or restrict competition, an executive scheme requires a Regulatory Impact Statement (RIS) relating to the proposed legislation to be submitted to the Office of Regulation Review (ORR) for consideration. This process is a valuable step in securing consultation with interested parties.

The ORR says that:

> RISs tabled in the Parliament with Memoranda and Explanatory Statements have provided greater transparency regarding the rationale behind the Government's regulatory decisions, resulting in the Parliament being better informed. In addition, Parliamentarians have drawn on published RISs in debate. For example, in 2002-03, there were 37 separate discussions in Parliament about particular RISs and regulatory policy issues (14 times in the Senate, eight in the House of Representatives and 15 times in the work of parliamentary committees). A wide range of issues were discussed, including vehicle and aircraft safety standards, urban speed limits, electromagnetic radiation protection, fisheries management, educational standards and international trade agreements. For the most part, discussions focussed on the analysis contained in the 'impact' and 'consultation' sections of RISs, as well as the likely small business impacts and the role of RISs in policy development.[19]

However, a RIS is required for only about five per cent of the instruments that are tabled. Whether there should be consultation prior to making is left to the legislation-maker to decide in most cases. There is no mechanism in place that requires the impact of proposed legislation to be ascertained from those that will be affected.

It is the lack of consultation prior to making delegated legislation that leads to allegations of 'red tape'. The delegated legislation-makers will not necessarily have any clear understanding of how the legislation will impinge on its subjects.

Acts are made after publication of the intended text in the form of a Bill. This provides the opportunity for those likely to be affected by the legislation to make representations as to its content. This is not the case with delegated legislation.

The Parliament does not have in place any mechanisms that will remedy this position. This is understandable to a point as one of the main reasons for delegating law-making power is to save parliamentary time. However, the absence of requirements for pre-making consultation when coupled with the commencement of legislation on

[19] See www.pc.gov.au.

making gives the executive wide power to make delegated legislation that imposes unrealistic demands on the private sector.

This reinforces the case for postponing the commencement of legislation until after the time for disallowance to enable persons affected at least to bring their concerns to the attention of the Regulations and Ordinances Committee.

Parliament and policy

The major weakness in the oversight by the Parliament of delegated legislation is that the Parliament seldom reviews the policy embodied in the legislation. As noted above, the application of its criteria by the Senate Regulations and Ordinances Committee results in some policy issues being considered. However, these are limited to what might be termed interference with general human rights. The policy decisions that might be termed red tape—requirements for information, requirements for business licences, requirements for approvals to conduct an activity—are not questioned.

As far as parliamentarians generally are concerned, it is only overtly political delegated legislation such as, in recent times, control over immigration, that attracts attention.[20]

The absence of formal machinery for consultation before making means that, if the Parliament is really going to exercise an oversight role in relation to the use by the executive of delegated power to make legislation, it needs to take steps to apprise itself of that legislation and have means available to those affected to raise their concerns.

This will require confrontation with the significant issue of principle—are Members of Parliament politicians or parliamentarians?[21] It is this question that the Regulations and Ordinances Committee has conjured with successfully throughout its existence. It has managed to keep the politics at bay by limiting its role to issues where its members feel that they are not driven to support their party. However, by so doing it has left a large hole in the oversight of delegated legislation. More significantly, it has created a culture which denies that the Parliament should be involved in the oversight of the policy underlying delegated legislation.

This means that the executive is able to include in delegated legislation provisions that it would, at the very least, have to justify if they were included in an Act and, in the face of a hostile Senate, might not be able to enact. It is thus much easier for the executive to establish regimes of control through delegated legislation than it is through primary legislation.

What can be done about this?

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[20] Perhaps the most striking use of the disallowance power was in 1967 when the Senate was recalled from the Winter recess and disallowed regulations to increase postal and telephone charges. A Bill to increase such charges had been defeated in the Senate and the regulations were seen as an attempt to get around this outcome: see *Commonwealth Parliamentary Debates* (Senate) vol. 34.

[21] See Malcolm Aldons reviewing 'The Challenge for Parliament: Making Government Accountable', *Australasian Parliamentary Review,* vol. 18, 2003:152.

It is of value that the Scrutiny of Bills Committee sees as one of its tasks the need to bring to the attention of the Senate the breadth of delegated legislation making powers that are included in Acts. For example, it protested about a provision that stated:

> The regulations may provide for prescribed decisions of the Secretary to be reviewed by prescribed review officers on applications, as prescribed, by prescribed persons.[22]

However, it is doubtful whether the interest of this Committee alone will be sufficient to contain excessive regulation.

I suggest that there is some guidance to be found from the existing structure of the Senate Standing Committees. When first established, they were simply allotted a subject area and they dealt with any issues that were referred to them pertaining to that subject. They are now divided into legislation and references committees. The legislation committees look at bills and the references committees consider broader policy issues.

Could the Regulations and Ordinances Committee be similarly divided?

One division would continue to perform the valuable role that it presently carries out. The other would be a references committee to which could be referred delegated legislation that involves government policy issues of a significant kind that warrant investigation. This committee would be able to take evidence. It could make recommendations. It might well divide on party lines as do the standing committees now. However, the additional information that would emerge should it conduct an inquiry would provide a basis for informing the Senate whether it seemed appropriate for a Senator to move a disallowance motion.

The abandonment by the Parliament of a role in relation to the policy of delegated legislation has empowered the executive in a manner that the great settlements between the Crown and the Parliament that occurred in England in the seventeenth century were intended to prevent. It seems incongruous that political argument and possible division along party lines is accepted as appropriate for legislation in the form of bills but not for legislation made by the executive. This is particularly the case in relation to legislation that imposes obligations on persons and businesses to which the term red tape can be applied. The Parliament has opted out of any responsibility for these sorts of provisions.

I should like to suggest that the Parliament (and realistically that means the Senate) should examine afresh its obligations in relation to the oversight of delegated legislation. Without some greater interest being taken in the substantive content of the ever increasing body of this form of legislation, the parliamentarians of today must be taken to have ceded a significant part of their legislating role to the executive. If they do this they will have failed to meet the expectations of their predecessors one hundred years ago.

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22 Migration Legislation Amendment Bill 1989 clause 61(1).

Question — It seems to me that there are two qualifications to what you are saying. One is the fact that delegated legislation, to be valid, must come within the scope of the Act. The other qualification is one of process. You mentioned the example that was picked up by the Scrutiny of Bills Committee, which simply highlights the reality that, very often, there is very little time to develop the details of policy. When a bill is being worked through, there is just a very general idea of how it is going to work, and there are various deadlines to be met to get it through the system. It is only later, when the regulations themselves are being drafted, that the uncertainty arises of how it is going to be made to work. The other aspect of that is, although there are deadlines that must be observed in the development of a bill, policy nevertheless continues developing. It is not uncommon that, by the time the department wants the regulations, they have thought through in much greater detail what they want, and the refined policy is different to the developing framework that did not really anticipate that sort of detail or approach. So often it is an element of the process that brings about these situations. Is there an easy answer to resolve that?

Dennis Pearce — I'd like to be able to boast at this point that the provision about the second of time was something that I did. I have two great contributions from the time that I was a drafter: I gave Australia decimal currency and I gave it the second of time. Not many people can boast about that. The point that you make is in a sense the same place I am coming from. When acts go through they have a skeletonic idea of what the policy is going to be, so they try to anticipate that. There is considerable political pressure to get particular legislation out, and later on in the process there is draft legislation or other instruments that fit within the scope of that. I've had to do it too, so I know how difficult it is.

However if what you are going to be doing is spelling out the policy, that is shutting the Parliament out—and the Parliament really ought to have a say if there is a significant policy development being put into the legislative instruments that wasn't there in the act itself. It is for that reason that I think there should be some facility to be able to bring the issues back for parliamentary attention. I wouldn't imagine it is going to happen all the time. There are 2000 legislative instruments, and I would think that 1990 of them have minimal policy issues—but there are some that will have, and they are the ones that people later find are being bound up in red tape. They then wonder how on earth these sorts of requirements are thrust upon them, and they wonder how they can have a voice in what is being required of them.

Question — At the moment the Senate can either accept or reject the regulations placed before it, but it can't amend them. Is that a useful process, or not?

Dennis Pearce — It is always an interesting question. The Legislative Instruments Act will allow the disallowance of bits of a legislative instrument, provided they are discrete bits. It won't allow the disallowance or removal from a regulation of the 'not' that might colour the ultimate outcome. The Western Australian Parliament is I think the only one that has the power to actually amend regulations, and the danger that is

seen there is that an amendment will be made which has all sorts of implications and that the Parliament is not fully apprised of what they all are—which is of course different from the position when dealing with a bill, where they can find out what the impact of a particular change is going to be.

I have always been ambivalent about whether Parliament should have this power. In theory there is no reason why they shouldn't. One would have to be wary that whatever body was going to deal with it—and normally it would be just the Senate—was fully apprised of what the likely implications were of making such a change. So I lean against amendment, and more toward the capacity to be able to disallow individual items or parts of an instrument.

Question — Do you think that something could be done to limit the amount and the areas of a policy nature which are able to be made by regulation? I notice that when the disallowable instrument provision came in, a number of things that used to be part of legislation—and were therefore subject to parliamentary debate—now came in the form of disallowable instruments, and so could then slip through. It worries me that the current amendments could take that even further, and we could see more things coming under the terms of the new instrument, rather than in legislation and the consequent parliamentary debate. It also seems that the number of instruments that will come through under the new regime will make it almost impossible for the regulations committee or anyone else to quickly find where the relevant parts, which really should be in front of the Parliament, have been hidden in the regulations. So I was wondering if we need to have, say, the legislation committee look much more closely at legislation which allows things to become instruments, to pre-empt that. It seems the only way we can get policy back in front of parliamentary debate.

Dennis Pearce — That's a very valid point. The Scrutiny of Bills Committee has that as one of its terms of reference, and does take it seriously. The capacity to be able to identify fully the scope of the delegated legislation-making power in the time within which Scrutiny of Bills has to operate is a limiting factor in that, and it does point to the issues that you raise. Again, that is part of the reason that there is a need to increase the role of Parliament in relation to those sorts of instruments. But I think you quite properly point to the uncertainty that we now have before us, of how much of this material there is going to be, and whether it is going to be realistic to expect the Senate Regulations and Ordinances Committee—no matter how structured—to be able to get across all the elements of what is in this increased range of instruments. The fundamental question is how much should be dealt with by the Parliament and how much should be shuffled off to the executive? That is an issue that one would hope that most parliamentarians are asking themselves when they are looking at the instruments and at the acts.

The Australias Are One
John West guiding colonial Australia to nationhood[*]

Patricia Fitzgerald Ratcliff OAM

I acknowledge that we meet here today on the ancestral lands of the Ngunnawal people.

I thank the Australian Senate for this opportunity to stand before the original emblem of Federation, created in 1851, and to introduce to you its designer, John West, as one of the true founding fathers of the Australian nation.

The publisher's statement on the dust cover of my book, *The Usefulness of John West: Dissent & Difference in the Australian Colonies,* published a year ago, reads:

> There is a chapter missing from the story of Australia. Historical writing has recognised the contributions of convicts, governors, settlers and explorers, Anglicans, Roman Catholics and Scots Presbyterians, but the influence of the dissenting middle class has received less attention.[1]

John West was arguably the most influential of the middle class dissenters, a person of colossal intellect, a dynamic orator with a mellifluous voice. He was independently educated, classically literate, an educator, lecturer and essayist, a political activist who

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* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House on 23 July 2004.

1 Patricia Fitzgerald Ratcliff, *The Usefulness of John West: Dissent and Difference in the Australian Colonies,* Launceston, Tas., Albernian Press 2003 [hereafter *Usefulness*]. Front jacket flap.

published his *History of Tasmania*[2] in 1852 when it was still the convict colony of Van Diemen's Land, under the patronage of another Independent dissenter, Henry Hopkins. His *History is* included in a recent list of 101 best Australian books.[3]

With fellow-dissenters he co-founded the *Launceston Examiner* in 1842. He was its chief editorialist, and his inaugural editorial remains the exemplar of responsible journalistic practice.

He wrote and lectured on the widest possible range of subjects: bread and water problems in the daily life of his adopted community, against exclusivity in education, about the civilising effect of art in colonial life, the separation of Church and State, the consequences of the French Revolution of 1848 for the troubled British nation and her colonies, and the significance of the world of Mahometanism—his name for Islam—in relation to Christianity, a subject not without significance today.

John West was born in 1808 in Britain, into a world of agitation for political reform at home, while the Imperial government engaged in the colonisation of distant places through the transportation of its so-called 'criminal classes' abroad—a time also when to be socially useful was seen to be virtuous. The son of Christian parents, William and Ann West, he took their Wesleyan trend towards non-conformity a step further when he was ordained a minister of the Independent (later known as the Congregational) Church.

This denomination, together with the Baptists, Quakers, and secessionist Scots Presbyterians, consisted of Christians who held that there was no need for a priest to interpose between God and the believer, and that worship did not need to take place in a consecrated building. They dissented absolutely from the authority of the Church of England, with its hierarchy of deacons, priests and bishops, and a sovereign as head of a church established by law as the true religion of the State.

Dissenters paid dearly for their beliefs; they were denied civil rights and public office, and could not take degrees from the universities of Oxford and Cambridge. The Pilgrim Fathers and Mothers who sailed across the seas in the seventeenth century and founded America were dissenting Christians. Roman Catholics were also in dissent, but for different reasons.

Independents were financially responsible for the construction of their own chapels, the supply of their own ministers, and creating their own schools with their own teachers. They also established services to the wider community, insurance companies, general cemeteries, breweries where the water supply was troublesome, immigration societies, mechanics' institutes and schools of arts which were sometimes the precursors of other cultural institutions: museums, public libraries and art galleries, as well as charitable activities such as strangers' friends societies and city missions.

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2 John West, *The History of Tasmania*, Launceston, Tas., Henry Dowling, 1852, 2 vols.

3 The *Bulletin* (Sydney), 19 November 1991: 100-104, selected by the National Centre for Australian Studies, Monash University.

Many of the great institutions we take for granted had their genesis in the private enterprise and voluntary activity of people who were in no doubt that they were their brother's keepers, and who were their brothers and sisters, and they regarded the receipt of financial aid from the State for religious purposes as a compromise of principle.

To further educate the wider community in their particular set of social and political values, they established their newspapers.

So, what was the significance of John West's particular value system to the civic position in which he found himself in the police state that was Van Diemen's Land in the first half of the nineteenth century?

John West migrated in 1838 with his wife Narcissa and five children under the age of seven. He came to Hobart Town, 'the Botany Bay of Botany Bay' as he described the place in his *History*.[4] They travelled in the ship *Emu*, which also carried the news from the Colonial Office to the Governor that transportation was to cease, a decision that was not effected for another fifteen long years, until 1853, and in Western Australia not until 1868.

John West had many sources of political inspiration. His wide knowledge of history gave him access to the achievements of earlier British dissenters, from Cromwell and Milton, to the heritage of a famous body of memorialists for civil rights (a sort of parliament of lobbyists). They were known as the Dissenting Deputies.

An ecumenical committee of Christian laymen, it was founded in 1732 to lobby Parliament for the repeal of the Test and Corporation Acts, the repressive laws of Tudor origin that deprived dissenters of civil rights. One hundred years of faithful and persistent lobbying finally bore fruit in 1828, giving dissenters access to a limited democratic process.

John West's Independent Christian heritage was the fount of his democratic ideal. Independent or Congregational Churches were organised on democratic lines, being governed by their members who had an equal vote, whether minister or lay, man or woman. He wrote explicitly connecting Christianity to democracy in an editorial in the *Launceston Examiner* on 18 March 1854. This was the year he became official editor of the *Sydney Morning Herald,* the newspaper of his fellow dissenter and friend from their Warwickshire days, John Fairfax. Entitled 'Democracy', the editorial reads:

> Some ignorant, half-witted, and beclouded bigots are yet in the habit of quoting this term as synonymous with anarchy, though it only accurately describes that influence the people are entitled to exercise in the management of public affairs. In England and in every other constituted state, it is democracy that in the long run moulds and fashions every movement, but few seem to be aware of its origin.
>
> In [James Aitken] Wylie's prize essay, democracy is placed in its true position. He says: 'It was through Christianity that the first democratic element came into

[4] West, *History*, op. cit., vol. 1: 29.

> the world. That principle was altogether unknown to the ancient governments which were either autocracies or in a few instances oligarchies.The people as such were excluded from all share and influence in government. Christianity was the first to teach the essential quality of all men, and the first to erect a system of government in which the people are admitted to those rights .... '[5]

He goes on to recognise that the Church 'abandoning her own idea, began to copy in her government and organisation, the order of the State', otherwise, 'ere this time of day, the world would have been filled with free and constitutional states.'[6]

It was John West's desire that a future union or federation of *the Australias,* the name he used for the antipodean colonies, would be conducted on democratic Christian principles, the principles he employed in his daily life. A miniature democratic community was set up in Launceston where nine women and nine men signed the Covenant which established their little Independent Church in St. John's Square. The equality of gender implied in the wording of the Covenant signifies the esteem in which each held the other. A small community of brewers, schoolteachers, newspaper proprietors, editors, carpenters, builders, and merchants, they became the fount of the local Christian social enterprise.

The greatest social issue confronting the colonial societies of pre-federation Australia was the problem of the moral, political, and economic consequences for all the antipodean colonies of the policies of the British government which had declared it expedient that Van Diemen's Land alone should be the *Empire's gaol.*

During the years of his governorship of Van Diemen's Land (1824–1836) the military Lieutenant-Governor George Arthur created a dependency in the free settlers on the assignment of a captive labour force to develop their sometimes vast estates. With the support of the Commissariat, they constructed their excellent houses, grew their crops and minded their sheep, while a police state with closed borders ensured a seemingly ordered society.

But all this changed with the conclusions of the 1837 Molesworth Select Committee of the House of Commons who found that transportation as a method of minimising crime in the British community had failed and therefore should be abandoned. The government did not abolish transportation but decided that the system whereby a prisoner by assignment became effectively the property of the settler, with most of the moral implications of slavery, would cease.

There remained in Britain the need to deal with the numbers of convicted classes consequent upon the abolition of the death penalty for a wide range of crimes short of treason and murder. Transportation of these persons would continue to Van Diemen's Land, but under a new system devised by Lord Stanley, the transportees, to be called 'exiles', were subject to a system of probation which allowed them to climb ladders or slide down snakes according to their capacity for reform.

5 James Aitken Wylie, 'The Papacy: its History, Dogmas, Genius, and Prospects,' Evangelical Alliance Prize Essay, 1851. Wylie (1808–1890) was a Scottish protestant journalist, writer and historian.

6 *Launceston Examiner*, 18 March 1854.

The free settlers of Van Diemen's Land were outraged at the decision to end assignment of labour. Public meetings of pro-transportationists in 1839 authorised and paid for an unsuccessful petition to Queen Victoria for the continuation of transportation and assignment. Transportation did continue, under the new system of probation whereby 'exiles', no longer assigned, were housed in government barracks and employed on public works. Only when they had concluded their probation period successfully would they be available as a colonial labour force, now free to work for wages, and thus to compete with the free labour force.

On mainland Australia, a new nation was forming—what was its real democratic potential?

John West did not stand idly by while Van Diemen's Land, a society divided between convicts and privileged settler classes sank into the civil and moral inequality inherent in its role as the Empire's gaol. Launceston, the town of his adoption, maintained and serviced and exploited the obvious appurtenances of convictism, the treadmill, the public gallows in Paterson Street, the stocks in Cameron Street, the Female Factory.

Limited freedom to pursue self-government had been granted to the other colonies, New South Wales to which transportation had ceased, South Australia, where transportation had been explicitly excluded from the beginning, and Western Australia, where convictism was rejected until after it was abandoned in the Eastern colonies. Victoria on separation inherited the freedom of New South Wales. New Zealand had never directly known the 'convict stain'.

The attractions of an easily exploited captive labour force remained, putting in jeopardy the prospects of free emigrant labour. In this setting, John West took up the task of injecting hope and expectation of a more just society into his hearers and readers. John West shared Anthony Trollope's faith in the power of the pen. 'We all know', claimed Trollope, 'That if anything is ever done in any way towards improvement, the public press does it.'[7]

He began his campaign for the Australias' emancipation from convictism in verse:

> There is a midnight blackness changing into grey,
> Men of thought and men of action clear the way!
> Once the welcome light has broken
> Who shall say
> What the unimagined glories of the day.
> Aid the dawning, tongues and pen,
> Aid it, hopes of honest men,
> Aid it paper—aid it type,
> Aid it, for the hour is ripe
> And our earnest must not slacken into play:
> Men of thought and action clear the way![8]

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7 Anthony Trollope, 1858.

8 *Launceston Examiner*, 16 June 1848: 46, concluding editorial on the French Revolution of 1848 (quoted in *Usefulness*: 364). Verse possibly by Narcissa West.

John West had no illusions about the vast and powerful imperial forces gathered in the Colonial Office in Downing Street, Westminster, and he understood clearly that educated men of thought and action were needed to liberate the colonists from the thrall of convictism.

Writing with well-cloaked irony, he alerted colonists to the pitfalls of government from the Colonial Office. In his fourth essay on Union, he said:

> Downing Street is the celebrated seat of a colonial empire upon which, as has been said, the sun never sets. And Downing Street is the substitute for federation.
>
> The modesty of its designation, the simplicity of its aspect and the gentleness of its dialect, create no suspicion of tyranny … the homely, familiar, unpretending name which yet includes the sovereignty of nascent empires has nothing august, thrilling, or soul subduing; suggests nothing but friendly calls and punctual correspondence. Still, we know that it is in Downing Street 'the groans of Australia die away in silence'; there it is that despatches, which have run over half the world are couched in oblivion; while beneath in cellars of unfathomable depth, long-forgotten petitions that have prayed in vain, and memorials as dead as a man out of mind, lie deep in dust.[9]

The Colonial Office had come under the charge of Henry George Grey—Viscount Howick until he succeeded to the Earldom in 1845. George Grey, in the words of John M. Ward was 'a high-minded minister who sought to act wisely and rightly towards the Empire as a whole' and who 'made the most extensive and determined efforts to improve its system of government.' As an ardent free-trader, Earl Grey 'thought that the Australian colonies might be federated so that tariff barriers would not hinder their development' and proposed to provide them 'with some central authority to handle matters that concerned them in common.'[10]

But the inhabitants of Van Diemen's Land, bond and free, held little in common with the partly enfranchised citizens of the sister colonies. Her status as a penal colony would, if persisting, condemn all her inhabitants as social pariahs and preclude any possibility of their contributing to nationhood.

The Rev. John West, ever the ardent supporter of political and religious freedom, persistently promoted the idea of people's democratic representation. As early as 1842, he wrote in the *Examiner* on the desirability of 'the only effective resource—a united effort to secure that form of legislation in which alone the voice of the people is heard, their interests understood—their wishes regarded.'[11]

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9 Patricia Fitzgerald Ratcliff (ed.), *John West's Union of the Colonies; Essays on Federation Published under the Psuedonym of John Adams.* Launceston, Tas., Queen Victoria Museum and Art Gallery, 2000 [hereafter *Union*]: 43–46; quoted in *Usefulness* at 160.

10 John M. Ward, *Earl Grey and the Australian Colonies 1846-1857: a Study of Self-Government and Self-Interest*, Melbourne, Melbourne university Press, 1959: v; *Usefulness*: 373.

11 *Launceston Examiner*, 1842: 46; *Usefulness*: 365.

However, by 1848, John West was obliged to argue against Earl Grey's federation for the Australias on the very clear grounds of the prevailing state of social and civic inequality of their citizens.

He looked to history for examples of other colonies dealing with the intransigence of British policy, and saw the Americas and their battle for representation. They had faced similar intransigence, their argument weakened by the distance of its voice. America created its own significant voice in London when Edmund Burke was appointed as their Agent on a salary of £500 per annum to plead their cause at the seat of Government. Van Diemen's Land would follow in their footsteps.

John West put together millions of words on colonial emancipation from convictism. Editorials in the *Launceston Examiner* and the Hobart Town *Colonial Times,* his pamphlet (following Thomas Paine) entitled *'Common Sense: An Inquiry into the Influence of Transportation on the Colony of Y D. Land',* (which was distributed as far afield as South Africa, and doubtless also to Great Britain), petitions, instructions to the London Agent, half a volume of his *History* (exposing in detail the process and effect of transportation), memorials and pleas, all were written to enable colonists to treat intelligently with Downing Street.

However, Britain was preoccupied with 'questions more important than a single colony'[12]—the potential war in the Crimea, the consequences of the famine in Ireland, rebellion in Canada, and paid little heed to the agitations from obscure agriculturalists, merchants and men of God who Lord Stanley regarded as deserving of their fate. In his opinion, the settlers knew they were migrating to a penal colony, and must accept the consequences.[13]

Hobart Town on the south side of the island was the seat of colonial government, while the northern side was the engine of private enterprise. Influential men of thought and action assembled there often at significant public meetings, and their proceedings and findings were faithfully reported in the *Launceston Examiner.* Colonists found their voice at the seat of Imperial government when they created their own London Agency Association.

John Alexander Jackson, former editor of the *Launceston Independent* newspaper, former Colonial Secretary and Treasurer of South Australia, was appointed their agent at £400 per annum for two years, the entire cost coming out of their own pockets. James Cox of Clarendon subscribed £25, while John West himself subscribed a modest one guinea, in addition to the liberality of the proprietary of the *Examiner.* South Australian residents added £130 annually, believing that 'Mr. Jackson's advocacy of their claims need not clash with the interests of their own country but be greatly benefited by his zealous energy.'

Jackson, under the guidance of a local committee, looked to John West whose most significant contribution he acknowledged to be the Letter of Instructions.[14]

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[12] *Usefulness:* 375

[13] ibid.

[14] *Usefulness*: 381.

The London Agency was the colony's instrument for change. The Canadian, C.D. Allin, in his history *The Early Federation Movement of Australia,* commented:

> The novel suggestion for the appointment of colonial agents in London who could co-operate in the advancement of Australian interests subsequently bore fruit in the creation of a corps of agents-general who have proved a most effective instrument for influencing the policy of Downing Street.[15]

Barbara Atkins tells us:

> the work of the Agents-General is, in a sense, an expression of nineteenth century Australian nationalism—they were the first ambassadors of an incipient Australian nation to a foreign country.[16]

Agents-General to the Crown Colonies already existed in London; Imperial public servants, their salaries were paid out of colonial funds, but they were criticised for lack of action. There was also the New South Wales and Van Diemen's Land Commercial Association to which John West recommended the London Agent, Jackson.

Economic prosperity and social emancipation accelerated on mainland Australia while tolerance of the distressing social conditions of an isolated Van Diemen's Land reached a dangerous and despairing ebb. Despite a despatch from Earl Grey in February 1847 that transportation was finally terminated, shiploads of convicts continued to arrive on her shores, creating 'an intolerable grievance'[17] for the community. Forty per cent of the population were now a bonded class of human beings, many housed in overcrowded and insanitary barrack accommodation.

Furthermore, New South Wales landowners and squatters, with the collusion of the Secretary of State in London,[18] hired some of Britain's so-called 'exiles', creating a broader demand for a labour force whose condition of inequality was seriously exploitable. The emerging nation of Australia was in great danger of having the existing class distinctions firmly entrenched by government policy.

Two years of representation and lobbying for emancipation from convictism by the London Agent achieved absolutely nothing, and it was now believed that Britain intended to revive transportation to New South Wales.[19]

The latest Governor of Van Diemen's Land was William Denison, the man who became Australia's first Governor-General. His salary of £2000 per annum was

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15 C.D. Allin, *The Early Federation Movement in Australia,* Kingston, Ontario, British Whig Publishing Co. 1907: 70.

16 Barbara R. Atkins, 'The Problem of Representation of Australia in England. The Origins and Development of the Australian Agents-General during the Nineteenth Century', M.A. Thesis, University of Melbourne, 1960.

17 *Union*: 6.

18 *Union*: 5.

19 *Usefulness*: 385.

supplemented by another £2000 per annum to make the unhappy system of probation work.

The 1850s were the turning point in the civilising of Australia. The British Empire's pre-eminence was to be celebrated by a great exhibition in which the Empire's products and artefacts would invite favourable comparison with those of all other nations.

Governor Denison and the local Royal Society organised the transportation of examples of convict workmanship and the riches of Van Diemen's Land to London, to be exhibited in the great Crystal Palace in Hyde Park erected for the Exhibition of the Industry of All Nations, which became known as the Great Exhibition of 1851. No indigenous artefacts were sent.[20]

Seemingly, Britain was quite intransigent on the question of transportation. Lines were drawn in the sand as the protagonists for emancipation rallied their forces against those who desired continuation of the entrenchment by government policy of an inferior class of citizens. In 1850 a call of last resource was made to the Australasian colonies for colonial emancipation.

A letter was dawn up by John West, Frederick du Croz and Adye Douglas and signed by the Rev. Dr William Browne of the Launceston Association for the Cessation of the Transportation of Convicts. It put the case for a unity of colonial interests. It was sent to the chief magistrates, colonial secretaries and legislative councils of the Australian colonies and New Zealand, for while South Australia and New Zealand had been designated as destinations to which prisoners could not be transported, the continuing influx of emancipated convicts to those colonies evoked harsh discriminatory legislation against such arrivals.

The letter begins:

> As a last resource we turn to our fellow colonists who united to us by the strictest ties are liable to the same wrongs … Her Majesty's ministers have taught the communities established in this portion of the Empire that their ultimate interests are One, that upon the public spirit, intelligence and virtue of each depend the happiness and prosperity of all.

The letter outlines in stark detail the facts and figures of transportation and its moral and social consequences. It concludes:

> We submit to your humanity as a British fellow subject and to your discretion as a Christian magistrate, the case for this country. In the mutation of human affairs, the arm of oppression which has smitten us with desolation, may strike at your social well-being. Communities allied by blood, language and commerce cannot long suffer alone. We conjure you, therefore, by the unity of colonial interests—as well by the obligations which bind all men to intercede with the

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[20] Exhibition of the Industry of All Nations, 1851, Catalogue, Van Diemen's Land.

> strong and unjust on behalf of the feeble and oppressed—to exert your influence to the intent that transportation to V. D. Land may forever cease.[21]

There was sufficient response to encourage the Launceston association to expand its aims into a national movement. New South Wales set up its own Association for the Prevention of the Revival of Transportation, and Victoria and the Geelong district each set up their own anti-transportation societies.

The *Sydney Morning Herald* believed that: 'The best way of dealing with this revival was that suggested by V.D. Land, the formulation of a great Australian confederation.'[22]

A common interest having been avowed by the continental colonies to liberate Van Diemen's Land, a decision was taken to form the first Australian intercolonial political association: the Australasian Anti-Transportation League. It embraced the colonies of South Australia, Van Diemen's Land, Victoria, New South Wales and New Zealand, and proposed to hold its inaugural conference in Melbourne, for geographical reasons.

However, New South Wales believed the suppression of transportation would be best achieved by the existing processes of correspondence and petitioning, and did not attend. Nor did South Australia, where it was believed that public opinion was not yet ripe.[23]

With no representation from either colony, the delegates from Victoria and Van Diemen's Land assembled in the Queen's Theatre, Melbourne, and on 1 February 1851, formed the League.[24]

The League, whose ends were to be achieved by moral means only, demanded a solemn Engagement that was drastic and absolute. Members would pledge not to employ any person hereafter arriving under sentence of transportation for crime committed in Europe.[25]

When John West denominated the Colonies as the Australias, he created for colonists a new identity, awakening a national sentiment.

He further expanded that sentiment with a symbol of nationhood, the Australasian Anti-Transportation League banner. He believed it was 'the beautiful emblem of indissoluble union and that it would be the glory of Australasia that she would achieve victory by a moral force as fine as the spotless border which surrounds the standard to be hailed as the emblem of Federation.'[26]

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21 Reprinted in full in *Usefulness,* Appendix Two: 547-548.

22 *Sydney Morning Herald*, quoted in West, *History,* op. cit., vol. 1: 301.

23 *Geelong Advertiser,* 10 January 1851; *Argus* (Melb.), 13 January 1851; quoted in *Union*: 13.

24 West, *History*, op. cit., vol. 1: 307.

25 The Australasian League, reprinted in facsimile, *Usefulness*, Appendix Three: 549.

26 *Launceston Examiner*, 15 March 1851, quoted in *Usefulness*: 409-410.

The original banner, hand sewn in silk by the women of Launceston, was unfurled at the inauguration of the League at the Queen's Theatre in Melbourne on 1 February, 1851. It had the Union Flag in the canton, and a broad deep blue field with four stars displaying the Southern Cross. On the upper border in gold were the words 'Australasian Anti-Transportation League'; in the lower margin, 'Established 1851'.[27]

A second version of the banner (see illustration) was sewn by the women of Melbourne in twelve days, also in silks. Twelve feet by nine feet (360 cm x 270 cm), it has an added star for New Zealand, and in gold on the white border are the words, 'Australasian League—Tasmania—Instituted 1851'.

This banner was presented to the Van Diemen's Land delegates at a great gathering at St Patrick's Hall in Melbourne on 13 February 1851, and carried in triumphant procession when John West and his party returned to Launceston. It was copied, manufactured in bunting, displayed at rallies, flown from mastheads, and observed on ships as far afield as the United States.

Subsequently John West and William Weston were delegated to visit the recalcitrant colonies and evangelise them in the cause. From March to May, 1851, New South Wales was being persuaded. The campaign culminated in success on May 10th. Under the conspicuous Victorian banner of the League, a grand conference dinner for 200 persons was held at Mort and Brown's huge Sydney warehouse. Charles Cowper presided, the New South Wales Association was dissolved, and the Australasian League adopted.[28]

John West successfully evangelised South Australia in September, and in October, Canterbury in New Zealand adopted the League's solemn engagement.

However, also in 1851, gold was discovered on Mainland Australia, and in the words of John West:

> Gold fields beyond the dreams of oriental vision unfolded while relations between labour and capital were entirely deranged—some considering their personal interests growing more earnest for convict labour. More generous spirits sympathised with the general aspect of a change promising to people a region as large as Europe. The strenuous resistance of transportation had cleared the character of the colonists and proved their feelings had harmonised with the universal and unchangeable convictions of mankind.[29]

By December, 1851, all the supplicating voices united with Van Diemen's Land against transportation. Five colonies answered to the stars of the Christian symbol of the Southern Cross.

One year later, in December 1852, transportation to the Eastern colonies was abolished.

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27 West, *History*, op. cit., vol. 1: 313.

28 *Union*: 14.

29 *Union*: 18.

The Anti-Transportation League had achieved its aims and was dissolved in 1854. Writing in the *Examiner* on 25 April, John West was able to comment:

> A lesson has been taught which will never be forgotten, it is that the Colonies isolated are powerless, united, invincible. It is on this account we are in favour of a strong federal government to regulate those affairs which are common to all, the tariff, land regulations, postal communications and defence from the attack of a foreign foe. This conceded, there would be no necessity for an organisation like the League, as a central authority on the spot would decide every general question. There is nothing to fear in the future progress of Australia; every temporary and trumpery obstacle fashioned by official fingers to stay her progress will be swept away as cobwebs by a breath of popular will.[30]

Eighteen fifty-four is the significant year for Australia, Van Diemen's Land, and John West. It was the year of the Eureka Stockade, and, the year an Act of the Imperial Parliament established a colonial parliament in Van Diemen's Land, which was renamed Tasmania.[31] And it was the year John Fairfax travelled to Tasmania and successfully persuaded John West to accept his invitation to be the first official editor of the *Sydney Morning Herald,* thus guaranteeing the continuing influence of dissenting middle class Christians in the affairs of state.

John West had already published 'Outlines of a new constitution: adapted to the circumstances of Tasmania or any of the other Australian colonies' in the *Launceston Examiner* in August 1853.[32] It was the work of another famous dissident, the 'revolutionary imperialist' Irish exile, William Smith O'Brien, who had previously written an impressive review of John West's *History of Tasmania.*

John West followed this with his seventeen essays on federation entitled 'Union of the Colonies', which he published under the pseudonym of John Adams—after the second President of the United States. Some appeared in the *Launceston Examiner,* and all in the *Sydney Morning Herald* from 30 January to 18 September, 1854.[33]

John West's campaign for educated and responsible political representation being under way, in October, he accepted John Fairfax's invitation to join him in New South Wales. He occupied that challenging position as the voice of the most influential newspaper in Australia at the time, with style and much erudition for nineteen years, until his death in office.

He republished six of his 'Union' essays in 1867 in a vain attempt to resolve the issue of narrow colonial protectionism, then as now complicating Australian affairs despite

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30 *Launceston Examiner*, 25 April 1854, quoted in *Union*: 20.

31 18 Vic. No. 7.

32 *Launceston Examiner,* 31 August 1853, reprinted as Appendix One in Davies, Richard (ed.), *To Solitude Consigned: the Tasmanian Journal of William Smith O'Brien 1849-1853*, Sydney, Crossing Press, 1995. Richard Davies' biography of O'Brien is entitled *Revolutionary Imperialist: William Smith O Brien 1803-1864*, Dublin/Sydney, Lilliput Press/Crossing Press, 1998.

33 *Sydney Morning Herald*, 7 March 1867.

Section 92, a matter which had arisen by the introduction of a 'Tasmanian Act to Promote Intercolonial Free Trade'. He commented:

> At present we treat each other as foreigners—we are protected against each other—we are jealous of manufacturing or agricultural prosperity on the other side of any of the geographical lines which separate us from each other—and this kind of policy is commended as natural, as calculated to Advance Australia.[34]

For nearly thirty years in the fledgling nation that was Australia in the nineteenth century, John West's concern was for the competence of legislators. Conscious of the historical differences which marked each colony, and mindful of the immense moral power of the press, he sought to educate and enlighten colonists on the vicissitudes facing Australia on the path to democracy. In his essays he discusses the problems of other nations, Britain, the United States of America, the United Colonies of Canada, the Dutch Republic after 1648, the Swiss federation, Earl Grey's 'paper constitution' and other experiments for New Zealand.

In his first essay on federation, he stated:

> No system of government can or ought to be satisfactory which does anything for the people which they can better do for themselves or takes out of the hands of a town, a district or a Colony, affairs which are limited in their interest which vary according to every place, or such as may be properly left to the judgement or even the caprice of those concerned.[35]

A different level of decision-making was needed at each level of government: 'A young colony cannot furnish a considerable assembly without descending low in the scale of political intelligence' was his view.[36] Consequently, he recommended a hierarchy of elected authorities—voluntary organisations, local government, state government, federal government. Ultimately, his vision was for a world federation: 'It is conceivable that vast masses of mankind may conspire to set up one grand authority as the only security.'[37] A remarkable vision for a colonial journalist as nation states approached their apogee, and European powers grasped for empire.

John West believed that to suppress lower order democratic institutions was to prevent training and acculturation in democratic principles and practice. His arguable constitutional beliefs were for an educated one-person-one-vote democracy, and universal suffrage based on the practices of his own daily life—in Congregational churches, women had equal voting power.

He favoured a bi-cameral parliament with a lower house popularly elected and an upper house by the same electors, but with equal representation for each colony,

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34 *Union*, passim.

35 *Union*, Essay I: 29.

36 *Union,* Essay X: 67-68.

37 *Union*, Essay VI: 51.

recognising their different interests and sizes. In the manner of electing his proposed upper house, he was far in advance of the United States at the time.[38]

He promoted federation rather than amalgamation, under the existing connections with the Crown.

He was ambivalent about the site of a national capital, believing a separate territory would prevent the dominance of one state (New South Wales), but he was against it as being remote from the centre of population and thus separated in those days from the vital influence of the Press: 'It is certain that the geographical distance diminishes the effect of political demonstrations and creates a disposition to neglect and despise them.'[39]

He thought Governors-General ought not to have been state governors—the first Governor-General (his old adversary Denison) had been Governor of Van Diemen's Land and then New South Wales, creating a potential conflict of interest.

He favoured a conservative principle: 'if by that is understood whatever binds a nation together, whatever speaks with moderation and reasons with dignity, rallies round the principle of federation.'

John West led a movement which won emancipation for Van Diemen's Land, civic equality for all Australians and the nation's freedom from the Imperial government's policy that would have entrenched class distinction.

John West did not live to progress his deeply personal and well-informed dream of a liberal, prosperous and moral nation. He did not witness the culmination of his efforts in a federal ideal. He died in 1873.

The exclusion of the Reverend John West from the national roll of honour of those who fathered Federation remains a hole in the fabric of the Australian story and I, following the Launceston and Melbourne seamstresses whose needles created the first Australasian League banners, have endeavoured to mend it.

Question — You mentioned that John West was editor of the *Sydney Morning Herald* for nineteen years, and you have given us some of his views, which appear to be quite advanced for the time, especially in relation to democracy. Yet the *Sydney Morning Herald* had a reputation in the nineteenth century for conservatism and for being the journal of the conservative ruling element of the population. Could you explain that?

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[38] US Senators were appointed by their state legislatures according to Article 1, Section 3 of the US Constitution until the XVIIth Amendment in 1913.

[39] *Union,* Essay IX: 63.

Patricia Ratcliff — I am not really familiar with the politics of New South Wales after 1854. I am conscious that the newspaper had the reputation for conservatism, and I understand it was a very different arena in politics. West confronted Henry Parkes of course, who was also from Warwickshire. Henry Parkes was not active in the Australasian League in its early days, at all. Henry Parkes and Lang and others had established the *Australian* League, which faded and disappeared before 1851, when Lang went to jail. The battle over federation and the transportation of convicts was not seen as so significant from New South Wales as it was by John West from Tasmania. That does not really answer your question, as I am not familiar with post-1854 New South Wales politics, only with John West's contribution before he went up to Sydney.

Question — You were speaking about the Governors-General of the time. My understanding is that the first one was actually Fitzroy, who was Denison's predecessor in New South Wales. I am referring to the 1847 ideas of Earl Grey on federation, which they attempted to establish by the appointment of a Governor-General, but only two, Fitzroy and Dennison were appointed, and then the office was abandoned because of opposition among the colonies. On another matter, the attempt by the British authorities in the Colonial Office to introduce some form of political association of the colonies is something that seems to be scarcely mentioned these days. Of course it was a failure, because the newly created authorities in each of the separate colonies would have no part of it.

Patricia Ratcliff — We must take that in two parts, because in 1847 when federation was initially mooted, Van Diemen's Land was still a penal colony and a police state and there were no civic rights whatsoever. The argument by John West from Van Diemen's Land about rights has been lost in the arguments from the other colonies, who had their own particular interests. Regarding Governor Dennison, he accepted a commission in 1852 on the same day to be both Governor-General and the Governor of New South Wales. It was my understanding he was the original, perhaps followed by Fitzroy.

Question — I noticed that in his list of 'Affairs Common to All', West did not identify Aboriginal issues. You said that he favoured universal suffrage and civil equality, so I wondered whether he included Aboriginal people in that. In his extensive writings, did he have anything to say about the treatment of Aboriginal people? If not, do you have any comment on why he didn't?

Patricia Ratcliff — When John West was writing and during his time in Van Diemen's Land there were only a mere handful of Aboriginal people. They were referred to as the 'remnants of the race', and had been exiled offshore to Wybalenna on Flinders Island. They were not regarded as being capable of surviving as a race, and the Tasmanian Aboriginal community was seen at that time as a distinctive race of Aborigines. In my reading of history and newspapers of the time, there is scant reference whatsoever to Aborigines. So they were really not in the equation. I have seen a report from the London *Times* of 1863 which said that it was expected that the Aboriginal people of Australia would be extinct by 1900. That was the thought of the day.

John West wrote about the condition of Aborigines up until 1850, when he published his *History of Tasmania*, and it is harrowing reading because he spares nothing in relaying the facts. He saw them as being, by their nature, overwhelmed. He writes about the injustice, and about the fact that there were no treaties with them—he was very critical. But it is a sad reflection on our comprehension of the significance of Aboriginal communities, that John West had very little to say about them in his general writing. They were not mentioned in his writing to any great extent at all.

I once checked out the year books of the Tasmanian Government to see when the word 'Aborigine' or 'Aboriginal' disappeared out of the index. It disappeared in 1874, even though Truganini didn't die until 1876. By the time she died, she was not even called 'Aborigine', she was called 'Lalla Rookh'.[40] The word 'Aborigine' just disappears entirely out of Tasmanian government records until the 1960s, when it was brought back again.

[40] Lalla Rookh was the eponymous heroine of Thomas Moore's long poem, published in 1817.

The Distinctiveness of Australian Democracy*

John Hirst

At my university, at the beginning of each semester, I am asked to speak to the new students from overseas. My task is to tell them what sort of society they have come to. Most of what I say is very conventional and would not surprise you. But one thing I say I ask them to keep secret from the Australians they will meet. I tell them that Australians are a very obedient people. I advise them to keep this secret because Australians imagine themselves to be the opposite of obedient. They think of themselves as anti-authority. They love a larrikin. Their most revered national hero is a criminal outlaw, the bushranger Ned Kelly. Their unofficial national anthem honours an unemployed vagrant who commits suicide rather than be taken by the police troopers for stealing a sheep.

All this is true. So I am careful to give the evidence for Australian obedience.

We were the first nation to make the wearing of seatbelts in cars compulsory. We have gone further and made the wearing of bike helmets compulsory for the riders not only of motor bikes but push bikes as well.

We led the way with compulsory breath tests for the drivers of motor cars to ensure they are not driving under the influence of alcohol.

Our laws against smoking in public places are very severe. Smoking is banned at our greatest sporting stadium—the Melbourne Cricket Ground—even though it is open to the skies. At games of Australian rules football the spectators yell foul abuse at the umpire and then at half time they file quietly outside to have a smoke.

* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House on 10 September 2004.

The founding population of Australia came from Britain and by the nineteenth century the British were a very law-abiding people. Is that the reason for our obedience? The great sociological work on political cultures written by the American scholars Almond and Verba, *The Civic Culture*, judges the British to be an obedient people because of the survival of deference to a ruling class.[1] That can't be the reason for the ongoing Australian obedience. We have no respect for anyone who thinks they have a natural claim to rule us. We very certainly have complete contempt for the politicians who make our laws.

So here is the puzzle I want to consider. The Australian people despise politicians, but the politicians can extract an amazing degree of obedience from the people, while the people themselves believe they are anti-authority.

We will begin by considering one of the most distinctive features of Australian political life, the compulsion to vote. Other countries have this provision but none in the English-speaking world. We did not copy it from anywhere else; we worked it out for ourselves.

The adoption of this system is universally believed to have been a response to shamefully low turn-outs at elections. This is not so. It was first used in Queensland state elections in 1915. At the previous election the turn-out had been a very respectable 75 per cent. It was adopted by a Liberal government because it feared at the next election the Labor Party for the first time would gain a majority of seats. Labor's great advantage was its large number of campaigner workers who, for no payment, worked to get out the vote; that is, to bring the people to the polls. The Liberals thought to offset this advantage by passing a law to make everyone come. They still lost the election but compulsory voting was law and Labor not surprisingly thought well of it and quickly adopted it as its national policy.

It was not worry about shifts in turn-out figures that put compulsion in the mind of Australian politicians. Compulsory voting was seen as a natural extension of compulsory enrolment in which Australia was also a pioneer. Before the federal elections in 1903, the first on the new federal franchise, the police of the various states went to every house in the Commonwealth to enrol the voters. This is an amazing exercise: the state's enforcing arm, the police, enrolled the citizens to vote, a task usually regarded as the responsibility of the citizens. Some colonies had been using the police for this task, which is how the Commonwealth got the idea. The police produced a comprehensive roll, but when people moved, which they often did, they did not inform the authorities of the change. The Electoral Office wanted the people to be forced to report changes. In 1911 the Fisher Labor Government accepted this policy and enrolment became a continuing obligation on citizens.

To get the new system started the police were called in again. They visited every house and got each elector to fill in an electoral card with their personal details. The cards were now to form the master roll. When electors moved house, they had to send in a new card. If they did not do so, they were to be fined.

[1] Gabriel A. Almond and Sydney Verba, *The Civic Culture: Political Attitudes and Democracy in Five Nations*. Boston, Little, Brown [1965].

But how would the Electoral Office know if people had moved house? It appointed spies. In cities and towns they were the postmen; in the countryside the police. They sent regular reports of comings and goings to the Electoral Office. They also distributed electoral cards to new-comers on their beat and encouraged them to send them in. When the Electoral Office got reports from their spies, it checked to see if new-comers had sent in their card. If they had not, they were asked to explain why. If they did not offer a good excuse, the Electoral Officer fined them.

In 1911, when compulsory enrolment was adopted by the Commonwealth, several politicians were ready to add to it compulsory voting. They asked what the point was of getting everyone on the roll, if they did not bother to vote. If Parliament was ready to force people to do their civic duty as regards enrolment, why not force them to perform the higher duty of voting? Note that at this time the proportion of people voting was rising. At the 1910 federal election the proportion voting had jumped to 62 per cent from 51 per cent in 1906 and 50 per cent in 1903.

Four years after the Commonwealth adopted compulsory enrolment Queensland adopted compulsory voting. The Commonwealth did not adopt compulsory voting until 1924. Now it is true that turn-out had fallen at the previous election—down to 58 per cent from above 70 per cent at the previous four elections—but that did not prompt any immediate reaction. Again it seems to have been a fear of what Labor might achieve at the next election that pushed the Nationalist government to propose compulsion. Labor supported it and the measure was passed in a rush with almost no debate.

Australian voters accepted compulsion and turn-out figures rose to above 90 per cent. Compulsory voting was adopted for state elections in Victoria in 1926, in New South Wales and Tasmania in 1928, in Western Australia in 1936, and South Australia in 1942.

Opinion polls record that over 70 per cent of the people are in favour of compulsion. If all those people voted voluntarily that would be a respectable turn-out. But the Australian people want to be compelled to vote.

Those who write and comment on politics in this country are overwhelmingly in favour of compulsion. In defending compulsion, they make a distinctively Australian contribution to political philosophy.

They argue that with compulsion governments have to pay attention to the interests of everyone and particularly of the poor which they could ignore under voluntary voting since the poor are the people least likely to vote. That may be so, but they go on to claim that to move to voluntary voting would 'disenfranchise' the poor. This is amazing double-speak. To allow people the freedom to vote or not would be to take the vote from them!

The writers and commentators are scathing about the low turn-out for American presidential elections and boast that in Australia governments have greater legitimacy because all the people take part in their creation. They do not think their case is weakened because the people are compelled to take part.

To the objection that compulsory voting is a denial of liberty, they argue that governments regularly make citizens do things—to serve on juries, to pay taxes, to fight in the defence of the country. Of course governments compel citizens, but compulsory voting relates to another issue altogether: how governments are themselves created. According to liberal principles, citizens create governments; governments don't force people to be citizens.

You see I am an opponent of compulsory voting. I don't expect to persuade you to change your minds. If you are a fair sample of enlightened opinion you will favour compulsory voting. What I want to persuade you is how distinctive your position is. A policy that in the UK and the US would be thought totally at odds with liberal principles is here accepted almost unquestioningly. We are examining something that is instinctive to Australian political culture.

The value placed on personal liberty and the responsibilities of citizenship has shifted markedly from that in other English-speaking democracies. The existence of government is taken for granted and the people can be forced to be citizens.

That government is simply there; that its existence does not have to be explained: that has been the Australian experience. Government in Australia has been continuous; it has never broken down and had to be reconstituted. Except in the treatment of Aborigines, government has never been an oppressive force, something that large numbers of people feared. Government has never been simply a means of fleecing people; it has always been a supplier of services that people wanted.

Australian government was not created in Australia. The government came off the boat, in the person of the Governor and his officials, carrying all the authority of the government in Britain. With only one exception settlers never had to come together and form a government. The authority which secured to them the benefits of their pioneering was not of their making.

Melbourne was the exception; it alone of the colonial capitals was an unauthorised settlement. For a few months the settlers did govern themselves. Then the Governor in Sydney visited and installed a magistrate responsible to him.

The founding governments of the Australian colonies had the virtues of the British government that created them; they provided a secure world in which all people enjoyed protection of their property and liberty. The convicts of course did not have their liberty, but they were deprived of it by the law, which also set the term for their release and protected the property and persons of ex-convicts as if they had always been free.

The early Australian governments were actually better than the British. The British government was run by the aristocracy and gentry who rewarded their followers with government jobs. The job might pay well but have no duties. If the job did have duties, the holder was not obliged to perform them himself. He hired a deputy to do the work, but kept most of the proceeds for himself. Jobs frequently did not have salaries; the holder made his money by the collection of fees which he could manipulate to his own advantage.

This system was being reformed just as Australia was settled and so the new rules applied here from the beginning. All jobs had to be real jobs; the work could not be done by a deputy; the reward would be a fixed salary rather than fees. So the British officials who ruled under the Governor's control were efficient and honest.

Government did not begin with taxation. The funds of the first governments came from the British taxpayer. The job of the Colonial Office was to get the Governor to limit his spending and to raise money by local taxation. It was some time before the colonists in Australia were paying the full cost of their government. For the first hundred years they never really did that because their defence was provided free by the British Navy. For most of human history defence spending has been the biggest item in government budgets. In the Australian colonies it was one of the smallest, which allowed government funds to be spent on the internal development of the colony.

Usually in empires, governors of colonies taxed the people and sent the proceeds back to the mother country. In the Australian colonies taxes were not sent to Britain. After the revolt of the American colonies Britain resolved not to tax its overseas settlers. Britain got its benefit from the colonies through the increase of its trade and the returns on the private funds invested in Australia. The governor's job was to promote the development of the economy which would enable the colony to pay its way and bring more benefit to Britain. There was a basic harmony between what the British government wanted of the governors and what the settlers wanted.

Governors and their officials built roads and bridges, improved ports, encouraged exploration, surveyed land for settlement, and provided settlers with their labour force, at first convicts and later free immigrants. The British government which sent the governors did none of these things in its own country. So the function of government changed in Australia; it was not primarily to keep order within and defeat enemies without; it was a resource on which settlers could draw to make money.

The social character of the government changed too, or rather it did not have a social character. In Britain government was closely linked to the social order; the richest people were the great landowners and they and their friends ran the government. In Australia the government was one person, the Governor, who was detached from, and superior to, all groups in the local society. Yet government was much more than the person of the Governor; he embodied the full authority of the British government and was the representative of the monarch. So government was both more singular and more abstract.

Settlers of course attempted to influence the Governor. The richer settlers had more influence than others and they occupied the positions in the legislative councils, which were at first appointed and then two-thirds elected. But the councils never controlled the Governor and the Governors did not rule simply in the interests of the wealthy settlers. Several governors clashed with the wealthy settlers. The demand for self-government in New South Wales in the 1840s came from the rich squatters who objected to Governor Gipps attempting to make them pay more for their land.

In the mid 1850s governors and officials were replaced by premiers and ministers responsible to the new parliaments. The transition was smooth. The public servants remained in place. The regular business of government remained the same: to provide the infrastructure for the development of the economy. Democratic government made it easier for more people to make demands for roads, bridges and local services. If people wanted something done, they went in a deputation to the minister, escorted by their local member. If the local member could not get results out of ministers, he lost his seat at the next election.

The democratic governments, like those run by the governors, were omni-competent; they took on everything. They ran the school system and the police, which in Britain and in many other countries were the business of local government. Local government in Australia was weak; it was established late and did not cover the whole country. Its chief job was the making of local roads and in the towns the collection of rubbish. Where there was no local government, the colonial government did all that was necessary. In most of the countryside of New South Wales there was no local government until 1906.

The colonial governments did all their work without imposing direct taxation. Until late in the nineteenth century there was no income tax and no company tax. All the money you earned you kept. Government was not a burden that you had to pay for; it was a magic pudding; you could cut slice after slice and there was always more.

The magic was performed by the government collecting its revenue from taxes that you were unaware of—duties collected on imported goods— and from the sale of crown lands—which was not a tax at all. Local government did tax directly; its revenue came from rates collected on land. This was the chief reason why it did so little and why in many places it did not exist at all. No one wanted to give local government more responsibilities because that would increase direct taxes.

The first government schools were built only if local people raised some of the cost of the building. That gave them some say in the running of the school. But from the 1870s the colonial governments, without raising any new taxation, were able to cover the full cost of school building. Local control of education disappeared. Who could quarrel with this when schools came for nothing?

I have been stressing the continuity of government and its continuing benevolence. But with democratic politics came an important change: a rapid decline in the respect for politicians. In recent years the reputation of politicians is claimed to have fallen. This change has been very small compared to the catastrophic collapse that can be dated precisely to the introduction of democracy in the late 1850s. We have to understand this change if we are to answer the puzzle we have set about Australians and their attitude to government.

Before self-government, as we have seen, the colonists were allowed to elect two-thirds of the members to the single chamber legislatures that went under the name of legislative councils. The Governor appointed the remaining members and was himself the real head of government. New South Wales had such a Council from 1842, Victoria, South Australia and Tasmania from 1851. The right to vote for these Councils was based on the owning or renting of property, as in Britain. The British

Parliament set the level of these qualifications. In 1851, the British Parliament was tricked into lowering these qualifications by a clever scare tactic: it was told that in New South Wales ex-convicts who owned property had the vote while the virtuous free working man recently arrived did not own or rent enough to qualify. To create a respectable electorate a lower franchise was needed. This amendment was actually initiated in the House of Lords, the only occasion when that noble body has proposed to give the vote to more people; its usual task was to quash such proposals. It did not realise how radical a change it was making because the new lower rates were to be the same as Britain's, but in the colonies property values were much higher. This meant that in the Australian cities skilled workingmen gained the vote whereas in Britain working men were excluded from the vote.

Just as these new qualifications came into operation in 1851 gold was discovered. In the goldrush boom, property values went through the roof. The occupier of the meanest hovel in Sydney and Melbourne was paying enough rent to get the vote. There were some demands from working people for the vote, but not widespread or well sustained. With everything in turmoil and fortunes to be made, it was impossible to keep a political movement together. But it turned out that a movement was not necessary to widen the franchise in goldrush Australia. Inflation was the great engine of democratic change.

In 1852 the legislative councils were given permission from Britain to draw up constitutions under which self-government would operate. Overwhelmingly, the elected and nominated members of these councils were conservative; they were large landholders, squatters, merchants, professional men, senior government officials. They had no intention of introducing, in the words of William Wentworth, a Yankee democracy. But the ground was shifting under their feet. Without approval from them, more and more people were qualifying for the vote. So for the new parliaments they were planning, they added new qualifications for the vote based on salary rather than property and rent in order to give the vote to their household servants, clerks and managers. It was a desperate ploy: to stave off full democracy they were giving more people the vote.

When the new parliaments came into operation the conservatives were quickly bundled aside. Power fell to the liberals who moved to introduce full manhood suffrage. This was no longer a radical change. Far many more people had acquired the vote courtesy of inflation than were granted it by parliamentary legislation.

Historians have struggled to explain why democracy came so easily. They have not looked at the qualification levels for voting and what happened to them in the 1850s. Not having a convincing explanation, they slide over the issue quickly or imply that democracy was the natural outcome for a new society like Australia. This argument seems to have some plausibility, but I don't want you to accept it. In detail this is how it runs: the first settlers came from very unequal societies where inferior people had to show respect to superior people. Most of the migrants to Australia did not come from the superior upper classes; they were middle-class or working people. They wanted to get rid of old-world distinctions and create in the colonies a world in which people did not have to know their place. Anyone in Australia who tried to pretend they were upper class was just laughed at. The old distinctions simply could not be re-

established in the new land. People began to treat each other as equals and so democracy was the only form of government that would suit them.

This is very misleading. Society was not democratised first and then politics. It was the other way about. Politics was democratised long before society was.

It is true that the migrants rejected some aspects of the old society. They did not want position to depend on birth or education or knowing the right people. But those who came to the colonies to better themselves wanted to show off their success in the old ways. What other signs did they know; what other signs would be recognised?

The migrants did not want dukes and lords in Australia, but successful migrants claimed the title of gentleman. Gentlemen in England were at first the large landowners who were not noble. They had to be of good breeding; that is, descended from other gentlemen, or better still, from a lord. They had to be men of leisure and not directly involved in money-making. They also had to display certain moral qualities, which was the opening for more people to claim the title. If you had the education of a gentlemen that might be enough, even if your parentage was doubtful. The rank of 'Gentleman' proved to be an excellent import for the colonies. It was not quite definite; the qualifications were elastic and could be stretched. Here they were stretched a long way. The test for not being involved in business was easily dropped. Even true gentlemen in Australia—and there were some—were very closely involved in money-making. So that made it acceptable for others to be making money. But the test was not dropped altogether. It was shifted. If you made money as a merchant, that was alright; if you ran a shop and served the public, you could not be a gentleman. As to good breeding, when the new gentlemen in Australia talked of their origins, they pushed their ancestors as far up the social scale as they dared.

The final result was that in Australia most men who had made money could be gentlemen. This was a huge change in the rules and it was not reached without great social turmoil, but the category of gentleman did not implode. The one definite test for a new gentleman in Australia was that he had to be wealthy and a wealthy man could look like a gentleman once he had a large house and a carriage and dressed like a gentleman with top hat and tails.

The first partly-elected legislatures in Australia were made up of landowners and squatters along with a few merchants and lawyers. They thought of themselves as gentlemen and were treated as such. As at Westminster, the councils were gatherings of the rich and well-educated.

All this changed with the rapid move to a democracy in the late 1850s. The rich found it hard to get elected and were forced to retreat to the upper houses. Poor men of little education replaced them. Members heaped vulgar abuse on each other and some were only in Parliament to benefit themselves.

Parliamentarians still dressed as gentlemen and hoped to be treated as gentlemen, but now there was an implosion: no one believed that parliamentarians were gentlemen. The new democratic institution did not dress itself in it own clothes; it set itself up for a fall by putting on a distinctly undemocratic uniform.

Rich and educated people now regarded politicians as a low-class bunch of incompetents. They made fun of those who could not speak or write properly, who had done lowly work before they became MPs, and who had wives who could never be accepted into good society. If a rich and well-educated man did get into Parliament, he was always apologising for keeping such low company. It did give him a lot of good stories to shock and amuse his friends.

These very ordinary parliamentarians had been elected by the votes of ordinary people. Their votes gave them the opportunity to show that they did not want parliamentarians to be just the rich and the well-educated. They elected parliamentarians who could not look down on them and whom they did not have to look up to. But they had not got rid of the idea that Parliament was a place they should be able to respect. By their votes they had produced parliaments that they too despised.

We have visual evidence of how two leaders of the democratic advance dressed. The illustration below shows Henry Parkes being chaired by his supporters after winning the seat of Sydney in the old Legislative Council in 1854. He is dressed as a gentlemen with frock coat and top hat. This is the man who arrived in the colony as an assisted migrant and whose first job was common labouring. We can follow the rise in his status by looking at how he was addressed by other people. Fortunately Parkes kept not only letters sent to him but also their envelopes. As we scrutinise the envelopes, we know we look no more closely at them than Parkes did himself. When briefly he worked in the Customs Department some people addressed him as Henry Parkes Esq. Parkes was not yet claiming the title for himself. At this time he was content to give himself a middle name and told his family to address him as Mr Henry F. Parkes. When he opened a toy and knick-knack shop in Hunter Street he was definitely not a gentleman. He made the transformation to that status in 1850 when he became the editor of the liberal newspaper *The Empire,* which was regarded as a gentlemanly occupation. To the disgust of the more radical *People's Advocate,* he began to talk of the respectability of his ancestors.

HENRY PARKES, ESQ., CARRIED IN TRIUMPH TO THE "EMPIRE" OFFICE.

Illustrated Sydney News, 6 May 1854

Daniel Deniehy was more radical than Parkes; he kept true to republican principles after Parkes abandoned them. He is famous for coining the term that destroyed William Wentworth's plan to give New South Wales an aristocracy so that the colony could have an upper house to match the House of Lords. Deniehy called the proposal 'a bunyip aristocracy'. But Deniehy was no social leveller. He thought of himself as a gentleman, a rank he was fully entitled to claim as a lawyer. When one of his opponents denounced him for remaining seated while the national anthem was sung he replied that, as a republican, he would he would not have minded if his enemies had sworn that he had said the anthem was 'damnable trash', but he objected 'as a gentleman' to being accused of sitting while ladies stood. Contemporary photographs show Deniehy dressed as a gentleman, and with a top hat.

By 1859 Deniehy was completely disillusioned by democracy because of the sort of men the people elected. In his own newspaper he named members of Parliament who he declared were unable to write two sentences or unable to read half a page of a book without a dictionary, or fit only for driving bullocks. But this was after all to be expected, he lamented, because of the quality of the electors who sent them there. Deniehy gave them the local name Geebungs:

> The Geebung looks down with contempt upon all education, literature and refinement, except such reading and writing as are necessary for 'getting on', and upon all scientific forms of knowledge except for 'lor'—for 'lor' he has the a sort of fascinated admiration like a savage's for firearms. The Geebung would rather put into Parliament a bullock-driver with 'property'—certainly not without, than an impoverished Fox or an O'Connell.[2]

Respect for Parliament evaporated very quickly. In the Supreme Court in Sydney in 1861 the Chief Justice at the top of society and a criminal at the bottom shared a joke at the politicians' expense. The criminal was being tried for escaping from gaol. Before the case began he asked that he be given another judge because it was the Chief Justice who had given him the harsh sentence that had put him in gaol. The criminal said the Chief Justice might have 'prejudicial feelings' against him. The judge, thinking he had said 'political feelings', replied, 'Why should I have political feelings against you. Are you a member of Parliament?' To which the criminal replied: 'Not yet'.

When the parliaments acted to protect their reputation, they discovered how little respect they enjoyed. The big man behind the bribing of the Victorian Parliament in the 1860s was the squatter Hugh Glass. When the Parliament committed him to prison, he became a popular hero. The Supreme Court set him free and the Parliament took no further action. The most corrupt member of Parliament was C.E. Jones, the Member for Ballarat. While he was a minister, he took money to organise opposition to his own government. When this was discovered, the Parliament expelled him, but Ballarat re-elected him.

[2] *Southern Cross*, 12 November 1859.

The Ballarat voters thought he was no worse than the men who had expelled him, so they were not going to see him punished. A vicious cycle had set in. Parliament was despised, but voters continued to elect men who kept its reputation low.

The *Bulletin* cartoon below from the 1880s allows us to see how far the status of politicans had fallen. A man approaches a well-dressed figure in the park and asks whether he is a Member of Parliament. The man replies indignantly: ‘No sir; I am a gentleman.’

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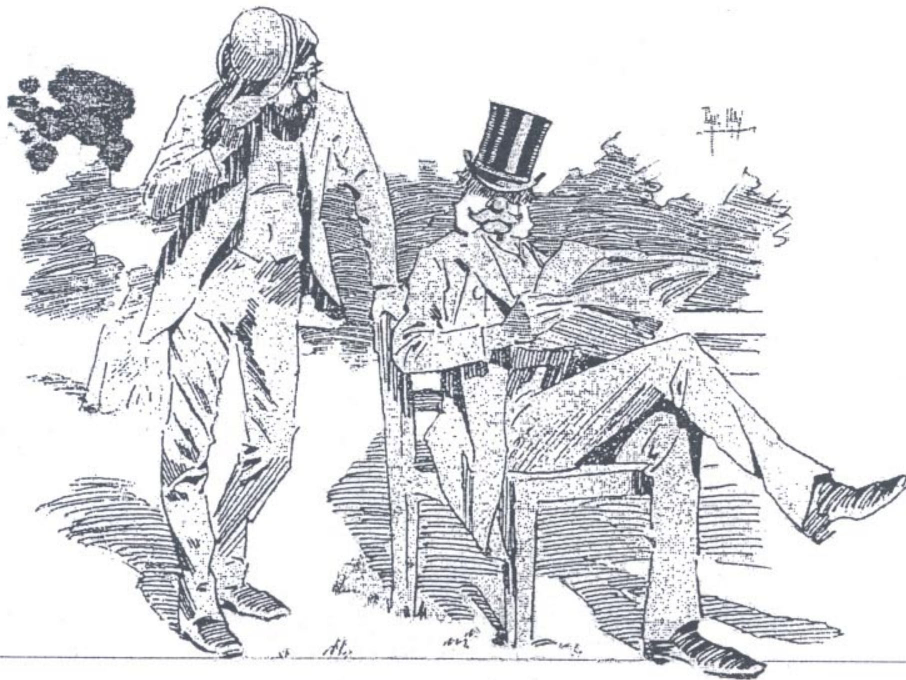

IN SYDNEY DOMAIN

"EXCUSE MY INTERUPTION, BUT MAY I ASK IF YOU ARE A MEMBER OF PARLIAMENT?"
"NO, SIR; I AM A GENTLEMAN

Bulletin (Sydney) 20 August 1887

‘Gentleman’ as social rank has now disappeared, though it still survives as a standard of behaviour. We might not expect parliamentarians to behave like gentlemen (or ladies) but we do expect that Parliament as the supreme tribunal of the nation will be conducted with decorum. We know particularly at question time this is not so. Teachers who visit with their children are hard put to explain why parliamentarians can act in the chamber in a way that children cannot act in the classroom. I have no doubt that the overall quality of parliamentarians has risen greatly from the rough-house beginnings of democracy, but the standard then set for parliamentary debate appears to persist.

But now I want to suggest that our respect for politicians would not increase even if they changed their behaviour. Their enemy is Australian egalitarianism, which has greatly strengthened during our history. By this I don't mean that society is becoming more equal in the distribution of material goods. It may be true as many complain that the gap between the rich and poor is growing greater. By egalitarianism I mean that insistence that we treat each other as equals and that no-one gives themselves airs. That is why we have sympathy for the larrikin and are reluctant to show respect for people exercising power. Australians will recognise that a boss or a military officer must have power, though they will respect him only if he exercises power properly. But politicians have no excuse for wanting power; they have wilfully put themselves above the rest. They will have trouble therefore in gaining respect, no matter who they are or what they do. Many Australians seem to think politics exists only because there are a few egomaniacs wanting to be politicians. So if Mark Latham does becomes prime minister and if he cleans up question time, perhaps it will make no difference.

We are now ready to offer an answer to our puzzle.

There has been strong, continuous, benevolent government in Australia but no ruling class. When the governors ruled, the rich landowners and squatters thought they would take over when self-government was granted. But when that happened, they were quickly defeated and democratic politics began. The democratic politicians were a very mixed bag indeed, not identified with any one group in society, so distinct that they were a group in themselves—the despised politicians, which is how they have remained.

Government is without social character; it is an impersonal force. That makes it possible for Australian egalitarians to give it the great respect which its record deserves. Australians are suspicious of persons in authority, but towards impersonal authority they are very obedient.

Question — My question is about democracy and government process. Ralph Nader said: 'A well-informed citizen is the lifeblood of democracy.' He went on to talk about timely information, and he said the prompt flow of information from government to people is essential to achieve the reality of citizens' access to a more just government process. Do you see a discernable difference between different governments as far as access to administrative justice, public accountability, malfeasance of public coffers, responsible government and all these important issues that we care about? And when you answer that question, can you define democracy?

John Hirst — In my talk today, I have been very careful not to define democracy. A democracy is a society in which the citizens are sovereign and control the government. As I give that definition, the argument about compulsory voting again comes to mind. If the citizens are sovereign, the government should not be telling us we have to vote. There should be that free moment, when we create the government. But you mention many of the things that are important for the good functioning of

democracy. I didn't address those because I was trying to identify what is distinctive about democracy. I think the government in Australia is accepted very readily—we are a deferential or obedient people in our relations with government, and that is what I was interested in establishing. And if that is true, that may mean that governments get away with more in Australia than they do elsewhere, which is an argument that some people have been running in recent times.

Question — My question also relates to the nature of democracy. In voting over the last twenty or more years, there has only very rarely, if ever, been a person elected that I have given my first preference to. I have probably voted in the past either for a socialist candidate or, since the Green party has been in, for a Green candidate. And there has been no Green Senate candidate elected in the ACT. So I don't feel that I have really been represented, or that our system really allows us to be properly represented, and I think your definition points to why that is the case. Certainly since we have single-member electorates a lot of people don't ever have the chance of having someone elected that they have voted for, and also by the system of voting once every three years on whatever happens to be the issue at the time—and that can obviously be very much influenced by fear or whatever, as we have seen in recent elections. So I would like you to perhaps expand on how you think democracy can be improved.

John Hirst — Well I want to accommodate you, but if you go on being a socialist you will probably go on having the same experience that you've had hitherto. But in our federal system we have stumbled upon a system of electing the two houses which goes a long way to meet your objection. Proportional representation for the Senate was introduced for the lowest of motives by the Labor government in the 1940s in its dying days. But what it has meant is that, though we run single-member electorates for the House of Representatives, we still have preferences there. It is a better system than first-past-the-post single electorates. In the Senate we have whole states voting as one and proportional representation—which means that if a party can get eight or ten per cent of the vote it will get a senator up. I think that has been a great improvement in our democracy. We have had some pioneers in electoral systems too, with the preferential system. Some people criticise the Australian electoral voting system as far too complicated—who *really* understands how to count Senate votes?—and it is said that it is only because we have compulsory voting that we can run such a complicated system. In France, for example, they have to have two rounds for presidential elections. They have one round one week, and then three weeks later, they choose between the top two candidates. We are very clever, we can do that in one go. So that supports the comment that we have been quite innovative.

Question — The two features of Australian democracy that I think are the most distinctive are the fact that we have compulsory voting, and also how very close, historically, federal elections have been. I think since 1945 all federal election result except three could have been changed with 10 000 votes. Often a political party can win power and get a minority of votes on the two-party-preferred system. When you look at the situation in America and elsewhere, elections overwhelmingly seem to have a comfortable majority. Do you think there is a relationship between compulsory voting and having very close election results?

John Hirst — I hadn't thought of that before, but it may well be the case. I am an historian, so I have been interested in studying the origins of compulsory voting, and I think they are often misrepresented completely. But I can see that your suggestion may have force, because what affects the results of elections elsewhere is the proportion of people who show up. A government might be doing well and might have the admiration of the people—so much so that the people do not show up to vote for it because they think everything is OK. So elections do have more things in play where there is voluntary voting. So you may well be right, but it is not something that I have studied or could give a definite answer to.

Question — One of the reasons why Australians have been shown to be deferential to government is perhaps connected to this holy grail of the rule of law, and all the regulations that can be hung on that. I suspect that the combination of the executive and the legislature in Parliament has tended to give the executive power over Parliament to a degree. Could you tell us in what ways that perhaps might be mitigated if it is so? The prime minister in our country seems to have a weight of power that defies the notion of separation of powers.

John Hirst — This has happened also in other Westminster systems like our own, where the party system and party discipline has meant that at least in one house of Parliament a government is almost never going to be challenged. But again, I point to the Senate. The Howard government has only been able to pass laws which can get through the Senate, which it does not control. A lot of people speak as if the government at the federal level now can do whatever it wants—this is not so.

The British government is in a better position, in a way. Party discipline is not as strong, so it faces more opposition in the House of Commons, but the House of Lords only has a suspending veto. The Howard Government has been putting up all sorts of things, and the Senate has been knocking them back for the whole period it has been in office, so I don't think we are in such a parlous position as you think.

What I am interested in is the fact that governments must always consider whether or not the people will wear a particular law. We have a proper respect for the rule of law, and I wouldn't want to join you in denigrating that, it if that is what you were doing. I think that is the cornerstone of our system. But governments have to consider the level of tolerance of the people, and what laws they will obey. I thought when they banned smoking in the MCG that they had reached a point where there would be mass defiance, but this turned out not to be so.

Question — A couple of years ago, a Maoist from Monash University, Albert Langer, advocated support for informal voting. Even though he did not suggest that people resist compulsory voting, both major parties quickly grouped together to block that through legislation. They did this to prevent people exercising their democratic right to advocate an informal vote. Could you comment on that?

John Hirst — I was opposed to what they did. Langer's suggestion was that people voted, but that they did not number all the preferences. There is an instruction that you must number all boxes for your vote to be valid. But Langer knew inside the system, and he knew that if your first three preferences are clear, then your vote is in fact counted. He broadcast that information, and that was his offence. They subsequently

tidied it up so that that couldn't happen again. As an opponent of compulsory voting, as you can imagine, I am equally an opponent of that. What is interesting is that the parties can come together to do that, and no-one batted an eye. I think that says something about the Australian political culture.

Question — What do you think, as an historian, about the dealings that we have had with Aboriginal people over the course of time, and what influence those dealings may have had on the process of democratisation, particularly in the nineteenth century? And whether indeed there was an influence at all?

John Hirst — Your question is very large and it differs from the matters I have been talking about. Although you will have noticed that in my talk I did say that governments have been benevolent in Australia towards everyone except the Aborigines. To me, the difficult and shameful legacy that we live with is not so much that Aborigines were displaced from the land, but that it was done in such a crude and offhand way, without any system or driving ideology. It was a much nastier regime that said, for the purity of Australian blood, we are going to control Aboriginal marriages and we are going to take away Aboriginal children. There are still people alive who experienced that, and it is an ongoing problem for this democracy.

Question — What are your ideas on a comparison with Canadian democracy, and how it came about? Because they have essentially ended up with a copy of Westminster, right down to the palace in Ottawa.

John Hirst — Yes, it is a different history. The history of Canadian union is different from that of Australia, in that the Constitution of Canada was virtually written in Great Britain, whereas ours was written here and the British were just asked to endorse it. Democracy also came later to Canada. New Zealand might be the equivalent case I think. What I am trying to stress is the rapidity with which democracy came here. It came before people were ready for it socially, and I don't think Canada or New Zealand—or even the United States—had that very rapid change. I think the explanation for the reasons why the standing of politics and politicians fell so rapidly is because our society was still British enough to think that parliamentarians should be superior people and have top hats. They put on the top hats, but they didn't act like British parliamentarians. So that's the implosion that I see. I'm not well enough informed to be definite, but I think that Canadian history and New Zealand history had a more gentle transition, and in that situation I think you can probably maintain a better respect for parliament and politicians.

The Usual Suspects?
'Civil society' and Senate committees*

Anthony Marinac

The Australian Senate's legislative and general purpose standing committees, established in 1970 and significantly restructured in 1994, are the means by which the Senate can deal with its massive workload without sacrificing the detailed scrutiny which is the *raison d'etre* of a house of review.

The committees cover eight areas of policy:[1]

- community affairs;
- economics;
- employment, workplace relations and education;
- environment, communications, information technology and the arts;
- finance and public administration; and
- foreign affairs, defence and trade.

Within their policy areas, each committee has a number of responsibilities: the detailed scrutiny of legislation, scrutiny of the annual reports of relevant agencies, the

* This paper was submitted for the Senate Baker Prize in 2003. I am grateful to John Carter, Stephen Palethorpe and Senator Lyn Allison for their comments and contributions.

1 In addition to these, there are 'domestic' committees and joint committees (which include members from the House of Representatives).

examination of budget estimates, and inquiry into general policy issues referred to the committee by the Senate.

However, the usefulness of committees extends well beyond an observation of the workload they can shoulder. A key feature of the Senate from the early 1980s until the present[2] has been that the government has lacked a controlling majority. As a result, in order to pass resolutions and legislation through the Senate, the government has had to negotiate and compromise with other parties. This process takes time, and is perhaps better conducted discreetly and away from the public glare of the chamber.[3] There is some evidence to suggest that senators, in the smaller and more collegiate atmosphere of Senate committees, do find opportunities to set aside their partisan differences and work together:

> The characteristic multi-partisan composition and approach of committees can also produce unexpected benefits by providing an opportunity for proponents of divergent views to find common ground. The orderly gathering of evidence by committees and the provision of a forum for all views can often result in the dissipation of political heat, consideration of issues on their merits and the development of recommendations that are acceptable to all sides.[4]

While this statement has a slightly rosy emphasis, the central point is probably sound, and is borne out by the considerable number of Senate Committee reports which are either unanimously agreed, or which contain dissenting reports which focus on small areas of the report, leaving the rest as common ground.

The co-operative nature of Senate committees is not an accident. Rather, it is built into the structure of the committees. Each of the eight areas of policy is in fact served by 'twin' committees—a legislation committee, which inquires into the provisions of bills, conducts estimates hearings, and examines annual reports; and a references committee, which inquires into matters referred to the committee by the Senate. Membership of the twin committees often overlaps, but there are two important differences: the Legislation Committee has a government majority and a government chair, and the References Committee has a non-government majority and a non-government chair. These arrangements provide the non-government parties, in particular, with considerable influence in the committees. Partisan games are not usually played in committees because the likely consequences may not reflect well on the parties which play them. A more co-operative approach suits all sides best.

Finally, and most importantly for this paper, Senate committees 'provide a means of access for citizens to participate in law making and policy review. Anyone may make a submission to a committee inquiry and committees will normally take oral evidence

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2 The Liberal/National Party coalition government will have a controlling majority after 1 July 2005. The impact of this change on the committee system remains to be seen.

3 In order to refrain from stretching this point too far, it should be noted that government Senate Committee members do not have ministerial rank. As a result, while senators in committees can expose public views on a piece of legislation, and consider its provisions in detail, any compromise on a bill's terms would have to come from the relevant minister, not from the committee.

4 Harry Evans (ed.) *Odgers' Australian Senate Practice*, 10th ed., Canberra, Department of the Senate, 2001: 366.

from a selection of witnesses who have made written submissions.'[5] This form of participation in the processes of Parliament is not available to citizens outside the committee system.[6]

This participation is, of course, somewhat limited. Not all groups choose to participate in inquiries which may be relevant to them, and some of those who endeavour to participate may find barriers to their participation.[7] In this regard Paxman notes:

> A criticism sometimes levelled at the process, however, is that bills inquiries regularly attract submissions and witnesses from the same organisations, and 'witness cliques' develop around certain issues, such as immigration and industrial relations. Governments and opposition parties alike are accused of 'rounding up the usual suspects' to support their positions. An implication of this criticism is a cynicism that the same old paths are being trodden as particular issues regularly arise, with predictable outcomes.[8]

Paxman then goes on to note that 'it is difficult to determine whether this criticism is valid.'[9] The purpose of this paper is to grapple with this difficulty by focusing upon one particular Senate committee, the Employment, Workplace Relations and Education Committee (EWRE Committee), in order to throw light on whether participation in committee hearings has been undertaken by a wide or narrow range of organisations, and in particular whether the committee risks being captured by a narrow range of articulate and professional organisations which come to form the 'usual suspects,' appearing before the committee during virtually every inquiry.

In this context, a secondary question might be to ask whether the committee and its 'usual suspects' form what Marsh and Rhodes[10] describes as a *policy community* where:

> within distinct [policy] segments, limited numbers of pressure groups and government actors are involved in making policy. They tend to create high barriers to entry, making it difficult for other groups to take part in the policy process … there is a continuum of policy networks from very open issue networks to closed policy communities.[11]

Adopting this model, it should be possible to place the EWRE Committee at some location within this continuum, by determining whether its inquiries are conducted

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5 ibid., p. 365.

6 A caveat here: it is possible, but altogether unusual, for a stranger to be called before a parliamentary chamber to give evidence. It has not happened since 1975.

7 For an extended discussion see Kate Burton, *Community Participation in Parliamentary Committees: Opportunities and Barriers*, Department of the Parliamentary Library, Research Paper 10, 1999–2000.

8 Kelly Paxman, 'Referral of bills to Senate committees: an evaluation', *Papers on Parliament* no. 31, June 1998: 83–84.

9 ibid: 85.

10 David Marsh and R.A.W Rhodes (eds), *Policy Networks in British Government*, Oxford University Press, 1992, quoted in M. Smith, *Pressure Politics*, Manchester, Baseline Books, 1995.

11 Smith, ibid: 27.

among a relatively closed group of inside organisations, or a relatively open community of interests with low barriers to participation.

Work of the Committee

During the period relevant to this paper (The entire 39th Parliament, and the 40th Parliament until March 2003), the EWRE Committee[12] undertook 27 inquiries which required public hearings.[13] Of these, nineteen were conducted by the Legislation Committee, and eight were conducted by the References Committee.

The membership of the committee, like most Senate committees, has varied widely during this period. While each Senate committee has its usual set of full members, each committee also has a much broader circle of 'participating' members, who lack voting rights but who can participate in the committee's hearings and deliberations. Furthermore, most committees (including the EWRE committee) have 'substitute' members who take the place of one of their party colleagues for an inquiry which touches on their particular areas of responsibility. This device is used very commonly by the Australian Democrats, who have relatively few senators, each of whom shoulders a broad number of portfolio responsibilities.

Despite this variation, there have been some constants. Senator John Tierney (LP, NSW) has been the chair of the Legislation Committee for the entire period. Senator Kim Carr (ALP, Vic.) has also been a constant member, serving as Deputy Chair of the Legislation Committee for the 39th Parliament, and remaining very active during the committee's work in the 40th Parliament. Senator Jacinta Collins (ALP, Vic.) was Chair of the References Committee during the 39th Parliament, before handing this role to Senator George Campbell (ALP, NSW) for the 40th Parliament. As noted above, the Australian Democrats' membership in the Committee has varied considerably, with three of the Democrats senators becoming involved in one inquiry or another. Senator Andrew Murray (AD, WA) has been a particularly active member of the Legislation Committee in its consideration of workplace relations legislation. Senator Lyn Allison (AD, Vic.) has also been an active member of the Committee. It is appropriate to note that, as a party, the Democrats have remained constantly involved in the Committee's work.

12 During the 39th Parliament, the Committee was known as the Employment, Workplace Relations, Small Business and Education Committee.

13 In addition, the Committee tabled reports on estimates hearings, reports on annual reports, and a handful of reports which were written from submissions without calling witnesses (the report into the Research Agencies Legislation Amendment Bill 2002 is an example). The Committee's full body of work for the 39th Parliament is available online at: http://www.aph.gov.au/Senate/committee/history/index.htm#Employment and for the 40th Parliament at: http://www.aph.gov.au/Senate/committee/eet_ctte/reports/index.htm.

Overview of appearances before the Committee

During the period at hand, the Committee took oral evidence from no less than 503 separate organisations,[14] who between them made a total of 719 appearances before the Committee (see Table 1). It should be apparent from these numbers that few of the organisations appeared more than once, and this is borne out by the analysis: of the 503 organisations to appear, 408 (or 81.11 per cent) appeared before the committee only once. Just seventeen (or 3.38 per cent) appeared five times or more, and only three (or 0.06 per cent) appeared ten times or more.

Table 1: Appearances before the Committee

1 organisation appeared 11 times
2 organisations appeared 10 times
1 organisation appeared 9 times
1 organisation appeared 8 times
2 organisations appeared 7 times
4 organisations appeared 6 times

These numbers are impressive, and seem to suggest that the committee is likely to be placed towards the more open end of the policy community continuum, with relatively low barriers to entry and a relatively large membership. At the very least, it is clear that a large number of organisations have had the opportunity to present their views in the forum of the committee. An impressionistic examination of the list of organisations shows an extremely varied set of organisations, from the largest and most highly organised (such as the ACTU) to the smallest (such as the Tiny Tots Childcare Centre). There are unions, employer groups, church organisations, schools, universities, many local area consultative committees, companies, parents' groups, and more.

Of course, it is likely that these organisations were not equal in their capacity to influence the committee's views, or to influence the outcomes of the inquiries. This paper does not posit—and indeed would oppose—the view that equal appearance before the Committee equates to equal influence. Some witnesses would no doubt have given compelling and convincing evidence, while other evidence may have been less so. But despite this caveat, a vast array of organisations took an opportunity to address the Parliament directly through one of its committees.

It is also useful to recall that this is just one of eight Senate committees. While there would no doubt be overlap between the committees' constituencies, if the other committees match the EWRE Committee's numbers, then a back-of-the-envelope

[14] This number does not include public service policy departments, who are called before the committee as a matter of course, or individuals who appeared in a private capacity. Further, it does not include organisations whose interactions with the Committee were less formal—such as the organisations visited in site visits for *Katu Kalpa*—the inquiry into the effectiveness of education and training programs for Indigenous Australian, and the organisations who participated in small business roundtable meetings for the inquiry into small business employment.

approximation suggests that the number of organisations appearing before Senate committees in this period was in the thousands.

The top performers

Table 2 lists the eleven organisations which appeared before the committee most during the period. Most of the names should come as little surprise, given the areas of policy covered by the committee. The Australian Council of Trade Unions (ACTU) and Australian Manufacturing Workers Union (AMWU) are both large, well-resourced and professional union organisations which are well placed to engage the committee's 'employment and workplace relations' brief. The Australian Chamber of Commerce and Industry (ACCI) and the Australian Industry Group (AIG), as employer and business groups, represent the opposite team to the ACTU and AMWU, and are equally placed to provide evidence on employment and workplace relations issues.

Table 2: The top performers

Organisation	*No. of Appearances*
Australian Council of Trade Unions	11
Australian Chamber of Commerce and Industry	10
National Tertiary Education Union	10
Australian Industry Group	9
Australian Education Union	8
Australian Manufacturing Workers Union	7
Council of Australian Postgraduate Associations	7
Australian Vice-Chancellors Committee	6
Independent Education Union	6
National Union of Students	6
University of Sydney	6

The National Tertiary Education Union (NTEU), Australian Education Union (AEU), and the Independent Education Union (IEU) are uniquely positioned because they have clear interests in both the committee's 'education' and 'employment and workplace relations' briefs.

Three organisations—the Council of Australian Postgraduate Associations (CAPA), the Australian Vice-Chancellor's Committee (AVCC), and the National Union of Students (NUS), have a strong focus on education policy, and the final organisation, Sydney University, has obvious interests in education policy, but has also provided expert advice to the panel on a number of occasions.[15]

Even within this list there is considerable evidence of balance: the list contains union groups and employer groups, student groups (both undergraduate and postgraduate), academic staff unions, and the representatives of education institutions (the AVCC).

[15] Sydney University is, of course, not the only academic institution to have done so, but it is the only one to qualify for the 'top performers' list.

This evidence supports the view that the committee has avoided capture by a single organisation or perspective, and further tends to support the notion, contained in the earlier quotation from *Odgers'*, that the committees can provide 'a forum for all.'[16]

The 'Oncers'

I have indicated that 81 per cent of organisations which appeared before the Committee did so only once. This figure can be analysed to provide interesting clues as to the operations of the committee. Of the 408 organisations who appeared once, 352 (or 86.27 per cent) appeared before the References Committee, and just 56 (13.73 per cent) appeared before the Legislation Committee. This leads to an inference that the References Committee provides more opportunities for organisations which appear infrequently before the EWRE Committee.

Table 3: Appearances, by committee type

No of Appearances	*References*	*Legislation*
1	352 (82.05%)	56 (49.56%)
2–5	66 (15.38%)	46 (40.71%)
More than 6	11 (2.56%)	11 (9.73%)

This is borne out by further analysis. While 82.05 per cent of all organisations appearing before the References Committee were making their only appearance before the EWRE Committee, just under half, or 49.56 per cent of organisations appearing before the Legislation Committee appeared only once. The Legislation Committee relied, for just over half of its witnesses, upon organisations that made more than one appearance before the Committee.

This is a stark and interesting disparity, leading to questions as to why References Committee inquiries provide so many more opportunities for diverse organisations to make their single appearance before the EWRE Committee.

More Time, More Witnesses?

The first reason which may explain the greater reliance on 'oncers' by the References Committee is that it simply has more time. During the period examined, the average length of a References Committee Inquiry was 364 days,[17] almost exactly a year. The shortest of these, the inquiry into the GST and new tax system, lasted 126 days, and the longest, the inquiry into the effectiveness of education and training programs for Indigenous Australians, took just over two years (738 days). The story is quite

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[16] Evans, op. cit.

[17] These numbers, and the equivalent number for the Legislation Committee, represent calendar days between the referral of the inquiry by the Senate, and the date the report was tabled (either in session, or out of session by presenting the report to the President of the Senate). The length of time for the References Committee is overstated slightly because two inquiries were referred before the 1998 election, but tabled after the election. While Senate Committees continue to operate despite the prorogation of Parliament, senators are obviously occupied with campaigning matters.

different for the Legislation Committee. Its average over the period was just 71.1 days, with the longest three inquiries taking 106 days each, and the shortest taking just 22 days.

Legislation committees have a shorter period in which to table reports, dictated by the government's legislative timetable. Legislation committees, as a result, usually only have one day of hearings for each bill, often in Canberra. Reference inquiries usually take the Committee to all states.

It is no surprise, then, to see that the average number of witnesses for each inquiry also shows a marked difference. References inquiries, on average, took evidence from 62.63 organisations, while Legislation inquiries took evidence from, on average, 11.47.

Can this difference be explained away simply on the basis of the time available to the committees? To correct for the length of time available to each committee, the number of organisations appearing before each inquiry was divided by the number of days consumed by the inquiry. The result of this (admittedly crude) calculation was remarkable: References Committee inquiries took evidence from an average of 0.213 organisations per day, and Legislation Committee inquiries took evidence from an average of 0.208.[18] In other words, the rate at which inquiries took evidence from organisations was virtually identical, favouring the References Committee by a slight margin. It does appear, then—slight margins notwithstanding—that the time available to each of the twin committees was the chief factor regulating the number of organisations each could see.

Proportion of 'oncers'

The conclusion that references committees and legislation committees take evidence at the same rate, but have different timeframes, still does not explain the disparity in the proportion of 'oncers' between the committees. Why, for instance, did the smaller number of Legislation Committee timeslots not result in a reduction across the board? There is no inherent reason why a reduction in the number of opportunities to appear before the committee should be felt disproportionately by those organisations with less contact before the committee.

Kate Burton explored some of the reasons why this may be so:

> Most [submissions] are from groups and individuals who are already aware of the existence of the bill or who are contacted by politicians, their staff, or the committee secretariat. Groups and individuals who are known to have an interest in a particular matter are often invited to make a submission … Reliance on these methods, however, contributes to the problem of attracting 'the usual suspects'.[19]

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18 It is interesting to note that had these figures been reported to two decimal places, they would have been identical at 0.21.

19 Burton, op. cit.

Burton identifies narrow advertising as the principal reason why inquiries have failed to attract a more widespread audience. While advertising no doubt has an impact, advertising is another factor which is usually consistent between legislation and references inquiries. References inquiries do not necessarily obtain additional advertising by virtue of their longer timeframes, so there is no immediate reason to conclude that advertising should be the factor differentiating between the two types of inquiry.

Having made this observation, it may be that while advertising penetration rates are similar for references and legislation inquiries, the ability of organisations to *respond* to those advertisements is somewhat less in the tighter timeframes of a legislation inquiry. Constructing a strong submission in a short timeframe would require the dedication of considerable resources, and smaller, less well funded organisations may simply not be able to respond within the required timeframe. Senator Lyn Allison noted that:

> Legislative hearings are very focused and the organisations geared up to make a submission and appear in a very short time frame will usually be professional and well-resourced.[20]

An hypothesis: the usual suspects first?

Another possibility to explain the greater proportion of 'oncers' who appear before the References Committee emerges from the data. It is evident from Table 2 above that there are indeed 'usual suspects' who appear before the Committee regularly on issues where they can provide expertise. It seems reasonable to hypothesise that these organisations are the ones called upon first to appear before the committee. In this way, the Committee can be confident that the hearing is likely to solicit well-informed views from stakeholders who have an understanding of the Senate Committee process, and an understanding of the interests and requirements of the members of the committee.

To continue to hypothesise, one might suggest that once an appropriate number of these organisations have been slated to appear, the balance of the positions are taken by organisations who are either directly affected by the matter at hand, followed by organisations somewhat less affected, who nevertheless make useful and informed written submissions. This suggestion would explain why the References Committee took evidence from so many more 'oncers'—it simply has more available hearing places once the initial places had been taken by the 'usual suspects'.

The data presented in this paper can be interpreted against this hypothesis to suggest that for the Legislation Committee, the available invitations are split almost exactly evenly between 'oncers' and organisations who have an existing relationship with the committee, while in the case of the References Committee, just under a fifth of the invitations were taken up by 'regular' witnesses, with the balance taken up by 'oncers'.

Another comment from Senator Allison is instructive:

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20 Personal communication, 20 June 2003.

> Peak bodies, consumer groups and state governments are usually invited as a matter of course. After that it is important to get witnesses who represent a cross section. Some of the most compelling evidence comes from 'ordinary people' and we probably don't have them appear as often as we should.[21]

An indicative test of this hypothesis can be made by looking at the available data. If the hypothesis holds, then one would expect to see 'usual suspects' appearing in every inquiry. They would not, for instance, be clustered together in some inquiries, leaving others open to the 'oncers.' This does appear to be the case. Of the 27 inquiries considered in this research, no less than 26 included as a witness an organisation which appeared (overall) five times or more. Perhaps even more starkly, at least one of the five most frequent witnesses (ACTU, ACCI, NTEU, AIG and the AEU) appeared in 23 of the 27 inquiries. So, at its first test, this hypothesis appears to have some merit.

At this point, I am beset with a researcher's inevitable impulse to stretch the data too far. While this paper has presented sufficient evidence to allow the above hypotheses to be established and to provide some cautious confidence in its plausibility, there is not yet sufficient data to prove the hypothesis correct. The pattern of appearances before the EWRE Committee, in both its Legislation and References Committee form, is consistent with a process of selecting known, trusted, 'usual suspects' first, then filling the hearing schedule out with other parties who are either directly affected by the matter at hand, or who have provided the committee with an impressive submission. More research, both across other committees and with more direct contact with senators than has proven possible in this case, would provide a more convincing test of the hypothesis advanced in this paper.

Conclusions

A number of key conclusions emerge from this paper. First, it is evident that there *are* 'usual suspects', that is, organisations who regularly appear before the committee, and whose invitation becomes, in Senator Allison's words, 'a matter of course'. However, the second conclusion is that the relationship between these usual suspects and the Committee is far from exclusive, particularly in the case of References Committee inquiries. Paxman's suggestion, noted earlier, that 'the same old paths are being trodden as particular issues regularly arise, with predictable outcomes'[22] does not seem to be supported by this research. The barriers to participation in the inquiry process are not unreasonably high, and any organisation which submits an impressive submission and/or is directly affected by the subject of the inquiry, has a fair chance of appearing as a witness.

Third, it can be concluded that References Committee inquiries are more open to 'oncers'. This is likely to be primarily a result of the longer timeframes available to References Committee inquiries, allowing more organisations to marshal resources to make submissions, and allowing for more hearing days, and therefore more

21 Personal communication, 20 June 2003.

22 Paxman, op cit: 84.

opportunities to appear (once the initial appearances by the relevant ‘usual suspects’ have been scheduled).

The introduction to this paper included the suggestion that Senate Committees ‘provide a means of access for citizens to participate in law making and policy review’. In the period examined, 503 organisations were able to use this ‘means of access’ to present their views to their Parliament. The usual suspects were there, but so were the Disability Advisory Council, Kindergarten Parents Victoria, the Rasmussen State School and the Taxi Drivers Association. And with a touch of altruism, the author considers the Senate was enriched, as much by the latter group of witnesses as by the former.

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'
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