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# Contents

<i>Fitzpatrick and Browne after 60 Years</i> <i>Andrew Moore</i>	1
800th Anniversary of Magna Carta <i>Menna Rawlings</i>	15
Reforming the Public Sector <i>Jane Halton</i>	33
Serving the Senate: The Legacy of Harry Evans <i>Michael Macklin</i>	55
The Parliamentary Budget Office: Supporting Australian Democracy <i>Phil Bowen</i>	73
High Expectations Realities through High Expectations Relationships: Delivering beyond the Indigenous Policy Rhetoric <i>Chris Sarra</i>	91
Representation of Commonwealth Territories in the Senate <i>Michael Sloane</i>	109
The <i>Williams</i> Decisions and the Implications for the Senate and its Scrutiny Committees <i>Patrick Hodder</i>	143

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*Fitzpatrick and Browne after 60 Years*\* | *Andrew Moore*

It has been a big year for anniversaries. Apart from the big one, the centenary of ANZAC and Gallipoli, among them is the 70th anniversary of the end of World War II and related events of 1945, the release of prisoners from German concentration camps, and the Yalta and Potsdam conferences. It is also the centenary of the birth of the great Australian poet, Judith Wright, and in May 2015 there have been events to celebrate her life in Braidwood and Tamborine Mountain.

Most relevant here, however, among the anniversaries of note, is the 800th anniversary of Magna Carta of 1215. As Nick Cowdery, the former New South Wales Director of Public Prosecutions, argued at a recent conference in Sydney, from it we take the rule of law, the separation of powers, the principles of democracy, the presumption of innocence, the onus of proof, trial by jury, access to justice and much more.

Relatedly, it is also sixty years since the privilege case of *Fitzpatrick and Browne* when many of these noble principles were cast aside. In 1955 the working-class south-west Sydney suburb of Bankstown was the centre stage of Australian politics. Bankstown's local affairs were highlighted in all the major newspapers around Australia as well as internationally in papers like the *Manchester Guardian* and the *London Times*.

The issue, a celebrated event in Australian constitutional, political and legal history, involved the gaoling by the Commonwealth Parliament, specifically by the House of Representatives, of two individuals. One was a local Bankstown businessman and newspaper proprietor, Ray Fitzpatrick. The other was the journalist he employed, Frank Browne. Their crime was arcane: contempt of parliament, a crime of which most Australians, let alone Fitzpatrick and Browne, as well as most members of the fourth estate, had not heard.

I want to do three things this afternoon. First, I need to describe the sequence of events for they are not generally well remembered. I also think that understanding the background of events leading up to the privilege case is the key to understanding the privilege case of 1955. Second, I want to examine how the events may be interpreted. Here I propose to follow the historiographical parameters provided by two

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\* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra, on 29 May 2015.

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distinguished servants of this parliament and of democracy, Frank Green, Clerk of the House of the House of Representatives from 1937 to 1955 and Harry Evans, Clerk of the Senate between 1988 and 2009. Finally, I want to conclude with some of the legacies that may be gleaned from *Fitzpatrick and Browne* after 60 years. I note the interesting point that historian David Walker makes that the most important anniversaries in China follow a 60-year cycle, marking the journey to wisdom over a lifetime.<sup>1</sup> What, if anything, after 60 years have we learned from *Fitzpatrick and Browne*?

The beginning of the story, if not its background which I will come to in a minute, was on 28 April 1955 when the *Bankstown Observer*, owned by Ray Fitzpatrick, attacked the local MP in the Commonwealth Parliament, Charlie Morgan. The suggestion was that he (Morgan) had been involved in a series of ‘immigration rackets’. The information came from a leaked security service report. The matter was an historical one. It pertained to events nearly twenty years earlier when Morgan worked as an immigration agent, although the way the article was framed made it seem a current matter.



Charles Morgan, Member for Reid in the House of Representatives, 1940-46 and 1949-58

At this point Charlie Morgan had the option, of course, of pursuing legal action for defamation. Instead he took an unusual course of action. Morgan claimed that he was being intimidated and therefore could not perform his duties as a member of parliament. The implication was that he was being bludgeoned into silence. Seen in that light the matter was capable of being construed as a contempt of parliament. If one parliamentarian could not do his job—to speak his mind without fear or favour—parliament itself was undermined.

Morgan was able to convince first his colleagues in the House Privileges Committee that this was indeed an act of contempt of parliament. Then it went to members of the House of Representatives, who concurred. On 10 June 1955, sometimes known as ‘Black Friday’, the honourable members decided by a margin of 55 to 11 (in the case of Browne) and 55 to 12 in the case of Fitzpatrick to commit the ‘Bankstown Two’ to three months in gaol. Much of their incarceration was served in Goulburn Gaol, admittedly not the grisly high-security penitentiary it has become in more recent years, but certainly the

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<sup>1</sup> David Walker, ‘Know thy neighbour’, *Griffith Review*, no. 48, 2015, p. 195.

coldest gaol in New South Wales and not the most pleasant place to be at the height of winter.

When I tell this story people often wait for some reference to the court process. Perhaps, they assume, I have forgotten to mention what the legal judicial system had to say about the matter. But this had nothing to do with the courts. Instead parliament was judge, jury and prosecutor. It is true that both the High Court of Australia and the Privy Council in London considered the matter. But in dispute in those forums was not the rights and wrongs of the decision to commit, but about the constitutionality of the process. (Section 49 of the Australian Constitution states that the powers and privileges held by the British Parliament in 1901 are replicated in Australia.)

This was the first, the last, and the only time in Australian history this has happened. Clearly it is an issue that relates to political history, legal history and constitutional history.

Less obviously, it was an event to do with Labor history, curiously the residue of the Lang Labor split of 1931, more than the ongoing B.A. Santamaria/Grouper split in the ALP of 1954–55. In his few appearances in the secondary sources, Ray Fitzpatrick is usually described as a Langite, meaning a supporter of the former NSW Premier, J.T. Lang, and his quixotic career as MHR for Reid between 1946 and 1949. Quite possibly it would be more appropriate to describe Jack Lang as a Fitzpatrickite. Ray Fitzpatrick had many do his bidding in a number of jurisdictions. This included state and federal politicians. Lang, the ‘Big Fella’, was one of Ray Fitzpatrick’s envoys in Canberra.

The Fitzpatrick and Browne affair was also a reflection of the local history of the suburb of Bankstown. Indeed I believe that understanding events in Bankstown is the key to understanding the privilege case.

After World War II Bankstown was bursting at the seams. Factories were relocating from the inner city at a great pace. There was massive suburban growth. The municipality’s population increased by 7,000 a year. Bankstown rejoiced in its reputation as the ‘Birmingham of Australia’. It was also known as the ‘wild west’ and ‘another Chicago’. How Bankstown acquired that reputation had a great deal to do with one of the central characters in the privilege case, Raymond Fitzpatrick, known locally, predictably enough, as ‘Fitzie’ and in the media as ‘Mr Big of Bankstown’.

Ray Fitzpatrick was a 1950s underbelly-style gangster. To be fair he did not simply rely on intimidation. There was general respect for a working-class local made good. He was a big employer in the area and not ungenerous to local charities. The basis of

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Fitzpatrick's growing business and property empire, the legitimate part of it anyway, was in construction, sand and gravel, trucks and dozers.

It would take all of my time today to describe Fitzpatrick's many calumnies. Suffice it to say that he was congenitally corrupt, especially as far as Bankstown Council and its contracts were concerned. At least, however, unlike gangsters and the drug barons of the 1960s who used 'shooters' and goons, Fitzie used his own fists, occasionally crowbars; he was his own enforcer. His brothers were also big, rough, hulking men so he did not need hirelings. In any case if there was a lurk or a short cut on offer, a council, a policeman, politician or public official, even a judge, to be bribed, Fitzie was the likely perpetrator.

Leading up to the privilege case Bankstown had become a 'maelstrom of malevolence', an apt description coined by one of my informants, the late C.J. McKenzie who briefly worked for Fitzpatrick on the *Bankstown Observer*. There was a broad fault line in the community related to support or opposition to Ray Fitzpatrick; thus there were the Fitzpatrickites and the anti-Fitzpatrickites.

Ray Fitzpatrick's major opponent, both in this instance, as well as more generally, was Charlie Morgan, MHR for Reid from the 1940s to the late 1950s. Morgan was an excellent local politician but in national politics an inconspicuous figure. Had the privilege case not occurred more than likely he would be totally forgotten. Initially Fitzie and Morgan were mates. Their relations were congenial until World War II when various constituents made Morgan aware of Fitzie's corrupt practices. Fitzie's role in building Bankstown airport was particularly inglorious. Among other things he purloined an aircraft hangar and erected it in central Bankstown to house his trucks. Morgan named Fitzpatrick in the Commonwealth Parliament as a war profiteer and corrupt businessman. Ray Fitzpatrick, unsurprisingly, was outraged. One of his responses was to organise Jack Lang to take the seat off Morgan in 1946. Morgan won the seat back in 1949.

At this stage, in 1949, Morgan and Fitzpatrick seem to have organised a truce but it did not last. It was a long and complicated path to Goulburn Gaol, but suffice it to say that the turning point was the burning down of Bankstown's other newspaper, the eponymous *Bankstown Torch*, owned by the redoubtable Engisch family, on 11 April 1955.

Charlie Morgan fired up, firstly in parliament, accusing Fitzie of instituting a reign of 'terrorism and gangsterism' in Bankstown. Initially he alluded to the sinister role of a certain 'Mr Big' but then named him. The national media began hyperventilating.



Understandably Ray Fitzpatrick was not at all impressed by all this nationwide publicity. Nonetheless, given the allegations that he was a gangster, even an unsophisticated Bankstown businessman could work out it was inappropriate to work over the local parliamentarian with a tyre lever.

Instead, Fitzie's response was to engage the services of Frank Browne, a hard-bitten, hard-drinking journalist of far right-wing persuasion to write for the *Bankstown Observer*. Fitzie wanted, he told Browne, to 'get stuck into' Morgan.

Browne was best known for his scandal sheet *Things I Hear* which regularly defamed parliamentarians on all sides of the house. According to ASIO, Browne also used *Things I Hear* as an instrument of blackmail. Frank Browne was a ratbag of the highest order. He was violent and mentally unbalanced. Emerging from gaol in 1955 he apparently suffered from the delusion that he was Adolf Hitler after the Munich beer hall putsch and set about organising a neo-Nazi political party, the Australian Party, with predictably desultory results.

So on 28 April 1955 the *Bankstown Observer* published the article written hastily by Browne referring to the series of so-called 'immigration rackets' Morgan had been involved with in 1939. The two three-month gaol sentences for contempt of parliament were the result.

Despite its singular character, the *Fitzpatrick and Browne* privilege case of 1955 remains poorly understood and remembered. Amnesia is a common malaise in Australia. Perhaps because other events of the Cold War—the Petrov espionage drama and the split in the ALP—seem more compelling, most general histories of Australia pass it by. John Howard's account of his mentor, R.G. Menzies and his era, is only the most recent work that fails to mention the matter. Though there is now a full-length monograph published on the privilege case—my own *Mr Big of Bankstown: The Scandalous Fitzpatrick and Browne Affair*, and this was widely reviewed—what it really needs is another *Underbelly*-style television mini-series to break through the forgetfulness and the amnesia. (And indeed the story has all the ingredients for a gripping drama!)

For the most part the parameters of the debate about *Fitzpatrick and Browne* are still those articulated by Harry Evans on the one hand and Frank Green on the other. Harry Evans is right. This was a case of contempt, a little-known aspect of parliamentary procedure and a sanction dating back to the origins of representative government in England and the Bill of Rights of 1689. Article 9 of the Bill of Rights forms the basis of the principle of modern parliamentary privilege. Specifically, it declared that freedom of speech in parliament 'ought not to be impeached or questioned in any

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court or place out of Parliament'. Such sentiments were reflected in the speech Prime Minister Menzies made after the House had decided to imprison Fitzpatrick and Browne. Menzies argued that parliament was 'the flower of Australian democracy, and the degree to which this House preserves the freedom of its members to speak and to think will be the measure of its service to democracy'.<sup>2</sup> These are noble sentiments, but was Menzies being sincere?

For many years the received view of *Fitzpatrick and Browne*, oft repeated in various newspaper articles, is that advanced by Frank Green as part of his 1969 memoirs. This built on the contemporary advice the highly experienced parliamentary officer provided to the Committee of Privileges at the time that no infringement of privilege—or contempt—had taken place. The veteran Clerk of the House, however, was no fan of Prime Minister Menzies and this shaped his view of the privilege case. So did his disillusionment with the parliamentary process, in particular the growth of the power of the executive under Menzies. For Green, *Fitzpatrick and Browne* was the bitter end. Green now saw himself as 'a failure and Parliament as something meaningless, just a "front" for the dead democracy'.<sup>3</sup> After eighteen years of dedicated service, Green left parliament a week after the committal of Fitzpatrick and Browne. A valedictory dinner was held on 17 June 1955. One of the entrées on the menu was 'Fitzpatrick Fruit Cocktail'.

Fourteen years later Green's anger had hardly abated, when, in retirement in Tasmania, he contemplated the events of 1955. Green makes it clear that these 'disgraceful proceedings' progressed to their unfortunate conclusion without his approval and against his specific advice. Green explains that he was puzzled by the lack of attention paid to his official advice arguing that no infringement of parliamentary privilege had taken place. All became clear when 'two senior men' in the press gallery alerted him to a particular article Browne had written about Menzies in *Things I Hear* three months before the privilege case.<sup>4</sup>

This pertained to a raw spot from the prime minister's past. Hitherto an enthusiastic member of the Melbourne University Rifles, Menzies displayed a lack of military resolve in 1914 and had not enlisted. This was the issue Earle Page famously had used against Menzies in 1939. Frank Browne joined a significant queue of critics imputing that Menzies was a coward.

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<sup>2</sup> *House of Representatives Hansard*, 10 June 1955, p. 1628.

<sup>3</sup> Frank C. Green, *Servant of the House*, Heinemann, Melbourne, 1969, p. 163.

<sup>4</sup> *ibid.*, pp. 157, 159.

When confronted with this intelligence, Green, as he put it, ‘saw the light—Menzies was after revenge’.<sup>5</sup> In Green’s view Menzies and other politicians, including the then Deputy Leader of the Opposition, Arthur Calwell, were motivated by personal animus against Frank Browne. Seen in this way the primary target was Browne such that, to use a modern term, Ray Fitzpatrick’s gaoling was no more than ‘collateral damage’.

Harry Evans disputes Green’s interpretation of events with force and forensic precision. In a scholarly article published in 2003 and included in his writings on the parliamentary web site, Evans characterises Green’s account as unreliable and ‘confused comment’. Indeed Evans laments the fact that Green’s account ‘has unfortunately achieved the status of gospel on the affair’. According to Evans, Green had confused the issue of a ‘breach of privilege’ with ‘contempt of Parliament’. Evans is particularly disparaging of Green’s assessment that Prime Minister Menzies had been influenced by a desire to exact revenge against Browne. ‘That allegation’, Evans writes, ‘follows a long tradition of attributing the worst imaginable motives to Australian politicians’.<sup>6</sup>

Far less aggrieved about the civil liberties implications of the Fitzpatrick and Browne affair than Green, Evans invites his readers to consider the possibility that the Privileges Committee and the parliament correctly understood the nature of parliamentary privilege. Both Menzies and the Leader of the Opposition, Dr H.V. Evatt, Evans argues, were ‘eminent constitutionalists’. By inference, Evans suggests, they were above such shallow and mendacious motives as exacting revenge, too principled to have gaoled two individuals for reasons of personal malice. In Harry Evans’ view, Green denigrates the sincerity with which Menzies and his parliamentary colleagues genuinely believed that the sanctity of parliament was under attack. There were no ulterior motives. This was a clear-cut case of contempt of parliament, the terms of which, in Evans’ estimation, the Privileges Committee and the House correctly understood. Fitzpatrick and Browne got what they deserved. Who then is right? Evans or Green?

Notwithstanding the veracity of many of Harry Evans’ arguments, it is difficult to discount the possibility that revenge played a role in the proceedings. By the same token Frank Green’s version of events is unlikely. It seems highly improbable that one article alone drove Prime Minister Menzies. He was not that thin-skinned. More likely it was the long-term animosity between Browne and Menzies which underpinned the gaolings. They were old sparring partners and even rivals dating back to the days of the establishment of the Liberal Party in the 1940s.

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<sup>5</sup> *ibid.*, p. 158.

<sup>6</sup> Harry Evans, ‘Fitzpatrick and Browne: imprisonment by a house of the parliament’, *Papers on Parliament*, no. 52, December 2009, pp. 136–7.

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Nonetheless, the view that parliament's actions were shaped by malice against Frank Browne (and Fitzpatrick for that matter) is supported by a significant body of primary evidence. This is the forty-odd pages of Hansard reporting various honourable members' contributions to the debate to gaol or fine them. In large part these speeches make alarming reading and fail to vindicate Menzies' subsequent recollection of the parliamentary debate deciding Fitzpatrick and Browne's fate as being 'conducted for the most part, with one or two exceptions, on a remarkably high level'.<sup>7</sup>

If this were true, Harry Evans may well be right. On the contrary, however, and with some notable exceptions, the contributors to the debate paid scant attention to H.V. Evatt's exhortation that they should proceed 'judicially'<sup>8</sup>, presumably meaning impartially. The notion that members were protecting the integrity and reputation of parliament was lost repeatedly.

There was a bipartisan, unseemly enthusiasm for revenge. The whole matter proceeded with indecent haste. Fitzpatrick and Browne were accused, tried and sentenced by their victims in an atmosphere of hatred. As journalist Alan Reid later remembered, 'You could feel the waves of hate going out from the Parliament to Brownie standing at the Bar of the House'.<sup>9</sup> Nor did the Speaker of the House, the redoubtable A.G. Cameron, help. Fred Daly's suggestion that he looked and behaved like Hanging Judge Jeffreys was far from flippant.<sup>10</sup>

Finally, we also have to ask the question whether Morgan was ever genuinely intimidated, whether or not he sincerely perceived himself to be silenced? It is doubtful whether he did. A wily local politician, Charlie Morgan had been involved in internecine feuding with Ray Fitzpatrick for eleven years. The 'Mr Big of Bankstown' had done his best to end Morgan's career in the 1946 elections when, as campaign manager for the Jack Lang, he contrived to publish a damaging smear sheet raising the 'immigration rackets' allegations.

These were not merely similar allegations; they were precisely the same ones, derived from the same purloined security service report that was later recycled in the *Bankstown Observer* in 1955. Jack Lang, too, had repeated the allegations against Morgan from the safety of parliamentary privilege during his term in parliament as MHR for Reid. By 1955 there can have been few electors in Bankstown who were not

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<sup>7</sup> Sir Robert Menzies, *Afternoon Light: Some Memories of Men and Events*, Cassell, Melbourne, 1967, p. 302.

<sup>8</sup> *House of Representatives Hansard*, 10 June 1955, p. 1630.

<sup>9</sup> Alan Reid, oral history recording (National Library of Australia) quoted in C.J. Lloyd, *Parliament and the Press: The Federal Parliamentary Press Gallery 1901-88*, Melbourne University Press, Carlton, Vic., 1988, p. 201.

<sup>10</sup> *Sun*, 14 May 1976.

apprised of the ancient charges against their generally popular local member. As Fitzpatrick colourfully put it, in Bankstown ‘the dogs are barking it’.<sup>11</sup>

Employing the contempt machinery against Fitzpatrick was simply a final throw of the dice to deal with a local rival. More than likely the tactic occurred to Morgan in 1954 when he became a member of the House Committee of Privileges and sat in adjudication of other cases, including one, ironically, involving Jack Lang. Certainly Morgan had reasons to be wary of Ray Fitzpatrick. Reputedly in the lead up to the privilege case he increased his household insurance and took precautions to ensure his family’s safety. In reality, however, having ‘Mr Big of Bankstown’ put away for three months really only increased the likelihood of a late night visit from the aggrieved Bankstown businessman and one or more of his brothers.

In conclusion Harry Evans, in my view, takes too much of Morgan’s case at face value and does not say or know enough about the background. Because Charlie Morgan’s freedom of speech was not genuinely being attacked, neither was parliament’s and therefore this was not a genuine contempt of parliament. Frank Green is also wide of the mark. While there was a strong element of revenge, primarily the privilege case of 1955 concerned Charlie Morgan exacting retribution against Ray Fitzpatrick rather than Menzies (and Calwell et al) against Frank Browne.



The fault lines between Frank Green’s sense of moral outrage and Harry Evans’ view that this was a genuine contempt of parliament continue to shape contemporary understandings of the privilege case. Ward O’Neill’s 2000 cartoon features Menzies lassoing Frank Browne. Noteworthy are the gallows in the background and the bar of the House of Representatives in front of Browne, from which the journalist had delivered an impressive speech in his defence, invoking, among other things, Magna Carta.

Ward O’Neill cartoon of Prime Minister R.G. Menzies lassoing journalist Frank Browne, 7 July 2000. National Library of Australia vn3582577. Reproduced courtesy of Ward O’Neill.

<sup>11</sup> Les Haylen, *Twenty Years Hard Labor*, Macmillan, Melbourne, 1969, p. 158.

Harry Evans, on the other hand, would have approved of the version of history of *Fitzpatrick and Browne* featured in an exhibition in Old Parliament House in 2006. Perhaps he had something to do with commissioning it? In any case, to a group of



Display panel at a 2006 exhibition at the Museum of Australian Democracy, Old Parliament House. Image courtesy of Andrew Moore

attentive school children an avuncular Menzies revisits his rationale for the privilege case, deemed, for the purposes of the exhibition, to be the major statement of the entire year of 1955. The image was not contextualised but featured part of his ‘flower of democracy’ speech. Menzies’ justification for the events of 10 June 1955 is a reminder that as well as good intentions the road to hell is paved with noble sentiments.

If nothing else *Fitzpatrick and Browne* has inspired some excellent turns of phrase. Of the gaolings of the Bankstown Two, Gavin Souter suggested in his history of the Commonwealth Parliament that it ‘was rather as if the House had been annoyed by two blow-flies, and used its new Mace to swat them’.<sup>12</sup> Or as Enid Campbell, the Australian expert in the area of parliamentary privilege, suggests in a

splendidly understated way, ‘the adjudication of parliamentary contempt cases leaves a great deal to be desired’, not least because, as happened in relation to Fitzpatrick and Browne, the ‘judges’ were ‘judges in their own cause’.<sup>13</sup>

Sixty years later *Fitzpatrick and Browne* remains of ongoing significance for those who care about civil liberties and free speech. It bears upon fundamental principles in a democracy, including the role of the executive branch of government, the importance of the rule of law and the separation of powers.

Menzies’ promise in 1955 to revisit and regularise the principles of parliamentary privilege was never delivered upon. In 1987 some ground was made in terms allowing more scope for judicial intervention to decide whether an offender’s behaviour constituted contempt, though the penalty was increased from three to six months gaol.

<sup>12</sup> Gavin Souter, *Acts of Parliament: A Narrative History of the Senate and House of Representatives, Commonwealth of Australia*, Melbourne University Press, Carlton, Vic., 1989, p. 431.

<sup>13</sup> Enid Campbell, *Parliamentary Privilege*, Federation Press, Sydney, 2003.

Even if the prospects for an encore performance of *Fitzpatrick and Browne* seem slim, as was suggested more than once in 1955, there is a need for a bill of rights to give legal effect to our basic freedoms for the first time.



**Question** — Can I just clarify something: did you say that there is a gaol built in this current Parliament House to house people and, if so, that it was built 30 years after this case and people had had plenty of time to digest it? Could you provide some context for that?

**Rosemary Laing** — I will offer to take that one. It's possibly one of the big urban myths about this building. It was at one stage thought that there should be provision for holding cells in this building. You may even find plans with those areas marked, but they were never built, never proceeded with. I think they became electrical substations down in the bowels of the building. So it's a great story; unfortunately it did not proceed into bricks and mortar.

**Question** — Could you please tell me what the reaction of B.A. Santamaria was to the setting up of the neo-Nazi party by Browne?

**Andrew Moore** — Well, not in any great detail, no. One of Frank Browne's many gigs was to write an awful lot for Santamaria and for grouper publications. I think Frank Browne might have some claim to being one of the most interesting personalities of Australian history. He was a prolific journalist. He wrote for the groupers—not under his own name; he was just a wordsmith. He wrote for the People's Union, an anti-communist group of that period. He wrote television reviews. He could never stop writing. He wasn't ultimately a great fan of Santamaria. I think he made some denigratory remark about how they had a very short life expectancy, but he did write for the movement. I don't know what Santamaria thought about that. He did work for the groupers, but then again he worked for almost everybody else as well. I think he might have written for most newspapers at some stage!

**Question** — My understanding is that after the event, most of the parliamentarians said something like 'never again'.

**Andrew Moore** — Yes they did, and so did the press. I don't think there was ever a great determination that it would never happen again from parliamentarians concerned. One of the principles that's lying in the background here is the police 'You

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was overdue, gov' principle. That is to say it was widely assumed, for instance, that Frank Browne would end up in gaol for something that related to his work. So when it became a question of 'Okay, is it right to send this ratbag to gaol?', that tended to discourage a great deal of thought. I think it's quite an ignominious affair by many parliamentarians, with one exception. One of those articles there is about Allan Fraser—but that's not in the book or anywhere written; the book ended up being much shorter than what I hoped it would be—who was a parliamentarian who actually campaigned extraordinarily on civil liberties grounds against this ever happening again and nearly got chucked out of the Labor Party as a result of it. But most parliamentarians simply moved on to other things.

One of the things I should point out is that it happened on a Friday afternoon and, as the numbers would suggest, there was only a third of parliament actually there. They had all gone home. It was a day that was added to the parliamentary sitting and most parliamentarians had gone home on the Thursday, as parliamentarians do. So, again, there were not that many parliamentarians there.

I would say one of the reasons it has never happened again is there was an absolutely almighty barrage from the media and journalists, who had of course a vested interest, but nonetheless an appropriate vested interest, in that they thought, 'Well, where does freedom of expression stand? Where does freedom of the press stand if these people have been sent to gaol?' So there was an extraordinary campaign on those grounds. But I think most parliamentarians, apart from Fitzie's mates, and Les Haylen was one of them, were probably pretty comfortable with what had happened.

**Rosemary Laing** — Can I add something to that, Andrew. I think today it would be unthinkable in either house for a penalty of imprisonment to be imposed on someone who was found guilty of contempt. Andrew, you mentioned the 1987 legislation and I want to be a pedant here. It wasn't Hawke Government legislation. It was actually introduced by the then President of the Senate; it was a private senator's bill. It was a parliamentary initiative and it became the *Parliamentary Privileges Act 1987* and that Act did a number of things. It did have a direct link back to the *Fitzpatrick and Browne* case because when Browne and Fitzpatrick applied for writs of habeas corpus the High Court heard the matter and decided that they respected the law of parliamentary privilege and the right of a house of parliament to run its own affairs and protect its own patch, as contempt of court protects the patch of the courts. The High Court said, 'We won't look behind the warrant of the Speaker committing these men to prison,' and the warrant of the Speaker simply said that they had been found guilty of contempt and were committed. So what the 1987 Act did was to say that where a presiding officer issues a warrant to commit people to prison for contempt, the warrant will specify what the contempt was and that will then allow the courts to



come in and review that, whereas the courts didn't really have any say in this matter because it was entirely a parliamentary question of protecting its own powers and immunities. So that was a little footnote, but I think such a penalty today would be unthinkable.

**Question** — What happened to Fitzpatrick after he left prison? And did he remain a force in Bankstown and for how long?

**Andrew Moore** — That's a good question. He didn't live that long. He was a heavy drinker already and gaol did not help that. Indeed, interestingly, you could apparently get a bottle of whiskey a day in the Canberra police station lockup with no problem at all, so he drank that. He was never going to live to a ripe old age. I think actually he transformed himself to a degree. As far as I can gather, he made a huge amount of money out of property investment, and still to the present day there is money to be made in property investment that is partly to do with Ray Fitzpatrick's legacy. But he, I think, became more straight than not, and indeed his problem in the future was trying to get Bankstown Council, for instance, to have any dealings with him. Rather than actually being partial towards him, they would see the words 'Ray Fitzpatrick' and assume it would be a bad idea to have a business relationship with Ray. But he then went on and made squillions out of legitimate business. He built a very lucrative farm and, as I said, property empire. He kept going with what he was doing. He probably made more money out of straight—well, what I take to be straight—business than he did out of being a shonk.

**Question** — Just a follow-up: what happened to Browne afterwards?

**Andrew Moore** — Well, he started Australia's first neo-Nazi party and that didn't go down very well. He had a few supporters. He had a very colourful career afterwards. For instance, one of the colourful bits is that he goes off to fight in Rhodesia for white minority rule there in 1977. He is 62. I always think, 'That's my age and I wouldn't care to be off fighting or doing anything in Rhodesia at that age'. He came back and was associated in the late 1970s with various neo-Nazi right-wing groups, nationalist groups, in Sydney, who were very pleased to get him because he was a major figurehead for the right. But he also had this strange other life. He could run perfectly legitimate businesses as a journalist and he continued to run *Things I Hear*, which Sir John Gorton later called 'Things I Smear', but it was a pretty good journal of record, and he could also conduct business deals. Then again, as I said, he had this other strange career as a nutter, a real right-wing ratbag, and I only really got interested in him because I'm interested in right-wing ratbags. But he then dies and, if you want some sense of schadenfreude, he dies totally alone in a squalid little flat in Kings Cross having drunk himself to death. So that was the end of him.

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**Question** — Is a proportion of our perception of these events formed by contemporary journalists being outraged by another contemporary journalist being victimised?

**Andrew Moore** — I would say so, yes. When you read the newspapers of the time, I think it is one of the few issues where the *Tribune*, the far left of politics, agreed with the far right or the conservative end of politics with the *Herald* and *The Argus* and *The Age*. I mean there can't have been more universal opposition to this. I think the only person who thought that it was a good idea was Francis James. The rest of the press was very strongly against the whole issue. Is it an enduring impression? It probably is. They are all preserved in the National Archives too, of course, so you don't even have to do anything terribly adventurous to read a series of the newspapers. It was a major mobilisation against that act and it probably was another reason why it has never happened again.

I don't know about you but, in terms of imputing violence, when Alan Jones had that incident talking about Julia and the chaff bag and throwing her into the sea, I thought that was contempt, if you like. I mean that's contempt but is it a contempt of parliament? Probably not. Journalists, however, say whatever they want. As Allan Fraser pointed out, if the same rule applied, every journalist in the country had defamed the Chifley Government, so how come they didn't end up in gaol?

Another thing I would say about it is that it is also about power and influence because it is significant that it was not a Fairfax or a Murdoch or a Packer that was put in gaol, but it was the editor of the *Bankstown Observer*. That is, this is a relatively small inconsequential villain who is the editor of a relatively small and inconsequential newspaper, and I think that's another dimension to this. Arguably it wouldn't have happened if it had been Sir Warwick Fairfax. I don't think he would have done time in gaol. He would have had plenty of clever lawyers anyway to have got him out of it, but it is about that dimension as well I think.

**Rosemary Laing** — Interestingly, the 1987 Act abolished the contempt of defamation. So in a nice prefiguring of the discovery in the Constitution of an implied guarantee of freedom of political communication, the Parliamentary Privileges Act abolished that kind of conduct as a contempt. So there were no longer any of these contempt cases involving a naughty journalist saying something horrid about a member of parliament.

The history of Magna Carta is an epic one, spanning as it does 800 years and being concerned with a great many lofty ideals about justice, freedom and the rule of law. But, at heart, it is also a great story.

So I would like to begin my speech today by telling that tale, complete with its cast of colourful but, generally speaking, pretty nasty characters. Then I will have a go at explaining how Magna Carta made the leap from English legal history to internationally recognised symbol of liberty and what that means for us today. Then, if I could be so bold, I would like to end by laying out briefly what a Magna Carta for the twenty-first century might look like.

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When the curtain lifts on Act 1 of our story we find ourselves in England in the year 1215—a country wracked by civil war. On one side, the grasping King John seeks to bring his rebellious barons to heel. The barons, tired of the king’s continuous efforts to raise taxes by picking their pockets, seek to curb his powers.

The stage for this opening scene is an unassuming one—a place called Runnymede, not much more than a meadow next to a bend in the River Thames. In 1215, there was no particular significance to this location; it just happened to be far enough away from the barons’ base of the City of London and not too close to the king’s fortress of Windsor Castle. It is still there, of course, though the surrounding area is a little bit more developed these days. If you have flown in or out of London’s Heathrow airport, you have probably passed over the very spot where this momentous piece of history occurred.

King John and the barons had met there to thrash out the terms of a peace deal that would end the civil war, and in doing so, almost by accident, they would sketch out the framework of what we now call the ‘rule of law’.

The cast of our play are a fairly gruesome bunch. King John, as anyone who has seen any film or television version of *Robin Hood* will know, was a nasty piece of work—and if anything the scriptwriters of modern times may have been rather generous. The

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\* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra, on 19 June 2015.

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barons who opposed him were certainly not interested in establishing a fundamental system of rights for the common man. They were concerned only for their own rights. Their talk of the rights of free-born Englishmen was only meant to refer to themselves and others of their class, not common folk.

Despite a great deal of bad blood and very little in the way of mutual trust, the two sides were able to come to an agreement of sorts—essentially a set of rules that laid out for the first time how the king should govern the country. The sixty-three clauses that make up what we now call Magna Carta were copied out on parchment—the treated skins of sheep. Of the four surviving copies of the 1215 Magna Carta each is a different size and shape, according to the dimensions of the piece of parchment it was written on, but the words are essentially identical.

So what do those words say and, perhaps more importantly, what do they really mean?

It is a bit of a hotchpotch of a document really. Unsurprisingly, there is a lot about taxation of various kinds as this was, in large part, what the war had been about. There is also much attention paid to inheritance, dowries for widows and the like—all of which were of great importance to the aristocracy back then but of much less relevance today.

The interests of the merchants and guilds in the City of London—who had thrown their lot in with the rebels—are reflected in some very practical stuff about weights and measures and freedoms for traders to move about the country unobstructed by fish weirs—clearly a big thing in 1215 but of less obvious relevance now.

As an aside, I am reliably informed that the fish weir clause gave rise to a public right of fishing, which was believed to have transferred over to Australia. Indeed, Magna Carta was cited as recently as 2010 in a submission to the New South Wales upper house by the Canberra Fisherman's Club. That suggests that the clause has survived the test of time rather better than many others. It also suggests that picking a legal argument with the Canberra Fisherman's Club would be a really bad idea.

But we must return to the matters at hand in 1215. Magna Carta also outlines some important and very practical reforms to the administration of justice and local government—petitioners for the king's justice no longer needed to follow his court around the country, for example.

But tucked away in all this talk of the machinery of medieval government is one particular sentence which elevates Magna Carta from a moderately interesting

historical document to the foundation of the rule of law and, in later centuries, the inspiration behind our system of democracy and belief in human rights.

This sentence is usually known as clause 39 from its place in the original text:

No free man is to be arrested, or imprisoned, or disseized, or outlawed, or exiled, or in any other way ruined, nor will we go or send against him, except by the legal judgment of his peers or by the law of the land.

This clause is considered to be of such fundamental importance to our system of law that it remains part of the English legal code today.

The next clause adds:

To no one will we sell, to no one will we deny or delay, right or justice.

There are other clauses in Magna Carta which still have resonance but, for me, these two sentences are why this 800-year-old piece of parchment still matters today.

These statements changed something fundamental about the relationship between a people and the government—in this case a king—that ruled them. The power of that government was no longer absolute. A crucial principle had been established: that no man was above the law, not even the king.

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The fact that 800 years later I am standing in a parliament on the other side of world talking about Magna Carta suggests strongly that—in the long run, at least—it has proved to be a success.

But it did not get off to a great start—the peace that it was supposed to guarantee lasted just a few weeks. King John himself only lasted another 16 months before dying, most likely of dysentery, while on campaign with his army. He was not much lamented—the chronicler Matthew Paris, writing some 40 years later, noted that ‘Foul as it is, Hell itself is made fouler by the presence of John’. As you can tell, John had made a lasting impression on his subjects—and it was not a good one.

For the purposes of our story though, John’s death was crucial. It brought his nine-year-old son Henry III to the throne and the boy king’s advisers needed a way to bolster his legitimacy as ruler and rally more allies to the king’s side. So they reissued Magna Carta, first in 1216 and then again the next year. Over time, this began to have

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the desired effect—in fact it proved to be such a successful tactic that the king was to reissue or restate his commitment to Magna Carta every five years or so on average throughout his long reign, which lasted until 1272.

His son, Edward I, continued the tradition, issuing what is usually considered to be the definitive version of Magna Carta in 1297. It is a copy of that document that is kept here in Parliament House—but more about that later.

The repeated publication of Magna Carta throughout the thirteenth century is a useful lesson for all of us involved in the public discussion of government policy—it is not enough to just say something once, however important it is. You have to keep saying it again and again until as many people as possible get the message.

This remains as true today as it was 800 years ago. Indeed, Alastair Campbell, Director of Communications under Prime Minister Tony Blair, used to say that it is only when you feel physically sick of hearing the same old message that other people are just about getting it.

Each time Magna Carta was reissued or reaffirmed, the document had to be diligently and carefully copied out by hand an estimated 50 times so it could be distributed around the country. So maybe we should save our sympathy for the aching fingers of the poor scribes charged with this painfully tedious task.

But it was thanks to this regular reissuing and reaffirming of Magna Carta—and a lot of hard work by the royal scribes—that by the start of the fourteenth century the process of getting that message across was essentially complete. Magna Carta had cemented its place as the bedrock of English law. And with that, the first act of our story draws to a close.

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The second part of the Magna Carta story concerns how a set of rules designed to constrain a medieval English king took on a much greater significance and in doing so leapt oceans, helped give birth to new nations and made its way here, to the very parliament in which we sit.

Between Acts 1 and 2 of our story we must take a short interlude—of about 300 years—and pick up the plot again in the early part of the seventeenth century.

The political situation at the time might have been familiar to our cast of characters from 1215, though the fashions had moved on a bit. England again faced tensions

between a king, Charles I, who was perceived to be behaving in a tyrannical manner, and the governing class—who were no longer barons but members of parliament. As in the thirteenth century money, or rather the lack of it, was the cause of much of this tension. The king needed money but could only raise it with the support of parliament; they were unwilling to provide it without conditions.

These tensions would eventually lead to a terrible series of civil wars that would see the British Isles devastated, the king deposed and eventually executed. But that is certainly a topic for another lecture—and another lecturer. What makes it part of today's story is that the legal and philosophical opposition to the Stuart kings was, at least in part, based on Magna Carta.

Of course, Magna Carta was even then a 400-year-old document so proponents such as Chief Justice Sir Edward Coke and the Leveller 'Freeborn John' Lilburne, interpreted it in a new light, one that better reflected the political considerations of their day. But rooting their new ideas on the foundations of the ancient liberties established by Magna Carta gave them greater legitimacy and more persuasive power.

And here is where our tale takes an international turn. At the same time as Magna Carta was once again being cited as a touchstone for individual freedoms, many people were leaving the British Isles for America. Many of those were fleeing political and religious persecution and it is easy to see why a 'great charter' guaranteeing ancient rights might have had enormous appeal to them as they began a new life in the 'New World'.

Thus it was ideas stemming from Magna Carta that in the next century would be expressed first as 'no taxation without representation' and would then find form in the United States 1776 Declaration of Independence. Some of the language in the Declaration, and even more notably in the Bill of Rights that followed twenty or so years later, is unmistakably similar to that of Magna Carta. Perhaps then it is not surprising that the charter's image is proudly displayed on the doors of the US Supreme Court. Slightly more surprising is that the Magna Carta Memorial at Runnymede—inscribed with the words 'To commemorate Magna Carta, symbol of Freedom Under Law'—was paid for by the American Bar Association.

Having influenced the founding fathers of the United States of America, Magna Carta would continue to inspire others charged with drafting the constitutions of new or newly independent nations. Its distinctive style can be found in the constitutions of Australia, Canada, India and many other Commonwealth countries.

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Given the historical connections between these countries and the UK—the ‘home’ of Magna Carta—perhaps we should not be too surprised at that. But the influence of this 800-year-old piece of sheepskin has grown far beyond the Anglosphere and the Commonwealth.

In 1948, as Eleanor Roosevelt was chairing the committee charged with drafting the Universal Declaration of Human Rights she described it as ‘the international Magna Carta of all men everywhere’.<sup>1</sup> And the influence of the original is clear to see in the final version of her committee’s work.

A more recent example of Magna Carta’s influence can be found in the Charter of the Commonwealth, which was only adopted in December 2012. It is worth noting too, that the countries of the Commonwealth clearly see the continued relevance of a written charter of rights, responsibilities and values in the twenty-first century. That is something that I hope to build on in the final part of my talk today.

Having noted Magna Carta’s influence on Australia’s Constitution I do not intend to try and discuss it—in this 800th anniversary year there will be plenty of opportunities to hear other, far better qualified speakers on that topic. In fact, an earlier Senate Occasional Lecture by Harry Evans, from way back in 1997, covered this ground brilliantly.

But it would be remiss of me not to note that Canberra is one of only two cities outside the United Kingdom to play host to a copy of Magna Carta. The other is Washington DC and they only unveiled theirs as recently as 2008, nearly 50 years after Canberra’s was first put on display.

The story of how Australia’s Magna Carta came to take up residence in this building is a fascinating one, with its own cast of quirky characters and plot twists aplenty. I am sure I will not be able to do it justice so I will only recommend that you seek out a copy of Professor Nicholas Vincent’s essay on the subject. Helpfully, it has just been republished by the Department of the Senate, in an excellent book alongside many other great essays on Australia’s Magna Carta, including the one by Harry Evans that I just mentioned, and a particularly fascinating one by Rosemary Laing.

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<sup>1</sup> Eleanor Roosevelt, ‘Statement to the United Nations’ General Assembly on the Universal Declaration of Human Rights’, 9 December 1948, The Eleanor Roosevelt Papers Project, [https://www.gwu.edu/~erpapers/documents/displaydoc.cfm?\\_t=speeches&\\_docid=spc057137](https://www.gwu.edu/~erpapers/documents/displaydoc.cfm?_t=speeches&_docid=spc057137).



We have now told the story of how Magna Carta came into being and how its influence has spread and grown right up until the present day. But what of the future? And why is it that people like myself, representing the British Government, still feel that it has more to give to the world?

Certainly, one part of the answer to that last question is that Magna Carta is a topic close to the heart of our Foreign Secretary Philip Hammond, and not just because he represents the constituency of Runnymede and Weybridge in our own House of Commons. It is because the rule of law is still the crucial, necessary element that provides the foundations for a successful society.

In a speech given by our Foreign Secretary in London earlier this year, he said:

The foreign policy of a democratic nation must have a single, unifying goal: the relentless pursuit of the long-term enlightened national interest—that is, the interests of its citizens, present and future.

But that is not to suggest that the projection of our values is relegated to the margins of foreign policy making. On the contrary, the rule of law, good governance, and the accountability that rests on equality before the law and freedom of speech ... these are the building blocks of successful societies and the very expression of our national self-interest.

And since successful societies are the building blocks of the global security and prosperity to which our nation aspires, so the rule of law, good governance, and accountability are fundamental enablers of our own national security and prosperity objectives.<sup>2</sup>

I think this expresses most clearly why, while the parchment that Magna Carta was written on may have aged, the concept of the rule of law that first found expression in its words has not. And it is my firm belief that it will not lose its significance any time soon.

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Having completed the second part of our story, we now move on to the third and final act, in which the narrator—that's me—muses on the significance of it all and, perhaps unwisely, attempts to draw some conclusions.

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<sup>2</sup> Rt Hon. Philip Hammond, Speech delivered at Magna Carta 800th Anniversary Dinner, The Guildhall, City of London Corporation, 12 January 2015.

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In the run-up to this, the 800th anniversary of the sealing of Magna Carta, I have been thinking about what a Magna Carta for the twenty-first century might look like.

Firstly, a disclaimer. This is not the work of a high-level committee of the finest minds in Great Britain, it is not necessarily the official policy of the British Government and it is neither fully formed nor definitive. It does, however, reflect some of the experiences I have had in 25 years of criss-crossing the globe as a British diplomat. And, more importantly perhaps, it has been informed by the aspirations I have for the world that my three children will grow up in.

You will be relieved to know that I think I can express it in six clauses rather than 63. It is not in Latin. And it will be reproduced on my blog and Twitter account rather than sheep's parchment.

### **Clause 1: Equal rights for all**

No one should be discriminated against on the basis of gender, race or sexuality. Just taking my own organisation as an example, it used to be the case that female diplomats had to resign from the Diplomatic Service when they married—shockingly, that rule persisted until the 1970s. And we refused to admit homosexual staff into the Foreign Office until 1991, two years after I had joined the organisation. We have come a long way on this in recent years, with around 40 female Heads of Mission around the world and a growing number of ambassadors who are from minority groups or who are openly gay.

But there is still plenty more that we can do in the Foreign Office and across our societies to reach the stage where men and women of all backgrounds have equality of opportunity—and equal pay. The gender pay gap in both Australia and the UK is surprisingly large, and in fact growing—reaching 18.8 per cent in Australia and 19.7 per cent in the UK in 2014. So my twenty-first century Magna Carta would address this issue head-on, reflecting the changes in our society over the last 800 years or so.

There is an obvious fairness argument about why we have to get this right but the often overlooked point is that discrimination imposes a huge cost on societies by preventing many of our talented people from achieving their full potential—be that in business, civil society or the arts. And while there is an important role for anti-discrimination legislation, the key to realising this change is to demonstrate that inclusive organisations with diversity at senior levels perform better than those that are homogenous in representation and ways of thinking.

**Clause 2: The internet, particularly social media, should be used to promote closer relations between peoples and states, not to propagate hatred and violent extremism**

It seems odd to consider something that has only really begun to affect our lives in the last 20 years as being of such fundamental importance—after all, most of us managed to get along without it. But I have included it here because of its enormous power to communicate across divides. Both in the physical sense—most Brits in Australia will be familiar with Skyping or Facetiming friends and family back home—and in overcoming social and cultural barriers.

I recently came across some staggering figures about our use of the internet. Every minute one hundred thousand tweets are sent, thirty hours of YouTube footage is uploaded and Google processes more than two million search queries. That is every minute of every day. And those figures are growing fast.

That is why the internet and social media have become our best tools to spread some of the messages we discussed earlier—the importance of the rule of law, good governance and an accountable democracy.

But in recent years we have been provided with ample evidence that the online communication can also be used to spread poisonous ideologies and hatred. Earlier this month I attended the regional Countering Violent Extremism summit in Sydney. I was heartened to hear examples of how we can use strong, positive messages to fight back against those who incite violence online. It is important that we take effective action to protect some of the most vulnerable in our society from these influences.

I left that event certain that the internet is a powerful force for good in the world. But it also relies on each of us to behave responsibly, to call out the trolls. It also requires collaboration between government and the technology giants—Facebook, Twitter, Microsoft, Google, Apple—to shut down the voices of extremism and hatred, without suppressing freedom of expression. I recognise this balance is not an easy one to strike, but in my twenty-first century Magna Carta, we should at least try.

**Clause 3: Freedom of religion**

How disappointing it is to think that this issue, which was close to the heart of many people fleeing Britain for America in the seventeenth century—and indeed many others throughout history—still needs to be championed in the twenty-first century. But it surely does. As a global community of nations we must unite in opposition to the politics of hate and the grim view of the world promoted by ISIL and their adherents that justifies killing others purely on the grounds of what they believe.

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My friend and former colleague, Gerard Russell, has written a brilliant book called *Heirs to Forgotten Kingdoms: Journeys into the Disappearing Religions of the Middle East*. In it, he ventures into the distant, nearly impassable regions of the Middle East where small and mysterious religions are clinging to survival, but face the possibility of extinction due to the advance of militant extremism. It is a moving reminder that we still cannot take our eye off the ball when it comes to freedom of religion—far from it.

#### **Clause 4: Global abolition of the death penalty**

We have made progress in the 800 years since Magna Carta on moving away from all kinds of barbaric and degrading punishments. And progress has been made in recent decades towards the shared UK and Australian goal of global abolition of the death penalty. In 1977, only 16 countries had abolished in law or practice; today that number has risen to 140—nearly two-thirds of countries around the world.

Yet in 2014, Amnesty International recorded executions in 22 countries, the same number as in 2013. At least 607 executions were carried out worldwide. So we have more to do to achieve our goal to see the total abolition of the death penalty globally. As UN Secretary-General Ban Ki-moon says, ‘we must continue to argue strongly that the death penalty is unjust and incompatible with fundamental human rights’.<sup>3</sup>

#### **Clause 5: A commitment to long-termism**

The authors of the original Magna Carta were not really focused on the long-term benefits of their charter—it was all about preserving their own short-term interests, and pockets. But we are better than that. In our busy, complicated world where we face a constant stream of threats and challenges, I believe we have a shared responsibility to focus on the long-term as well as the short-term, the important as well as the urgent, thinking of our children, and our children’s children.

Two issues I am thinking of in particular. One is climate change, which can only be tackled holistically as an international community of nations, working collaboratively and beyond our own borders. That is why the climate change conference in Paris at the end of this year is so important in uniting the world in pursuit of rapid climate action.

The second is the fight to end poverty, in particular by ensuring that no one is disadvantaged by their place of birth when it comes to education and healthcare. This

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<sup>3</sup> Ban, Ki-moon, Statement: Secretary-General’s video message for High-Level Event of the Human Rights Council on the Question of the Death Penalty, Geneva, Switzerland, 5 March 2014, [www.un.org/sg/STATEMENTS/](http://www.un.org/sg/STATEMENTS/).

is part of the work that began through the Millennium Development Goals, which expire in 2015. These eight goals were set in 2000 by 191 UN member countries and included commitments to halve world poverty, reduce child mortality, halt the spread of HIV/AIDS and provide universal primary education.

Not all of them have been reached, but they set the aspiration high and there have been some real successes. For example, the proportion of people living in extreme poverty has been halved from 46 per cent to 22 per cent; there are more girls in education; we have begun to reverse the spread of HIV and AIDS; and we have halved the proportion of people without access to safe drinking water.

There is a lot of important work going on now to decide how we should take this forward and in what form, setting an ambitious post-2015 development agenda. I will not go into the details of that now, but I think this work sits neatly within the framework of a twenty-first century Magna Carta.

Of course there is a tension between long-termism and short parliamentary cycles—especially when, as in Australia, those only last for three years. So I was heartened to see that, before the recent UK general election, the three main party leaders issued a letter which basically said: ‘we all agree on climate change, so it isn’t an issue in this election’. This could be a model applied more widely to long-term issues, with party leaders campaigning only on things they can actually change within a three-year time frame. That would be a refreshing change!

### **Clause 6: For all states to abide by the rules-based international system**

That brings me to the sixth and final clause of a twenty-first century Magna Carta. And it is probably the most important, since it underpins almost everything else I have said today.

You may remember that in the quote I read out earlier, our Foreign Secretary stressed the central importance of both our national security and prosperity objectives in how we conduct our foreign policy. That is because these are inextricably linked to the way in which we and other countries deal with each other.

We know that the world today faces many challenges, including some that we had hoped were consigned to the past. Last year we saw one European country annex the territory of another for the first time since the Second World War. In our own Asia-Pacific region, territorial disputes over uninhabited rocks and reefs have the potential to generate enough friction in international affairs to spark a confrontation.

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With nations connected like never before, there are few parts of the world that can consider themselves safe from the contagious effects of conflict between states. Even for those countries not directly affected, the global reach of news and the almost universal access to it means there are no more ‘far-away countries of which we know little’.

That is why in the twenty-first century the best hope of resolving these challenges lies in what is sometimes called the rules-based international system.

It is a concept that comes up regularly in diplomatic circles but what does it mean in layman’s terms? Essentially, it means that nations are driven by rules, not power, in how they conduct themselves internationally—so abiding by the rule of law, good governance and ending corruption. Of course, we cannot entirely avoid disagreements between countries but we can try to contain those disagreements within the dispute-resolution mechanisms of international and regional organisations—such as the United Nations, ASEAN or the African Union. If we are successful in avoiding the wars—both hot and cold—that so scarred the history of the twentieth century then the prize, in terms of peace and prosperity for all our countries, is a truly enormous one.

That is why the final principle of my Magna Carta for the twenty-first century is this: for all states to abide by the rules-based international system. A system that ensures, just as Magna Carta did 800 years ago, that no one—neither king nor country—is above the law. That would be worth celebrating for at least another eight centuries.

We have covered a lot of ground today: from Runnymede to the English Civil War; from Alistair Campbell to Ban Ki-moon; from America to Australia; and from a document written 800 years ago on sheepskin to some ideas for a Magna Carta for this, our twenty-first century. I hope I have convinced you, at least, that the Magna Carta has relevance and resonance in our complex, globalised world today.



**Rosemary Laing** — In relation to the use of the internet in the twenty-first century to promote closer relations, you mentioned that this sets up some kind of tension with the idea of freedom of speech. Freedom of speech is one of those central liberties that we focus on a great deal and have done for several hundred years, but how do you think we can manage the internet to put limits on hate speech and the use of the internet for terrible purposes? Do you think that governments have a role in this? Does it come down to self-regulation or people turning away from that kind of content on the internet? I would appreciate your thoughts.

**High Commissioner** — Thanks Rosemary, I did touch on it in my speech without actually resolving the issue, but now you are forcing my hand so I will have a go. First of all, it is not easy and certainly in Britain we hold the values behind the idea of freedom of speech very dear as I know our friends do in America and obviously in Australia as well. But I think we are facing a situation which is new and unique in our global history and I think we do need to find ways of managing that tension as you put it, between the right to freedom of speech but our insistence that we should not use tools like the internet to propagate hatred and promote extremism.

I cannot pretend to have all the answers but I think there are three components to it. One is government. In the UK our new conservative government has announced that we will be introducing a new extremism bill to parliament and the aim of that will be to do more to clamp down on people and organisations which do promote hate through the internet or through preaching, mosques or other places where people meet. I think that will try to get at what I call the grey area between what is obviously completely outrageous and very bad and illegal, and what is okay and part of the freedom of speech. It is trying to find that grey area and take more action in that space which I think is the key to government intervention. I am not pretending it is easy and I know there will be a lot of debate about that in the UK.

The second area I think is industry and I did mention the internet giants. I think they have got a role as far as they can in monitoring what is going on, on their websites and on social media, and taking action where they are seeing it being misused and going against their own rules of engagement. I know we have very productive conversations in Britain, Australia and elsewhere with those companies and in fact it was great to see many of them at the summit in Sydney a couple of weeks ago, where they were very engaged on this and very much wanted to be part of this agenda, so I think that is promising.

The third thing I would say is that it does come down to each of us as individuals, it comes down to people. To go back to the Sydney summit, somebody gave a presentation and they talked really powerfully about the asymmetry of passion. What they meant is that at the moment, it is the people with the more extreme views, the people who are propagating hatred and extremism who are taking up a lot of the space on the internet. They had a figure, which I cannot quite remember, but it was quite startling the number of nasty, extremist, violent messages put out on things like Twitter every day. Their pitch was that as individuals each of us has a role in responding to that and grabbing some of that passion and using it in how we use the internet and challenging that narrative and making sure that we balance out the use of the internet for those purposes. I found that struck a chord with me and it is something that I will try and talk to my kids about a bit as well. They, of course, are much more

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in the maelstrom of all this; we are more often observers of what is happening. So I think if you can get those things right—government, industry and us as individuals—then we will be able to find a balance and make progress.

**Question** — I was particularly interested in your six principles. You did not include the rule of law and I suppose you thought that was given. In a very important address on Monday at Old Parliament House the Australian Human Rights Commissioner suggested that the greatest threat to the rule of law came from the increase in executive power, particularly in response to perceived threats of terrorism. My question to you is what principles should guide the community in on the one hand addressing the obvious threat of terrorism and on the other hand the values we place on the rule of law?

**High Commissioner** — I may not have had the rule of law as a principle but I think the point is that that is the principle that underpins a rules-based international order and a rules-based international system. So I think what I am saying is that the rule of law is not a national concept anymore, it is very much an international concept, and that should be our guiding principle in how we conduct relations between states and between nations. I think the issue around the increase in executive power is one that is part of this difficulty we were referring to earlier on, about the balance between freedom and managing the threat that we face from terrorists. I think there has to be a balance.

I think part of the balance is in our legislatures to be honest. In the UK the extremism bill that I have referred to which probably will notch up executive powers a little bit again, will have to go through a very vigorous process of debate. It will be debated on the floors of the houses of parliament, in the media and in the press. At the end of the day I think we are part of a democracy and that is the role of the democracy—to challenge, to test, but ultimately to abide by the laws of the states. So I think that is where the answer has to lie and it is incumbent on parliamentarians and those of us who write the laws to bear in mind as well the views of our constituents across our countries and across the international community. Does it worry me on a personal level? Yes, it does. I think that we have to keep working towards that balance but I am also confident that our own democratic systems will support it and make sure that we achieve the right outcomes.

**Question** — How is it that these copies of Magna Carta have survived for 800 years? I read somewhere that the church had something to do with this because I gather there would not have been any official archives, but can you tell us a little bit about the history of how the copies may have survived?



**High Commissioner** — I may ask Rosemary to help me answer that one. I do not know the answer actually and I think there are lots of different copies around and I am not the expert on where they are and how they got to where they are today. I think in recent times it is a lot of very careful preservation of the ones that we do have, including by museums and institutions, and I guess as well the fact that they have lasted in a way is a testament to their own continuing relevance through our societies and perhaps that there were lots of them in the first place. So some survived but presumably others did not, but I am going to pass to Rosemary to help you out with that one.

**Rosemary Laing** — Well I am no expert either, High Commissioner, but I can possibly add a little to the story. There were quite a lot of copies made. The purpose of coming to this agreement, signing up this treaty, binding as many people as possible to the terms of the treaty, meant that the methods of communication in the thirteenth century were brought into play. It required that many copies of Magna Carta and similar charters be made so that they could be sent to various parts of the country and promulgated. So, for example, the typical places where copies were sent were to the sheriffs of the counties. There was a distribution to churches as well so that in county courts, in gatherings, Magna Carta was read aloud not just once, but at the opening of court sessions. The church, I think, has played a very important role in the preservation of copies. If you think of who could read and write in those days, most of that talent was gathered in churches—clerics, clerks who could read and write were engaged, scribes in copying out various exemplifications of these documents—and the church had a pretty good record of keeping things in storage.

I will just give you the example of our copy. How did we get our 1297 copy? How did we find it to buy it in 1952? Well the fact is we know that that particular copy was written out by a scribe called Hugh of Yarmouth. His signature is on it and it was destined for the county of Surrey and it was sent to the sheriff of the county of Surrey who also happened to be sheriff of a nearby county. For safe keeping it was quite common for documents to be held in monasteries and priories and we think that this particular copy was safely held in a priory in Sussex and it stayed there within the religious institution until the dissolution of the monasteries. From there our particular copy probably went into the hands of a local lawyer and after a few mix-ups it ended up in a school from where it was discovered.

These things are not things that are taken out every day and read; they don't have the wear and tear that books in our own libraries might. They are precious things. They are taken out from time to time but they are preserved and protected where they can be found and that is perhaps one answer why we have still got from the thirteenth

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century, from the 1200s, 23 or 24 original issues from that time. And also vellum is pretty tough, but ink fades. It is in some senses a miracle.

**Question** — Your Excellency, I have to say I concur with all of your thoughts. It springs to mind: very noble, but who bells the cat? I think of all the people who have a vested interest in the instability in our world society, all the people who may find their vested interests in conflict with the direction that we, as a caring community, would like to go. I think of media barons, I think of arms barons and I think of the politicians who have the task of helping us to create this new world and their conflict of interest. They want to be re-elected, they want that position of power, but these vested interests have a desire to see them suppressed. We have all seen what happens in Britain with the media barons and what you went through in the last few years. I think of America wrestling with the arms race and the people who are making so much money. I think of our dependence upon oil and this is what is financing terrorism. So I would like to travel with you, I hope for the sake of my grandchildren I can travel with you, but I just don't know how we are going to get there. I do not expect you to have the answers but your thoughts would be interesting.

**High Commissioner** — I wish I did have the answers and I don't really, like everybody else. I think all I would say is that having worked very close to people in the centre of government in the UK in some of the previous jobs I have done—I was private secretary to our permanent undersecretary during the Iraq war, for example, when some other terrible things happened including the Bali bombings, the attack on our consulate in Istanbul in which some of our staff were killed, et cetera—all I would say is that up close I think the people who are taking decisions are very often just like the rest of us and trying to do their best.

I completely recognise that is a very rosy interpretation and of course there are all sorts of power plays going on beneath that. Of course there is vested interest and conflict of interest but I think that fundamentally I believe that people are trying to do the right thing and that usually goes for our politicians and our leaders as well. Certainly those experiences that I have had have only built my faith in the democratic institutions of our states rather than made me disillusioned or angry, which is why I am still doing the job that I am doing. I think we just have to keep working together to try to reach solutions.

I have set out a series of principles and ideas but I am conscious that trying to get those implemented and achieved would be a whole different ball game. I think, as our foreign secretary said, you have got to keep those principles with you and they have to be woven into our foreign policy because if they are not, then our policy is nothing and it won't actually support our own long-term national interest. So I think we have

to rely on that and keep thinking about the values that underpin our interactions with other nation states. But I take the point. It is not all easy, there are lots and lots of challenges, but I think these principles might help us continue to deal with them.

**Question** — I was particularly interested that you indicated areas where Magna Carta had a great influence outside the British Commonwealth. Are there other equivalents to Magna Carta in other countries that were used to establish the rule of law? It is good to find Magna Carta has played such an influence, but are there other documents of long vintage that are also equivalent to Magna Carta in status?

**High Commissioner** — I think it is a really good question and the question you are asking me is: is Magna Carta unique in terms of our human existence? In getting this prominence but also spreading its wings beyond the shores of the British Isles and then even the Anglosphere. Tony Brennan, who is our Deputy High Commissioner, has just said the Koran, so I think that is a good example. The Bible?

**Comment** — French Republic documents?

**Rosemary Laing** — Very new! Almost still shiny.

**Comment** — I remember when I went on holiday to Iceland, they had a tradition where they all met in the Thingvellir valley and they went to Denmark, I think it was, and got their law and they brought it back to Iceland and everybody assembled and it was recited. If you didn't correct the person who was reciting it, then the new version became the law, so it was very important that everybody knew what they were listening to and hauled the narrator up if he left something out otherwise you would lose it. That was done every year, but I don't know if they still do it.

**Rosemary Laing** — Iceland certainly has one of the ancient parliaments of the world.

**High Commissioner** — That is very interesting. So we cannot quite answer your question but there are a few ideas, mainly ancient religious texts I think, that have stood the test of time. But we will go away and do a bit of googling as well and see if we can come up with a better answer.

**Rosemary Laing** — And there would be law codes from ancient civilisations like Assyria, ancient Greece, codes of Solon, such as that. But I think what is so profoundly moving about Magna Carta is that you have a group of incredibly self-interested barons who are out to master the king for their own interests and you end up with this set of principles that resonate so massively 800 years later based on some

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very simple ideas. I think that is not only a great irony but one of the things that makes Magna Carta such a magic thing.

## Introduction

‘Reform’ is a word that is overused, even abused. Some, when they hear the word, get suspicious of over-promise and under-delivery. And I can understand that.

I have a simple rule—if you want to know what something means, go to the dictionary. It helps to calm things down. ‘Reform’, my old *Oxford Dictionary* says, is making something better by removal of imperfections, faults or errors. People can reform, as can institutions and procedures.

Who we are, the way we govern, how we do things—these can all be *improved*; but when they are *reformed*, the reach is deeper and the impact longer lasting. When you reform something, you do away with previous constraints and often build something new in its stead.

Some reforms are risky, because they take away or disrupt something that particular people or interests hold true, and replace it with something they don’t like. Sometimes reforms do not deliver on their promise. So how you reform is important.

In his *Costa del Nightmares* program last year, Gordon Ramsay went into one family-run restaurant in Spain<sup>1</sup> where he made massive change in a very short space of time. He sacked the chef, cleaned out the kitchen, redid the menu, and transformed the look and feel of the whole business in his usual understated way.

It seemed effective at first; new customers queued up around the block and the restaurant’s takings rose dramatically.

Then the camera crew left.

Within a month, the British press was reporting that things at the restaurant had gone back to where they were before the Ramsay whirlwind went through. The restaurant’s owners had reintroduced their own recipes and gone back to their old ways.

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\* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra, on 14 August 2015.

<sup>1</sup> The restaurant was called *Mayfair* on the Costa del Sol.

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Ramsay may have ‘reformed’ in a narrow dictionary definition sense, but the changes did not produce a lasting effect. Ramsay may have improved things, but he moved on. There was no buy-in from the owners, let alone the sacked chef; no follow-up and no embedding of the changes Ramsay made.

The lesson from this is that for reform to be successful, you need to take people with you and ensure that change is truly embedded in structures and systems. Otherwise, good ideas will inevitably be lost through poor implementation.

Contrast Gordon Ramsay with Peter the Great, three hundred years before. He also wanted to reform a family-run business, but in this case his own: the governing of Imperial Russia.

Now this is an historical example that occurred in an overall environment of oppression, imperial excess, and ruthless military expansion that is totally unpalatable by modern standards.

Like Gordon Ramsay, Peter the Great was given to the odd grand gesture: he imposed a tax on the long beards of the nobility, for example, because they symbolised the backwardness of a Russia that was resisting his Europeanisation of the country.

I don’t want to give my colleagues in Treasury any ideas, but in building a new fiscal base for government, Peter the Great also taxed other cultural customs like bathing and beekeeping.

Peter introduced, systematically and over two decades, sweeping administrative and economic reforms, many of which lasted for almost 200 years, until the Russian revolution.

Peter persevered with his reforms, unfolding them over a period of more than 20 years; embedding them through new laws, structures and people. He brought in a new generation of technocrats with professional skills who were committed to the new way of doing things.

Being royal, he also used patronage to secure loyalty to his new order in a way that is unacceptable in a modern accountable system of democratic government. Fortunately ethics and accountability in public administration have moved along.

Like Gordon Ramsay, Peter the Great knew what needed to be done, but in contrast to the culinary superstar, he was pursuing lasting change, not fifty minutes of modest entertainment.

## **Reform agenda for the Commonwealth public sector**

Let me now draw the link between all of this and the public governance, performance and accountability reforms that my department has led over the last few years, and which I am here to talk about today.

Reform, to be successful, needs to work at many levels. It needs to work with people and culture, to ensure that hearts and minds are behind the changes proposed. It can only work if the right technology and enabling platforms are in place to support the implementation of change. And it can only succeed if resources are properly focused and performance expectations clearly articulated in terms of the outcomes and impacts sought.

Lasting reform depends on people and resources being lined up behind good ideas, and proper accountability structures being put in place for the long haul.

Reforms last when they are based on good ideas and there is a clear value proposition about the case for change. A clear value proposition that is championed by people of influence—from the top if you like—is one that is most likely to drive along lasting reform.

The Finance Minister, Mathias Cormann, has expressed this government's aspiration for a more efficient public sector that is performance-driven and can provide faster services to support Australia's prosperity into the future.

The Prime Minister and Communications Minister have both championed improving how Australians interact with government over the internet, which has led to the recent establishment of a Digital Transformation Office.

And in various parliamentary committees, especially the Joint Committee of Public Accounts and Audit, there have been bipartisan discussions about improving accountability for how public resources are used and the achievement of public policy goals.

So there is a convergence of political interest that provides a value proposition for the reforms that my department has been working on—an agile, modern, connected and responsive public sector that is accountable for what it does and how it does it.

Happily, my dictionary gives simple meanings to each of these key words—they actually mean what you think they mean on face value.

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And when you think about the growing interconnectivity of the big issues that challenge us as a community and the approaches that go to managing them; when you think about the increasing scarcity of, and certainly contestability for public resources, then you can see that unless the public sector adapts quickly, it will be left behind from where its key stakeholders want it to be.

Reforming the Commonwealth public sector to achieve this change is a big job. Partly this is because the Commonwealth itself is big and diverse. This year, it will spend around \$430 billion. It consists of more than 190 separate entities and companies, hundreds of boards and committees, and a large number of subsidiaries and other arrangements.

Reforming the Commonwealth is also a big job because it involves cultural change, technology transformation and rethinking the design of many existing programs and services.

Reform on the scale that we are talking about has many different elements and many parties working on related initiatives.

But my focus today is on what the Department of Finance is doing, and how we are going about it, and what we hope to achieve as a result.

### **Financial framework reforms**

The operations of the Commonwealth have been governed by three financial governance frameworks over 115 years. The first one lasted for a particularly long time—96 years.<sup>2</sup>

The current financial governance framework is contained in the Public Governance, Performance and Accountability Act, which was enacted by the parliament in June 2013. I will refer to this from now on as the PGPA Act. It replaced two pieces of legislation called the Financial Management and Accountability Act (or FMA Act) and the Commonwealth Authorities and Companies Act (or CAC Act), which between them constituted the Commonwealth's second financial framework and divided government into two camps.

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<sup>2</sup> The *Audit Act 1901* was replaced by the *Financial Management and Accountability Act 1997*, the *Commonwealth Authorities and Companies Act 1997* and the *Audit Act 1997*. The *Audit Act 1997* remains in place, although it was amended to allow for the introduction of the new financial framework.



## **FMA and CAC Acts**

Now, I don't wish to be reductionist in the characterisation that follows, because the range of governance arrangements, operational requirements (including commercial ones), statutory obligations and accountabilities for performance in the Commonwealth are varied, nuanced and complex.

Having said that, talking in broad terms about the two camps under the previous financial framework helps to explain why particular changes were made under the PGPA Act.

One camp, the FMA Act camp, consisted largely of departments and agencies that were directly accountable to ministers, were usually headed by a single person, were largely budget funded and legally constituted the Commonwealth of Australia.

Many of these features naturally constrain what these organisations can do, even under the new PGPA Act. They cannot, for example enter contracts in their own name, or bank in their own name, and they are subject to government policies in a range of areas.

However, in addition to these natural constraints, the former framework imposed even more process controls over organisations in the first camp. There was an appropriate and strong emphasis on ensuring the proper use of the public property that was in their hands. However this was achieved through detailed process controls around money appropriated by the parliament and how it was drawn down, managed and spent.

The old framework said very little about the governance requirements on these organisations, and said nothing about risk management and their performance obligations.

Life was quite different in the second camp, or the CAC Act camp. This is where organisations that were corporate in nature, including Commonwealth companies, were placed. They had governing boards, their own legal personality and usually a high degree of operational independence under their enabling legislation.

The CAC Act framework did set down some core governance and reporting standards, including the duties of directors and the senior executive, but set no standards for the proper use of the public property. There were very few controls around how organisations in the second camp managed and spent the money they held, even if it was appropriated by the parliament. And there was little to remind these bodies that, independent though they were in many respects, they owed accountability to the parliament and the people about how they run their affairs.

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Life in the second camp was largely governed by principles. As a result, organisations were more likely to be innovative, with stronger risk management and strategic planning practices.

Life in the first camp was constrained by detailed rules—not just from the Finance department, but from departments and agencies across the system. Here you were less likely to find innovation, strong risk management and strategic planning practices.

And to make it more complicated, you had some highly independent, statutory bodies placed in the first camp, and some mainstream core government activities in the second. So you had camp crossing behaviour.

People in the first camp were desperate to pitch their tent in the second camp, because they saw fewer rules and controls from the centre.

And there was a prejudice for creating new bodies under the CAC Act for this very reason, even where, for reasons of the type of role the organisation played, or for governance or accountability reasons, it was more appropriate to have a mainstream government function under the FMA Act.

Finance played the role of boundary rider, caught up in debates that focused more on the impact of prescriptive rules, reporting requirements and red tape on their business than on the right structure for a public entity playing a particular role. It is not surprising that these debates were conducted with passion.

The Finance people involved in reviewing the previous financial framework still recall their discomfort when some Commonwealth regulatory bodies that moved from the CAC Act regime to the FMA Act space ran them through the costly changes the transition forced them to make to their internal business and reporting systems with no benefit to the quality of their operations.

You wonder why we did it to ourselves.

### **PGPA Act—overview**

So in a context where government is interested in improved cohesion, more agility, more innovation, and stronger governance, performance and accountability standards, we had, at the whole-of-system level, a Commonwealth public sector that, over time, had grown apart in ways that made a coherent reform journey difficult.

One of the core aims of the reform process launched in 2010, which led to the PGPA Act, was to bring cohesion and a single set of principles into play for all

Commonwealth entities, whether they were non-corporate or corporate entities, whether they were statutory bodies or government business enterprises.

It took over two years to get to the point where we could even consider drafting legislation.

The policy development process included 13 issues papers, a discussion paper and separate position paper, meetings with every Commonwealth entity, with private sector companies, third sector and professional peak bodies, state governments, academics and former public sector leaders.

Ministers and parliamentary committees endorsed the final reform package before it was debated in parliament.

It was a Peter the Great approach rather than 50 minutes of high-octane television, although there were pressure points in the process that saw colourful Ramsayesque moments.

The PGPA Act approach is principles-based, which is pretty innovative in terms of international practice. Five principles underpin the Act and the reforms that accompany it:

1. Government should operate as a coherent whole
2. A uniform set of duties should apply to all resources handled by Commonwealth entities
3. The performance of the public sector is more than financial
4. Engaging with risk is a necessary step in improving performance
5. That the financial framework should support the legitimate requirements of the government and the parliament in discharging their respective duties.

Let me deal with the first two and explain how they come together.

That government should act as a coherent whole is in my view a no-brainer, but sometimes this is surprisingly difficult to achieve.

To the extent that the previous framework made this difficult, we have made some significant changes in the PGPA Act that should make it easy. And we have done this by taking good ideas from both the former FMA Act and the CAC Act, applying them broadly, and then supplementing them with new provisions.

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## **PGPA Act—proper use of public resources**

The core philosophy in the PGPA Act is that public resources are public resources, no matter whose hands they are in.

Believe it or not, this is a new concept in a Commonwealth Government context.

Under the PGPA Act, all Commonwealth entities are accountable for the proper use of the resources that they hold, no matter how it came to be in their hands—whether through appropriations, commercial activities, levies, charges, taxes, cost recovery or some donation.

There is a common definition for ‘public resources’. Public resources consist of appropriations, which are defined in the Constitution, and relevant money and relevant property, which are defined in the PGPA Act. All public resources are to be used and managed properly.

Again proper use and management of public resources is defined in the PGPA Act. It means efficient, effective, economical and ethical, and for non-corporate entities that constitute part of the Australian Government it also means used and managed in a way that is not inconsistent with the policies of the government.

This standard for proper use is drawn from the previous FMA Act that applied to the first camp, but it is now applied to all officials.

Each Commonwealth entity has officials, who are, broadly speaking, the persons who are, or form part of, an entity.

## **PGPA Act—duties**

Officials handle public resources.

The PGPA Act lays out in sections 25 to 29 the general duties that officials must observe when they do this, including care and diligence, acting honestly in good faith and for a proper purpose.

The general duties are drawn from the previous CAC Act that applied to more senior people in the second camp, but it is now applied to everybody.

For those familiar with the duties in corporations law, the duties in the PGPA Act are very similar.

In addition to the general duties that apply to all officials, there are additional duties on accountable authorities.

An accountable authority, broadly speaking, is the person who heads a non-corporate Commonwealth entity—a secretary of a department, for example, like myself—or the board that governs a corporate Commonwealth entity, like the board of the Commonwealth Scientific and Industrial Research Organisation or Australia Post.

So as Secretary of Finance, I am subject to both the general duties on officials in the PGPA Act, and the duties of an accountable authority that are spelled out in sections 15 to 19 of the Act. These duties include promoting the proper use and management of public resources for which I am responsible, including through establishing and maintaining appropriate systems of risk oversight and internal controls within my department.

I can also issue, under section 20A of the PGPA Act, written instructions about how the officials in my department handle relevant money or public resources in general.

All accountable authorities are responsible for promoting the achievement of the purposes of their entity and its financial sustainability, and to give information to their minister and the Finance Minister on particular things.

You might say this is somewhat unremarkable.

Of more interest are the following two provisions.

### **PGPA Act—acting coherently as a public sector**

Under section 15(2) of the PGPA Act, an accountable authority has to take account of the effect of decisions that it makes on public resources generally.

This means that the accountable authority has to consider how the actions and policies they pursue will affect other entities individually and collectively, and public resources generally.

This works both ways, both in the positive and the negative.

It opens us up to sharing better ways of working together between Commonwealth entities, because accountable authorities have to think beyond the boundaries of their own organisation in assessing the value proposition of some decision they are making.

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It covers decision-making that might have particular benefits to the entity in question, but has broader negative implications for other entities or public resources generally.

An example would be an entity that pursues its own policy or operational interests, for example by imposing unnecessary red tape costs on others, or by imposing charges that cross-subsidise its own operations.

A related concept can be found in section 57 of the Public Service Act, which talks about the role of departmental secretaries in providing stewardship across the Australian Public Service.

### **PGPA Act—joining up with others**

The next interesting concepts are in sections 17 and 18 of the PGPA Act.

These sections came about because those who worked with the Commonwealth—commercial partners, the community sector and the states and territories—told us that partnering with the Commonwealth could be a really bad experience.

Broadly speaking, they said that we have the money to get things done, but that we are risk averse and afraid to innovate. Our thinking is dominated by fear of failure, rather than the prospect of breakthrough success; we push risk onto other parties and micromanage how they fill their side of the bargain.

Given that innovation in public policy involves engaging with risk, finding new ways of doing things, backing good ideas and putting faith in others, this was criticism that went to the core of our aspiration to move down the road of an agile, modern, connected and responsive Commonwealth public sector.

Section 17 places a positive duty on an accountable authority to cooperate with others to achieve common objectives, where practicable.

This duty recognises that Commonwealth entities do not operate in isolation. Effective collaboration between Commonwealth entities, with other levels of government, and with the private and not-for-profit sectors is critical to the achievement of many of the government's priorities and national goals. The Commonwealth needs to partner with others.

This section says, in effect, we expect you to do it if it is the right thing to do.

Long-term disadvantage, chronic health issues, improved education outcomes, domestic security—are all issues where the COAG has committed to doing more, and where joined-up government and a joined-up community are part of the solution.

From exploring more innovative funding models to trying new governance and accountability models—we have a lot of work to do on this front.

While the PGPA Act unblocks some of the legal and technical issues in this space, I acknowledge that some of the key challenges may go to the sorts of issues that are being explored in the Federation White Paper.

## **Risk**

This brings me to the subject of risk.

The next section of the PGPA Act, section 18, says, when you do join up, think carefully about the requirements you place on others in relation to the management and use of public resources.

I explained earlier that one of the underlying principles of the PGPA Act is that engaging with risk is a necessary step in improving performance. All major public policy involves risk.

But risk can be identified and strategies can be developed in consultation with ministers and other stakeholders to handle it.

We cannot afford another catastrophic failure like the Home Insulation Program, where negligible effort was put into understanding the operating environment for the roll-out.

But neither can we afford government programs that don't innovate or sensibly push boundaries at all because they are designed to exclude even the most immaterial risks.

The PGPA Act says: think about the risks involved and how you are managing those risks in the arrangements you negotiate with others, but don't load your partner with red tape just because you want to cover your bases if something goes wrong.

Section 18 of the PGPA Act puts the onus on accountable authorities to assess the risks in relation to the public resources involved in a joined-up enterprise, and then places proportionate obligations on those they are joining up with.

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For example, an established community sector grant recipient with proven credentials and a strong track record of delivery in an established area of operations could have a different level of reporting obligations placed upon them than a new organisation venturing into a new and unknown area.

But equally, accountable authorities should engage with risk sensibly and not avoid traversing into a new area just because it involves risk.

The proposition is that it should be done, but done sensibly; or in PGPA Act language ‘an accountable authority should establish and maintain an appropriate system of risk oversight and management ... to promote the achievement of the purposes of the entity’.<sup>3</sup>

To support better risk practice in the Commonwealth, we have issued the first ever Commonwealth risk management policy, which sets the principles to underpin better risk management in the day-to-day operations and decision-making processes of Commonwealth entities.

More sophisticated and nuanced risk management on the part of Commonwealth entities might help to get us down the path of more innovative and agile delivery and less red tape.

My department will work closely over the next few years with both the Australian Public Service and all Commonwealth entities to promote better risk planning and more positive risk engagement in the activities of national government.

### **Other provisions in the PGPA Act**

The PGPA Act contains many other provisions.

Like other financial management legislation, it lays out the basis on which appropriations are released; it talks about who has banking and investment powers, the scope of those powers and how they can be exercised.

It sets the framework for the granting of indemnities, warranties and guarantees, the gifting of relevant property, and the custody of money.

It establishes a legal basis for non-corporate Commonwealth entities to enter into arrangements and commitments, and how ministers approve expenditure.

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<sup>3</sup> This language is a combination of sections 16(a) and 15(1)(b) of the PGPA Act.



Importantly, it also provides the framework for rules around the management of procurement, grants, fraud and financial reporting.

A particular area that my department is working on now is in the area of improving public accountability by having better performance reporting to both the parliament and the public, through the introduction of corporate plans and enhancements to annual reports.

For the first time, all Commonwealth entities are required to produce and publish a corporate plan. This is to be done by the 31 August.

Corporate plans are to outline the purposes of each entity, what it will do to achieve those purposes, what environmental, risk and resource issues it will have to deal with, and how it will measure and report on its success.

These corporate plans will have a four-year time horizon, and be updated every year. At the conclusion of each operating year, each entity will issue in a statement in their annual report to explain how they performed against their corporate plan.

In promoting this reform, we have talked about corporate plans and annual reports as the bookends of the performance story.

I said earlier that two of the principles of the PGPA Act are that the performance of the public sector is more than financial, and that the financial framework should support the government and the parliament in discharging their respective duties.

It will take time to improve performance reporting, but I am pleased to say that the Commonwealth public sector is determined to make a go of this.

Community of practice meetings and seminars have been organised in Canberra and other cities to allow entities to learn from each other and from international practice.

We are also running pilot projects to test particular approaches to improving performance information.

All governments seem to struggle on this front—it would be very satisfying for me if we can improve the quality of the performance information that we publish in a way that helps others do the same.

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## **Australian Public Service transformation agenda**

In the little time I have remaining, I would like to return to what I described as the clear value proposition for the reforms that my department has been working on—an agile, modern, connected and responsive public sector.

The government has asked us to work on redoing the menu, cleaning out the kitchen and transforming the look and feel of the business of government, with no entertainment value, but with the intent for systemic reform.

During the 2015 Budget, the government announced an agenda to transform the public sector, with contestability reviews, shared services and a smaller government initiative all playing a role.

### **Contestability program**

Looking at government activities and services through a contestability lens encourages Commonwealth entities to adopt a more commercial mindset and seek ways of improving the performance of existing or proposed government functions.

The contestability program, led by my department, is using the prospect of competition to encourage public servants to ask three key questions: Do we need to do this? How well do we do this? Are we best placed to deliver this?

In the pilot phase of this program, savings of over \$200 million were identified in the Functional and Efficiency Reviews of the Department of Health and the Department of Education and Training.

Encouraged by these results, the government has commissioned a further eight Functional and Efficiency Reviews.<sup>4</sup>

These reviews will look systematically at existing functions to assess their alignment with government priorities, and to see if an activity or service could be delivered by someone else to a higher quality standard at a lower cost.

We need to ask ourselves if performance can be improved through alternative structures, processes or provider arrangements.

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<sup>4</sup> These will cover the Departments of Agriculture, Environment, Foreign Affairs and Trade, Treasury, Attorney-General's and Social Services, as well as the Australian Taxation Office and the Australian Bureau of Statistics.

### **Smaller government initiative**

The smaller government initiative is about clarifying lines of accountability and cutting waste and duplication, while improving the efficiency and focus of the public service.

Since the announcement of the Smaller Government agenda, an estimated \$1.4 billion of savings have been made available to fund other policy priorities.

The number of government bodies will reduce by 286 through consolidation, abolition, replacement and, in the case of Medibank Private, successful privatisation led by my department.

While the changes announced to date amount to a significant reduction in the number of government bodies, there is not an equivalent contraction in government functions.

This is because a number of the reforms involve consolidating functions into departments or larger entities, as well as the merger of smaller bodies to link together related functions.

### **Sharing common services**

Embedding best practice across the Commonwealth is likely to be expedited by sharing common services.

We are standardising processes and infrastructure where possible and sharing transactional functions to leverage scale and scope for increases in efficiency.

An example of this type of work is the shared and common services program that consolidates common functions into centres of excellence.

Through this process a few entities will provide services for many.

A good example of this arrangement is the Shared Services Centre, a partnership between the Departments of Education and Training, and Employment.

The Shared Services Centre leverages economies of scale to provide competitively priced core human resources and finance systems and other more specialised services to other organisations.

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## Digital reforms

We are also looking at the consolidation of standardised systems to the cloud and consolidation of common, non-transactional processes; and supporting a larger range of common services (such as Enterprise Resource Planning systems) with minimal customisation.

A key factor driving more efficient government operations is the rise of new technology options.

For the majority of people and businesses, the internet is their preferred method for interacting with government.

Despite being an early pioneer of the internet, the Commonwealth public sector is now playing ‘catch up’ to the best in the private sector.

The community now wants government services and programs that are available anytime and anywhere on any device, personalised to reflect their particular requirements, and delivered faster at a lower cost.

The government is aiming to meet these expectations through the Digital Transformation Agenda, with a goal that, by 2017, the major transactions between citizens and government are digital, from end to end.

That is a lot of catching up to do for the Commonwealth public sector.

Government information is now published across more than 1200 disparate gov.au websites, plus a range of social medial accounts, apps and other digital formats.

The evolution of distribution of this information reflects the silos in which government operates, the very silos the PGPA Act has sought to break down.

The fact is that people largely don’t care how the government organises itself—they just want government to work.

The Digital Transformation Office (or DTO) has been created—to lead the government in transforming our services to improve the experience of Australians dealing with government.

The DTO is working closely with individuals, businesses and industries to identify opportunities for improvements and redesign government services from a user perspective.

The DTO is also working with government entities to help them to plan their transformation to provide users with a better experience when dealing with government and deliver public services across all channels.

The Department of Communications has estimated productivity gains of up to \$600 million could be achieved through improved digital capability for public servants and services to citizens and business.

Research by the UK Cabinet Office showed that, in general, a digital transaction is 20 times cheaper than one by phone, 30 times cheaper than one by post and 50 times cheaper than a face-to-face transaction.

Digital transactions are also simpler, in that people don't have to wait in a call centre queue, or travel to a shopfront or government office to transact their business.

I accept that, for a range of reasons, not all transactions with government lend themselves to web-based solutions, but there is significant scope on this front.

## **Conclusion**

So, will all of these things combine to reach deep enough and deliver changes that will be sufficiently long-lasting to constitute reform?

Are we really doing away with previous constraints and building something new in their stead?

I believe we are.

It will take time to transform how the Commonwealth public sector works, but we have shifted the frameworks and clarified the concepts that underpin Commonwealth operations under the PGPA Act.

We have created an environment where asking questions about what we are doing and how we are doing it, and whether we can do it with others or let others do it for us, are proper questions to ask.

This is no 50-minute TV show; although I would like to finish by quoting Gordon Ramsay from the *Costa del Nightmares* episode I mentioned at the commencement of this speech.

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Berating kitchen management practices of the Mayfair restaurant on the Costa del Sol, he said, ‘You can’t just buy fresh produce and stick it on top of the old stuff’. The same goes for lasting reform.



**Rosemary Laing** — A freer operating environment is a great idea. We need to invest, however, to make the digital transformations and all those other things. I would just be interested in your thoughts, philosophically, on how a concept like the efficiency dividend, which bedevils small agencies like mine, sits with those principles in the PGPA Act.

**Jane Halton** — The efficiency dividend has been a feature of how we have all run public sector organisations for years and I have personally railed against it to assorted ministers and various other people. There is a conversation to be had about how we make investment choices and certainly there is a more sophisticated discussion to be had about what mechanisms we can use to get resources to reinvest in activity. At the moment we use the efficiency dividend and efficiency dividend savings are taken and effectively reinvested. So I think that is a conversation we need to have and certainly there is a debate going on inside my department about what other mechanisms you can use to harness and to drive the ongoing need for efficiency at the same time as actually enabling people to invest. I think you raise an important point. It is something we are very conscious of and certainly something we have been discussing. I don’t have the answer to that yet, I’m sorry. You made the point, rightly, about the impact on small agencies. I would observe that both sides of politics, when they have been in government, have acknowledged on a number of occasions the particular challenge of small agencies, because obviously if you are running a very small agency your capacity to invest is quite constrained.

So I am very aware of the problem and I think we need to continue to have that discussion. Obviously any views you have got would be extremely welcome.

**Rosemary Laing** — It is a very, very difficult issue. I will risk one more contribution. It has always been my dream to come up with the parliamentary merchandising equivalent of B1 and B2. Under PGPA would I be allowed to keep the profits?

**Jane Halton** — Well of course we do have a variety of policies about cost recovery and then there is a negotiation to be had, so it depends on how successful B1 and B2 are. If they are incredibly successful, we may have to take a dividend, Rosemary.

**Rosemary Laing** — Yes, possibly.

**Question** — Do you see the current three-year length of government terms to be a hindrance to you implementing these far-reaching policies? My second question is: do you think the Commonwealth has a need for something like the NSW Independent Commission Against Corruption?

**Jane Halton** — If I were sitting at Senate estimates, what I would say is, ‘You’re asking me for an opinion, Senator, and we don’t give opinions’. So I’ll give you that answer to start with.

Can I say that, as the public service, we work inside the framework which is decided by the parliament. We work in the context of three-year terms of government and we work in the context of the institutions that are agreed to by the parliament. So in terms of the reform agenda that I talked about, that is a reform agenda that will continue. It is now an Act of parliament and we will be pursuing the nature of the reforms that I have described today through those three-year terms of government. Obviously we will have to manage that transition, taking account of the pace of reform that is possible and taking account of the lessons we will learn. I talked about performance reporting. I talked about the need for corporate plans. Corporate plans are something which departments of state have never done before. We are doing our first one as the Department of Finance and my officials who are preparing the corporate plan, versus my officials who have been giving this advice to the rest of this service, gave it a qualified bronze medal, which I thought was pretty high praise from them actually. I guess my message is this reform is not a short-run thing and the length of a parliamentary term is something we will just continue through.

**Question** — You have made a quite compelling case, I think, for the reforms that your department is leading. My question goes to the red tape reduction that you briefly mentioned. Could you give us an update of how that process is proceeding, with a particular emphasis on the impact it may have in alleviating the compliance burden that is currently put upon small agencies?

**Jane Halton** — Obviously in a speech of that nature it is hard to go to every issue that is relevant, but this is an incredibly important issue. For those who don’t know, we are currently doing an internal red tape review. That review is being conducted by Barbara Belcher, a very distinguished former public servant who is probably known to a good number of you. She is in the process of finalising that report. In fact I hosted a meeting this week of the Secretaries Committee on Transformation. Most of you would be aware there is a Secretaries Board and we have a subcommittee of the Secretaries Board called the Secretaries Committee on Transformation, which I am

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chairing. It enables us to come together and to work in a collaborative way around issues of common interest, the things that I was just describing in that speech. We had a meeting which enabled us to review a draft of that report and, not surprisingly, Barbara has found a huge number of things, which my department does as much as other people do, right across the internal workings of government where she has identified opportunities to sweep away red tape. So that was a discussion of, 'Have we got it right? Have we missed things? Are there issues? Is any of this wrong?' It was a very good meeting and I am very hopeful that she will be in a position to finalise that report in the fairly near future.

There is another comment I would make though about red tape. Yes, I think it will alleviate quite a deal of the compliance burden. Obviously what we will do when we get the report is we will roll it out and then we will actually collectively, I think and I hope, review whether there is more we can do in the medium term. But the other comment I would make, and I think this is important, is that one of the things I am constantly astounded by when it comes to red tape is how people make things up. People decide that there is a particular compliance requirement which appears nowhere in any chief executive instructions or in any piece of legislation and then it becomes a matter of holy writ that you have to do something this particular way. I have found a number of examples of this in my department, where people say to me, I need to do such and such before I actually procure on a credit card for something that is under a hundred dollars. Now it is just not right and we can sweep away a lot of that misunderstanding as well as red tape, I would hope, in this exercise because there have been a number of steps taken over the last few years which should make it easier for people to transact government business in a thoroughly proper and accountable way without going through unnecessary administrative overhead and hoops. So we will go to the actual red tape and then I am asking other people to go to the made up and mythical red tape while they are at it.

**Question** — Sometimes reform is talked about as programs of action or objectives, but of course that doesn't amount to very much. I think it is really in terms of impacts, which I think was what you were saying towards the end. But of course the big question is implementation. So how will you and we know that the impacts are actually occurring? How do you define success through monitoring or whatever?

**Jane Halton** — In a number of ways. Objectively there are a number of things that are required under the Act, such as the requirement for corporate plans. There are a number of actual institutional things you have to do and things you have to produce and obviously there is a very simple metric here, which is: did you do it? But the valuable part, the qualitative and quantitative part, which I think is the thing which is the real reform here, is: can we see improvement in the transparency, in the



accountability and in the ability for ordinary people, not people who read fluent acronym, to actually tell whether we are getting better at doing the thing that we are charged with, which is to deliver government policy? So our job as the public sector is to be transparent and accountable and to find ways to measure, monitor et cetera what we do, and that enables the community to debate about whether we are doing that well.

We have a couple of internal processes. My department is responsible for managing, monitoring and reporting to the minister, which we are doing. I talked about the Secretaries Committee on Transformation earlier. When I went to the secretaries and said, ‘The new legislation brings with it an obligation for us to work together in a way which has not been a feature of how we have run the agency called the Australian Public Service’, I was absolutely delighted with the enormous enthusiasm and willingness of my colleagues to come together to work on shared and common services, to look to see how we can work better together and how we can learn these lessons. So I think you will see objective things, you will see some of the measurement and monitoring and then I hope you will also see an approach to working together which, while you can’t measure it, will deliver measurable differences.

**Question** — I would just like to ask a question about the risk issue. It seems to me that there are two particularly strong drivers of the risk aversion that is a problem. One is that the psychologists tell us people are bad at assessing risks and very bad at appreciating that their assessment is a gut feeling and not a careful analysis. The other thing is that our society generally is becoming more and more risk averse to the point where avoiding risks and being safe is something that people do almost instinctively without thinking about it. In my work one of the risks that I often have to avoid is something that, for example, might embarrass the minister. Given that, as I understand, in order to be a minister one has to have the hide of a hippopotamus or no capacity for embarrassment at all, this has always seemed an odd risk to need to avoid. What I was wondering was whether you think the changes in the new Act are sufficient to get people to try to overcome pressures like this and, if so, how long do you think it will take to work?

**Jane Halton** — In terms of some of those remarks, if I could quote Tony Jones, ‘I’ll take that as a comment’. I have been talking with staff across the APS about the whole notion of risk and, as I have said to people, you can calibrate risk. I take your point about individuals not necessarily being very good at individually calibrating. I did a psychology degree, so I remember all the research and I find that research very interesting. But we are not talking about single individuals here; we are talking about

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institutions actually thinking about managing, monitoring and calibrating risk and, interestingly, I think it actually gives you a better way to manage.

I can go back to an example of what I did in Health. I changed the way we managed projects to actually calibrate how much resource you spent on going back to those organisations depending on how much risk there was. It is the example I gave in terms of grant recipients—if they are very established, well known and have a long track record, you don't have to spend the same amount of time oversighting their activities as you do in a brand new area where there is uncertainty. So it is not about one individual's inability to measure and monitor, because you are right, individuals can be sometimes not very good at that. It is about the institution thinking about what its risk framework is, what its risk appetite is and then calibrating its use of resources. Interestingly, I think this also makes it easier for administrators to talk with the Australian National Audit Office about how they have used their resources, about why we have done it this way. We have got a proper risk plan; we have calibrated. As I said, when you engage with risk it is not the same as being reckless. Recklessness is about taking risks without thinking about it and just launching in and doing things. What we are talking about with risk in this framework is actually having a plan, considering everything you are doing and then calibrating and measuring and monitoring appropriately.

On your general point, it is new, yes. How long will it take to achieve? I wouldn't want to predict, but I can tell you that even in my organisation, and certainly in my former organisation, those conversations have gone from being intermittent to now being institutionalised risk committees. People are actually thinking about risk. You are thinking about large institution-wide risk as well as the micro risks that you are managing. You are actually making sure that your senior management team understand what those institution-wide risks might be. So I wouldn't want to have a crystal ball out to tell you it will all be fixed in two years, but I can tell you I can already see an improvement in maturity in this area and we have to learn how to do this together. So I am optimistic actually that we will be much more sophisticated in our management of risk and if you look at some of our corporate commercial entities they have been much more practised at this. We need to catch up as departments of state with their activity. Thank you for the questions; it really is an important issue.

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

*Michael Macklin*

## Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## **Privilege**

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

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

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

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

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

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

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

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

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

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

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

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

### **Senate practice**

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

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



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

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

### **Accountability**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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## Traditionalist

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

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

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

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

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

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

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

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

### **Not a Westminster system**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And Harry wrote this 14 years ago!

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

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

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## Conclusion

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

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

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

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

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



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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## **The Parliamentary Budget Office: Supporting Australian Democracy\***

*Phil Bowen*

The establishment of the Parliamentary Budget Office (PBO) arguably represents the most significant institutional initiative to enhance the Commonwealth's fiscal responsibility framework since the passage of the landmark *Charter of Budget Honesty Act 1998*.

For our democratic processes to work effectively, it is essential that our parliamentarians, whether in government or not, are well informed about the policy choices they are required to make. Similarly, a well-informed public is a prerequisite for a well-functioning democracy.

The PBO contributes to this process by providing the parliament and the general public with information about the budget and fiscal policy settings; crucial information for making sound policy choices.

### **Establishment**

The PBO is one of a growing number of independent fiscal institutions that are being established around the world.

Approximately 30 member countries of the Organisation for Economic Co-operation and Development (OECD) have established such institutions.<sup>1</sup> Most have been established since the 2008 global financial crisis.

A few have existed for many years, such as the Congressional Budget Office in the United States which has been operating since 1975 and is a good role model for newer institutions, including our own.

The resource bases and mandates of these institutions differ depending on the political systems in which they operate, but they all share a common goal of enhancing fiscal discipline and promoting greater budget transparency and accountability.

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\* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra, on 25 September 2015.

<sup>1</sup> International Monetary Fund, 'The functions and impact of fiscal councils', *IMF Policy Paper*, 16 July 2013, IMF, p. 11, [www.imf.org/external/np/pp/eng/2013/071613.pdf](http://www.imf.org/external/np/pp/eng/2013/071613.pdf).

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The concept of an Australian PBO dates back several years. In his budget-in-reply speech in May 2009, the then leader of the coalition said that ‘honesty in fiscal policy would be served by the creation of an Australian version of America’s Congressional Budget Office’.<sup>2</sup>

Subsequently, a commitment to establish a PBO formed part of an agreement negotiated between political parties and independent members of parliament after the 2010 federal election.<sup>3</sup>

A joint select parliamentary committee was set up to inquire into the proposed establishment of a PBO. Reporting in March 2011, the committee unanimously supported the PBO’s establishment.<sup>4</sup>

The legislation establishing the PBO as an independent and non-partisan parliamentary department received royal assent in December 2011.<sup>5</sup> My appointment as the inaugural Parliamentary Budget Officer, for a term of four years from 23 July 2012, was announced on 30 May 2012.

## **Mandate**

The *Parliamentary Service Act 1999*, states that:

The purpose of the Parliamentary Budget Office is to inform the Parliament by providing ... independent and non-partisan analysis of the budget cycle, fiscal policy and the financial implications of proposals.

When introducing the legislation establishing the PBO, the then Treasurer said that the PBO would:

... enhance the credibility and transparency of Australia’s already strong fiscal and budget frameworks ... promote greater understanding in the community about the budget and fiscal policy [and] ensure that the Australian public can be better informed about the budget impacts of policies proposed by members of the parliament.<sup>6</sup>

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<sup>2</sup> *House of Representatives Hansard*, 14 May 2009, p. 3975 (The Hon. Mr Malcolm Turnbull).

<sup>3</sup> ‘Agreement for a better parliament: parliamentary reform’ in House of Representatives Standing Committee on Procedure, *Monitoring and Review of Procedural Changes Implemented in the 43rd Parliament: 4th Report*, 20 October 2012, appendix B.

<sup>4</sup> Joint Select Committee on the Parliamentary Budget Office, *Inquiry into the Proposed Parliamentary Budget Office*, March 2011, [www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=jscpbo/report.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jscpbo/report.htm).

<sup>5</sup> *Parliamentary Service Amendment (Parliamentary Budget Officer) Act 2011* (Cwlth).

<sup>6</sup> *House of Representatives Hansard*, 24 August 2011, p. 9141 (The Hon. Mr Wayne Swan).

These aspirations translate into two broad objectives for the PBO: first, to help level the playing field for all parliamentarians in their access to policy costings and budget analyses; and second, to enhance the transparency and public understanding of the budget and fiscal policy settings.

The PBO seeks to help level the political playing field by preparing policy costings and budget analyses for any parliamentarian who requests such work be undertaken.

Policy costings may be prepared on a confidential basis in response to requests made outside of the caretaker period for a general election. Responses to policy costings requested during the caretaker period must be made public.

Budget analyses that do not include policy costings may be prepared on a confidential basis at any time.

The PBO is required to publish any policy costings or budget analyses that have not been prepared on a confidential basis.

Transparency and public understanding of the budget and fiscal policy settings are promoted by the PBO through its self-initiated program of published research. The PBO is also able to make submissions to parliamentary committees. Such submissions must be made public.

In its work, the PBO is required to use the most recent official budget estimates as a baseline, along with the underlying economic forecasts and parameters.

Within 30 days after the end of the caretaker period for a general election, the PBO is required to prepare a report on the budgetary implications of the election commitments of the major parliamentary parties.

The then Treasurer, when introducing the amending legislation<sup>7</sup> for this reporting requirement, said ‘The bill will impose discipline on the promises of political parties and incentivise all political parties to be up-front and honest about the cost of their promises’.<sup>8</sup>

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<sup>7</sup> *Parliamentary Service Amendment (Parliamentary Budget Officer) Act 2013* (Cwlth).

<sup>8</sup> *House of Representatives Hansard*, 14 March 2013, p. 2093 (The Hon. Mr Wayne Swan).

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## **Independence**

The Parliamentary Budget Officer is an independent statutory officer of the Australian Parliament and is not subject to direction in the performance of his/her functions.

The independence and non-partisanship of the PBO are essential characteristics that give parliamentarians the necessary confidence to interact with the PBO, often on a highly confidential basis, as they formulate their policy proposals.

These characteristics also enable the PBO to publish analyses of the budget and fiscal policy settings unconstrained by external influences.

To preserve its non-partisan status, the PBO does not provide policy advice, nor does it make policy recommendations.

## **Accountability**

With independence, the requirement for accountability becomes more important than ever.

The Parliamentary Budget Officer is accountable to the presiding officers of the Parliament (the President of the Senate and the Speaker of the House of Representatives) for the management of the PBO, and to the parliament for the performance of his/her functions.

The PBO has a special relationship with the Joint Committee of Public Accounts and Audit (JCPAA). The PBO must consult with the JCPAA in the preparation of its annual work plan.

The JCPAA also considers the PBO's annual budget estimates and other aspects of the PBO's operations. After each general election the JCPAA may call for an independent review of the PBO's operations.

After the 2013 general election the Auditor-General conducted a performance audit of the administration of the PBO.<sup>9</sup> This report was tabled in June 2014 and was accepted by the JCPAA as an independent review of the PBO for the purposes of the committee.

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<sup>9</sup> Australian National Audit Office, *Performance Audit Report No. 36, 2013–14: The Administration of the Parliamentary Budget Office*, ANAO, Canberra, 2014, [www.anao.gov.au/Publications/Audit-Reports/2013-2014/The-Administration-of-the-Parliamentary-Budget-Office](http://www.anao.gov.au/Publications/Audit-Reports/2013-2014/The-Administration-of-the-Parliamentary-Budget-Office).



Subsequently, as is common practice, the JCPAA conducted its own review of the PBO's operations based on the Auditor-General's performance audit. The JCPAA reported to the parliament in November 2014 making a number of recommendations to support the PBO's operations.<sup>10</sup>

The government responded to the JCPAA in June 2015 noting and/or supporting the committee's recommendations, with the exception of the recommendation that the PBO should have access to the details of the contingency reserve in the budget.<sup>11</sup> The PBO's costings remain subject to the caveat that the PBO does not have access to the details of the contingency reserve.<sup>12</sup>

### **Access to information and confidentiality**

Access to information, including financial models, in a timely fashion is vital for the PBO to be able to prepare high quality responses to requests from parliamentarians within reasonable timeframes and to undertake research and analysis of the budget and fiscal policy settings.

The PBO does not have a statutory power to demand information but is able to enter into cooperative arrangements with Commonwealth agencies for access to information.

To this end, very soon after the PBO commenced operations, I signed a memorandum of understanding (MoU) with the heads of Commonwealth departments and major agencies for the provision of information to the PBO.<sup>13</sup> The MoU has a pro-disclosure bias and ensures that the PBO has access, at a minimum, to the same level of information that would be available under the *Freedom of Information Act 1982*.

We have since also put in place arrangements with some departments for the regular provision of information to the PBO after each economic and fiscal update with a view to reducing the administrative burden for departments and the PBO.

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<sup>10</sup> Joint Committee of Public Accounts and Audit, *Report No. 446: Review of the Operations of the Parliamentary Budget Office*, November 2014, [www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Public\\_Accounts\\_and\\_Audit/PBO/Report\\_446](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Public_Accounts_and_Audit/PBO/Report_446).

<sup>11</sup> Australian Government response to JCPAA *Report No. 446: Review of the Operations of the Parliamentary Budget Office*, June 2015, [www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Public\\_Accounts\\_and\\_Audit/PBO/Government\\_Response](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Public_Accounts_and_Audit/PBO/Government_Response).

<sup>12</sup> Parliamentary Budget Office, *Possible Impact of Contingency Reserve on PBO Costings*, PBO Guidance 05/2013, PBO, Canberra, 2013, [www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Budget\\_Office/guidance](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Budget_Office/guidance).

<sup>13</sup> Parliamentary Budget Office, *Memorandum of Understanding between the Parliamentary Budget Officer and the Heads of Commonwealth Bodies in Relation to the Provision of Information and Documents*, PBO, Canberra, 24 September 2012, [www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Budget\\_Office/arrangements](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Budget_Office/arrangements).

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In addition, the *Taxation Administration Act 1953* was amended to give the PBO the same access as the Treasury to confidential de-identified taxpayer unit record data to use in the costing of taxation proposals.

Our ability to engage with parliamentarians on a confidential basis is central to the effectiveness of our role in providing them with confidential policy costings and budget analyses for use at their discretion.

Confidentiality of dealings with the PBO is protected by the PBO's exemption from the provisions of the Freedom of Information Act. All documents relating to PBO requests that are in the hands of other Commonwealth agencies are also exempt from public disclosure.

In addition, government protocols are in place requiring ministers not to ask about, and Commonwealth agency heads not to disclose, details of their specific dealings with the PBO.<sup>14</sup>

Our experience to date is that the cooperative arrangements with agencies are working well and in general we are receiving the information that we need to undertake our work.

## **Resourcing**

The PBO is a small vibrant office of around 40 staff. Every staff member who joins the PBO brings a professional skill. Our analysts have strong quantitative skills and are highly experienced in economic, financial and fiscal policy analysis.

Staff are deployed on a flexible basis as operational needs dictate. Nominally, approximately two thirds of the PBO's staff are allocated to the preparation of policy costings and budget analyses, a quarter are responsible for our published research program, and a small core manage our corporate service delivery and compliance functions.

The PBO has an annual budget of approximately \$7 million with additional funding provided every third year to help meet the demands associated with a general election. The PBO also has access to a special appropriation with a current balance of \$5.3 million.

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<sup>14</sup> *Australian Government Protocols Governing the Engagement between Commonwealth Bodies and the Parliamentary Budget Officer*, released 15 January 2014, Canberra, <http://treasury.gov.au/PublicationsAndMedia/Publications/2013/PBO>.

## **Commencement of operations**

Monday 23 July 2012 will be forever etched on my memory. Returning to Australia the previous Friday from having worked overseas for more than five years, I found myself in Parliament House with one temporary staff member, occupying a borrowed senator's suite, with the task of establishing a new parliamentary department.

The immediate challenge was to build sufficient capability to respond effectively to requests from parliamentarians as quickly as possible. Some six weeks later, in early September 2012, with only a basic capability in place and around a dozen temporary staff, we opened our doors for business.

Parliamentarians immediately took up the opportunity to submit requests for policy costings and budget analyses. By the end of the first year of operations (2012–13) we had responded to more than 660 requests.

Clearly, there was a pent-up demand for the PBO's services, in particular from non-government parliamentarians. The level of demand was heightened by the impending 2013 general election.

## **The 2013 general election**

We faced a consistently high demand for policy costings and budget analyses in the lead-up to the 2013 general election. In the 10-week period from the beginning of July 2013 to polling day on 7 September 2013 we responded to more than 1,100 requests with no fully specified requests remaining incomplete.

The greater majority of the policy costings completed in the lead-up to the election were prepared on a confidential basis. This was because most requests were submitted as confidential requests prior to the caretaker period, including in the short window of opportunity between the release of the then government's economic statement<sup>15</sup> and the start of the caretaker period.

Very few publicly released policies were submitted to the PBO for costing and public release during the caretaker period.

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<sup>15</sup> Commonwealth of Australia, *Economic Statement*, Canberra, August 2013, [www.budget.gov.au/2013-14/content/economic\\_statement/html/index.htm](http://www.budget.gov.au/2013-14/content/economic_statement/html/index.htm).

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We published the 2013 post-election report of election commitments on 18 October 2013.<sup>16</sup> It included an assessment of the budgetary impacts of the election commitments made by each of the main parliamentary parties: the Australian Labor Party; the coalition; and the Australian Greens.

The report confirmed that the budget impacts of the election commitments made by each party were generally consistent with the costs of the policies made public by the parties prior to the election. This was hardly surprising since the greater majority of these policies had already been costed by the PBO prior to polling day.

### **Policy costings and budget analyses**

The demand from parliamentarians for policy costings and budget analyses has continued unabated. Over the course of our first three years of operations we received almost 3,200 requests for policy costings and budget analyses and provided more than 3,000 responses.

Already in the first quarter of 2015–16 we have responded to more than 300 requests, and there is little doubt that this level of demand will be maintained in the run up to the next election.

The costings we prepare cover a wide range of policy proposals. Various taxation and social transfer payment programs feature prominently because of their substantial budget impacts.

A PBO costing is not simply a set of figures. Each costing document also spells out the key specifications of the policy proposal, our assumptions (including assumed behavioural responses to the policy proposal), the data sources used, the methodology employed and the costing's reliability rating.

All costings cover the budget and three forward estimates years. Many include 10-year projections, either at the request of parliamentarians, or where the budget impact of a policy proposal differs markedly beyond the forward estimates period.

Increasingly, we are also being requested to include the distributional impacts of policy proposals on different socio-economic groups.

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<sup>16</sup> Parliamentary Budget Office, *Post-election Report of Election Commitments: 2013 General Election*, PBO, Canberra, 2013, [www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Budget\\_Office/2013\\_Election](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Budget_Office/2013_Election).

Prior to the establishment of the PBO, parliamentary parties with fewer than five members and independent parliamentarians had no access to publicly funded policy costing and budget analysis services. Non-government parties with five or more members could submit policies for costing by the Treasury or the Department of Finance under the then provisions of the Charter of Budget Honesty.

The charter required that only publicly announced policies could be costed, and then only during the caretaker period, with the costings to be made public by either the Treasury or the Department of Finance, depending on which department had prepared the costings.

In practice, this meant that non-government parties could have access to publicly funded policy costing services for only approximately four to six weeks in the total electoral cycle of three years. They had no access to these services on a confidential basis as they developed their policy platforms.

Since the establishment of the PBO, all parliamentarians have had access to publicly funded policy costing and budget analysis services over the entire course of the three-year electoral cycle.

This means that now, outside of the caretaker period, parliamentarians can deal confidentially with the PBO and use the process in an interactive and measured fashion to help develop more robust policies that have been properly costed before they are publicly announced.

Parliamentary parties and independent parliamentarians are no longer bound to run the gauntlet of the Charter of Budget Honesty costing process with publicly announced policies that have not been professionally costed in advance of their public release.

In the past there have been examples of policies that have been publicly announced with costings that, when reviewed by the Treasury and/or the Department of Finance under the charter costing arrangements, were found to be materially inaccurate.

Such discrepancies in costings could have a very detrimental effect on the credibility of the policies involved and, in extreme cases, could even damage the election prospects of the political parties concerned.

With the PBO now in place, and its services being extensively used by parliamentarians, it is much less likely that such undesirable situations will arise in the future.

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We are able to work in a relatively informal and interactive manner with parliamentarians.

For instance, we encourage parliamentarians to have informal discussions with us before formally submitting their requests. This helps to ensure that the requests are adequately explained and the necessary supporting material is provided to enable us to undertake our work in a timely fashion.

We also engage with parliamentarians during the preparation of our responses. We may initiate discussions to clarify issues or to seek additional information. Parliamentarians too may wish to contact us if they become aware of any additional information that could have a material bearing on the work that they have requested us to undertake.

This level of informal interactive engagement with parliamentarians on policy costings and budget analyses was not possible in the past. This is a positive development stemming from the establishment of the PBO that has considerable potential to enhance policy development.

### **Published research**

The Australian Government's budget documents are very extensive and contain a large amount of information. However, for the uninitiated reader and, I might say, at times even for readers familiar with the documents, finding and extracting information can be difficult.

The PBO has a role to play in making budget information more accessible and understandable for parliamentarians and the public at large.

In undertaking this public education role, it is important that we ensure that our publications are relevant and timely, and add value through expert independent analysis that helps to inform public discussion on current fiscal policy issues.

They must also be written in plain English, avoiding the use of obscure technical language and jargon, to make them meaningful to as wide an audience as possible.

The PBO's program of published research has a particular focus on the sustainability of the budget over the medium term.

Consistent with this focus, our first report, prepared after the 2013–14 Budget, examined the structural position of the Australian Government’s budget;<sup>17</sup> that is the position of the budget after allowing for cyclical and one-off factors.

We chose this topic because the underlying structure of the budget had been the subject of considerable public debate at the time, and a structural budget balance analysis had not been included in the budget papers since the 2009–10 Budget.

Our report showed that the budget had been in structural deficit for some years and, on the basis of projections as at the 2013–14 Budget, was likely to remain so over the forward estimates period. We indicated that there would be value in this analysis being undertaken on a regular basis to enable the structural budget balance to be monitored over time.

Subsequently, the secretaries of the Treasury and the Department of Finance included an analysis of the structural budget balance in their 2013 *Pre-election Economic and Fiscal Outlook* report.<sup>18</sup> Structural budget balance analyses have since been included in all budget reports, commencing with the 2013–14 *Mid-year Economic and Fiscal Outlook* report.<sup>19</sup>

Our other research reports to date have examined the following: historical trends in budget receipts and payments at the Commonwealth and national levels; the sensitivity of the budget to economic shocks; and medium-term (10-year) projections of budget receipts and payments.

Our latest medium-term projections report, prepared after the 2015–16 Budget, provided detailed projections of budget receipts and payments out to 2025–26 based on no change in the government’s policy settings over the 10-year projection period.<sup>20</sup>

The annual budget papers include detailed four-year estimates of receipts, payments and the balance sheet position. They also include 10-year projections of the

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<sup>17</sup> Parliamentary Budget Office, *Report No. 01/2013: Estimates of the Structural Budget Balance of the Australian Government: 2001–02 to 2016–17*, PBO, Canberra, 2013, [www.apb.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Budget\\_Office/research\\_reports/Estimates\\_of\\_the\\_structural\\_budget\\_balance\\_of\\_the\\_Australian\\_Government\\_2001-02\\_to\\_2016-17](http://www.apb.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Budget_Office/research_reports/Estimates_of_the_structural_budget_balance_of_the_Australian_Government_2001-02_to_2016-17).

<sup>18</sup> Commonwealth Treasury & Department of Finance and Deregulation, *Pre-election Economic and Fiscal Outlook 2013*, The Treasury, Canberra, 2013, [www.treasury.gov.au/PublicationsAndMedia/Publications/2013/PEFO-2013](http://www.treasury.gov.au/PublicationsAndMedia/Publications/2013/PEFO-2013).

<sup>19</sup> Commonwealth of Australia, *Mid-year Economic and Fiscal Outlook 2013–14*, Canberra, 2013, <http://budget.gov.au/2013-14/content/myefo/html/>.

<sup>20</sup> Parliamentary Budget Office, *Report No. 02/2015: 2015–16 Budget—Medium-term Projections*, PBO, Canberra, 2015, [www.apb.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Budget\\_Office/research\\_reports/2015-16\\_Budget\\_-\\_medium-term\\_projections](http://www.apb.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Budget_Office/research_reports/2015-16_Budget_-_medium-term_projections).

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underlying cash balance and net debt; but provide no details of the underpinning projections of receipts and payments.

Every five years, the *Intergenerational Report* provides a snapshot of how projected changes in factors such as Australia's population size and age profile may impact economic growth, workforce participation and the sustainability of public finances over the ensuing 40 years.

The PBO, by publishing detailed 10-year projections of receipts and payments, seeks to help fill the information gap between the government's detailed annual four-year forward estimates and its five yearly 40-year fiscal projections.

If prepared on a regular basis, detailed 10-year projections could help to throw more light on the major drivers of the budget, identify significant divergent budgetary trends over the medium term, and facilitate early consideration of any necessary fiscal policy adjustments.

The forecast improvement in the underlying cash balance over the 2015–16 Budget forward estimates largely reflects a projected increase in receipts contingent on an early and sustained return to above-trend economic growth.

The PBO's latest medium-term projections report highlights some of the risks to the budget. The 2015–16 Budget projections assume that labour productivity will achieve its long-term average growth rate over the projection period and the terms of trade will stabilise well above its long-run historical level. Both of these assumptions are subject to risk.

The budget projections also show a steady deterioration in the underlying cash balance after 2021–22, reflecting a small but sustained increase in payments over the last four years of the projection period. This projected deterioration points to an underlying structural imbalance in the budget over the medium term.

The PBO will continue to prepare detailed 10-year budget projections after each annual budget. We will also test the sensitivity of these projections to economic shocks to help identify the key risks to the government's budget position over the medium term.

### **Is the PBO achieving its objectives?**

In addressing this question I will draw on stakeholder sentiment, as expressed through the continuing demand for the PBO's services, the findings of the Auditor-General's



June 2014 performance audit of the PBO, comments from the Chair of the JCPAA, and the results of the PBO's 2015 stakeholder survey.

As I have already mentioned, the PBO has experienced a strong and sustained demand from parliamentarians for its policy costing and budget analysis services. This reflects a large amount of repeat business and is an indicator of the continuing reliance parliamentarians are placing on the PBO as they develop their policies.

In his performance audit, the Auditor-General found that 'The PBO has made a significant contribution to levelling the playing field for all parliamentarians' and that 'Overall, the work of the PBO has contributed to greater transparency about the fiscal and budgetary framework, and has the potential to further increase this transparency over time'.<sup>21</sup>

He also concluded that 'the PBO has effectively undertaken its statutory role and is already well regarded as an authoritative, trusted and independent source of budgetary and fiscal policy analysis'.<sup>22</sup>

The Chair of the JCPAA, in the committee's November 2014 report, commented that the PBO 'quickly gained the confidence of parliamentarians as an independent non-partisan source of expertise on the budget cycle, fiscal policy and policy costings'.<sup>23</sup>

He also stated that 'The PBO is an important addition to our democratic arrangements and has already made a significant contribution to transparency and accountability in the country's finances'.<sup>24</sup>

Towards the end of 2014–15 we commissioned an independent research firm to conduct a survey of the PBO's key stakeholders, including parliamentarians and their staff, independent analysts and media representatives.

A large majority of respondents to this survey indicated that they were satisfied with the work of the PBO and agreed that the PBO is non-partisan, independent, operates with integrity, improves the transparency of budget and fiscal policy settings, and helps to level the playing field for all parliamentarians. There was a strong level of satisfaction with the quality of the PBO's policy costings, budget analyses and research publications.

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<sup>21</sup> Australian National Audit Office, *Performance Audit Report No. 36, 2013–14: The Administration of the Parliamentary Budget Office*, ANAO, Canberra, 2014, pp. 101, 117.

<sup>22</sup> *ibid.*, p. 18.

<sup>23</sup> Joint Committee of Public Accounts and Audit, *Report No. 446*, *op. cit.*, p. vii.

<sup>24</sup> *ibid.*, p. viii.

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Stakeholder satisfaction with the PBO's service delivery arrangements was also high. In particular, the professionalism, accessibility and helpfulness of staff were rated highly, as was the consistency of the information provided by the PBO.

Stakeholders would, however, like to see an improvement in the timeliness of the PBO's responses. This will require us to continue to build our data and model repositories, further invest in staff training, and ensure the PBO is adequately resourced to cope with the sustained high demand for its services.

Overall, the evidence suggests that the PBO is achieving its objectives of helping to level the playing field for all parliamentarians and enhancing the transparency and public understanding of the budget and fiscal policy settings.

It also suggests that the PBO has been accepted as a credible, trusted, independent and non-partisan institution of the parliament, and an important element of the Australian democratic process.

That said, we must not become complacent, but continue to strive to improve the services that we provide to parliamentarians, and strengthen our public education role.

### **Concluding remarks**

By and large the work of the PBO is forward looking. The PBO does not have an audit role and the sometimes awarded label, 'fiscal watchdog', does not sit easily on the PBO's shoulders.

The PBO is a facilitator of policy development across the political spectrum, and an educator of parliamentarians and the general public about fiscal policy issues.

The PBO deals in facts and objective analysis. The PBO has a role in identifying issues that, at times, may be uncomfortable for governments or oppositions. But, the PBO must at all times remain non-partisan, and it must not take sides in policy debates.



**Question** — You have spoken about the strong and sustained demand, and you have given us some very impressive figures about that. I wonder whether you could tell us a little bit more about where that demand is coming from? To what extent does it

come, for example, from shadow ministers? To what extent does it come from backbenchers? To what extent does it come from non-government members? To what extent is it also used by government members of the parliament? In other words, can you give us a flavour of what kind of people are in fact using your service?

**Phil Bowen** — Yes, I can, without going into all of the detail and certainly not divulging confidences. The biggest demand, as I think you wouldn't be surprised to hear, comes from non-government parties, so heavy use by the opposition and by the Greens. There is demand also from cross-bench members, independents and some backbench government members. I don't think I have left anybody out; I don't think there is anybody else to include. Obviously we are a resource which is used very intensively by oppositions. This was the case in the lead-up to the last election when the coalition in opposition had almost all of their policies costed by the PBO. While not yet disclosed, I would be surprised if that was not the case this time with the current opposition. That is certainly the way it has been working and how it is shaping up.

**Question** — Mr Bowen, I wanted to put to you a little hypothetical situation of someone appearing on your doorstep wanting to have capital expenditure and not having thought about operating costs, for instance computers in secondary schools or something of that nature. What is the office able to do to nudge people closer to reality? In such a circumstance, where the data about operating costs lie more with the states than with Commonwealth agencies, what are you able to do to maximise the credibility of any estimates?

**Phil Bowen** — First I should say, just to make it clear, that the costings that we do are costings of policies that would impact the Commonwealth budget, not state budgets. That is the first thing, just to be clear. But of course we are happy to draw data from wherever we can find it to get the best data to help us do our costings. What we do when we get a proposal is make sure, first of all, that it is fully and comprehensively specified by the parliamentarian giving us the proposal. At times we will go back and ask the parliamentarian whether they have thought about even simple things—like when the policy would start from, which groups it would apply to, which it would not, eligibility issues, and things of this nature—so that we have got a complete set of specifications that we can cost. Then we have to make our own assumptions and find our own data to actually undertake the costing. If we were asked to cost a proposal—I think you talked about installing computers somewhere—we would not simply look at the capital cost. It is obvious they will be used over a period of time and we would do a lifecycle costing as it impacts the budget at least over the forward estimates.

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**Question** — I am a former consultant at the World Bank, specifically focusing on PBOs, so I am as passionate about your institution as you are. My question is two part. It is about the longer term prospects of the PBO. You said explicitly that the PBO does not do policy recommendations so it does not have that advisory role. Do you think that in Australia it could provide greater value to the public and to the budget process and to democracy if it did have a policy recommendation role in the longer term? Secondly, in the longer term, could the PBO here serve as a mentor of sorts for countries in the region that might consider establishing PBOs going forward? New Zealand and Fiji do not have these institutions, so perhaps your experience can be shared with them.

**Phil Bowen** — On your first question, my usual answer to a hypothetical question is to say I don't answer hypothetical questions. The model that has been adopted for the Australian PBO is not dissimilar to models of many other like organisations. For example, the Congressional Budget Office in the US, which I have mentioned and you would be familiar with, similarly does not provide policy advice or recommendations and the rationale basically is that to do so runs the risk of the organisation being seen to be supporting a particular political slant and that could make it difficult for the organisation to remain non-partisan and to be seen to be non-partisan. So at this point in time I would not see us moving down that path.

On the mentoring, we already do. I am a member of the OECD's Network of Parliamentary Budget Officials and Independent Fiscal Institutions.

**Question** — Is that the Global Network of Parliamentary Budget Offices you are referring to?

**Phil Bowen** — No, that is the World Bank one. We have provided some assistance to the network you just referred to, which comes under the auspices of the World Bank and includes mainly developing countries from memory, although Canada is quite closely associated. I would be happy to talk with you further about that outside. We have provided some assistance in peer reviewing a set of principles that are being developed for that group—I can't quite remember who was developing them now. We are also open to doing more of that to help others now that we are reasonably well established, although still quite young.

**Question** — Do you have a relationship with the Parliamentary Library?

**Phil Bowen** — Yes we do. It is not a formal relationship, but some of the best relationships are informal. We recently, I think it was earlier this week in fact, had a seminar presented by senior people from the Parliamentary Library to staff of the

PBO and we do look at ways in which we can cooperate. That said, we have distinct roles, responsibilities and mandates, but we have a very cooperative arrangement.

**Rosemary Laing** — You might recall that, before the PBO was established, the library did get some extra funding to have a capacity for more economic advice and perhaps costings. Of course, once the PBO was established, I don't think that funding continued. My question is very quick and you can give it a superficial answer. I was really interested in your educative function and what thought you have given to how you measure your impact on the capacity of parliamentarians to use that enhanced fiscal and economic literacy in the performance of their roles, for example, through their questions at estimates committees and such like. Is there any formal monitoring or evaluation of that yet, or is it too early do you think?

**Phil Bowen** — Well measuring outcomes is difficult at the best of times. At this point we are attempting to measure perhaps the next step down, the outputs that we deliver. We are doing that in a couple of ways. We do monitor the hits we get to our web page and the documents that are reviewed. We also monitor articles in the press that draw on our work, whether it is our published work or policy costings. Thirdly, as I mentioned before, we have conducted our first stakeholder survey and this is really important to get feedback from the people who we work with and who use our products. It is not perfect but it is one of the better indicators that we have got at this time of how well our work is being received and how helpful it is. I am not sure that we would ever get to the point of attempting to attribute a higher quality debate on fiscal policy to the PBO's work. There is always a difficulty in attribution of any such outcome. Of course we would be very happy to see it.



## **High Expectations Realities through High Expectations Relationships: Delivering beyond the Indigenous Policy Rhetoric\***

*Chris Sarra*

As part of my duty as an NRL Commissioner I had to be at the 2015 Telstra Premiership Grand Final. It was an epic match and easily sits as one of the best grand finals ever. The Broncos defended their line fiercely and admirably for 79 minutes and 45 seconds. Then, just as even the most loyal of Cowboys fans, like me, had all virtually given up, Johnathan Thurston refuses to die with the ball as he searches for his magical halves partner Michael Morgan. Morgan takes the ball with seconds remaining; Cowboys fans are saying ‘No hang on! We might be a chance here!’

With just moments to go Michael Morgan does what Thurston expects of him and conjures some magic to put Kyle Feldt away in the corner to level the scores on the last second of the last minute, with the kick to come to win the game after the hooter.

As if the football gods had not messed with our heads enough, Thurston kicks; it looks like it’s going in and it hits the post and now we have to go into extra time. The rest is history now as the Cowboys capitalise on a Broncos error in front of the posts and Johnathan Thurston goes on to kick the winning field goal. Cowboys fans like me start to cry because we have waited for this moment for 20 years.

There are so many things that are special about this day and this game. In the previous game an Indigenous captain holds the NRL State Championship trophy aloft. In the main game, two Indigenous captains, Justin Hodges and Johnathan Thurston, lead their teams in an epic grand final. This is the great thing about rugby league. The playing field is level. Indigenous players bring their sense of strength and excellence which is acknowledged, embraced and celebrated. At the end of the game we see Thurston and Hodges embrace after a game which was as fair as it was superb. Hodges is consoled by his dad and his wife, Thurston sits on the ground with his daughter who holds her favourite black baby doll and gives her tired-looking dad a hug and a kiss: excellence and humanity at its best.

Earlier in the day I had approached Malcolm Turnbull to congratulate him on his ascendency to the prime ministership and, as I described, his clever appointment of Senator Arthur Sinodinos to the role of Cabinet Secretary. As I mentioned to him, at

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\* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra, on 13 November 2015.

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least now we can have something that resembles a functional cabinet as opposed to the crippling centralised way of governing that many of us had become so frustrated by.

‘This whole Prime Minister for Indigenous Affairs thing’, I told him, ‘has done more harm than good, and seems to be more about gimmicks, personalities and polls, rather than proper policy process’. The Minister for Indigenous Affairs must be trusted and able to get on with his role, without distractions and confusion about who is responsible for what.

He then said ‘Chris, what are three things we can do in the Indigenous policy space to make a difference?’

It is too important and too complex a question to answer at an NRL grand final, and I did have to focus on the game, so I said to the PM, ‘I do have an answer for you but I’ll get back to you with those three things at some stage soon’, to which he responded, ‘Please do’.

So here I am offering just three things that we can do in the Indigenous policy space to make a difference.

It occurred to me that the answer to Prime Minister Turnbull’s question was being played out right before us on that epic NRL grand final night. On a level playing field we saw the humanity of Indigenous Australians authentically acknowledged, embraced with enthusiasm, and celebrated with passion. We saw young Indigenous Australians nurtured by hope, which cultivated their strengths and excellence and encouraged them to chase down their dreams, no matter how lofty they seemed. We saw Indigenous leadership working with non-Indigenous leadership together in an elite and honourable, high expectations relationship.

This is the perfect analogy for the Australian society we can develop. There are three things we can do:

1. Acknowledge, embrace and celebrate the humanity of Indigenous Australians
2. Bring us policy approaches that nurture hope and optimism rather than entrench despair
3. Do things with us, not to us!

### **Acknowledge, embrace and celebrate the humanity of Indigenous Australians**

It is always a complex and, for many, hurtful challenge to reflect on the past in such a way that we learn from the awful tragedies of our shared history, without letting it



define us in an unproductive way that can stifle our quest for shared emancipation into an honourable future. The truth is there have been, and continue to be, many very clear and graphic examples of where the humanity of Aboriginal Australians is either not embraced and acknowledged, or simply undermined. It is also true that in some Aboriginal communities we observe what might be described as ‘subhuman’ behaviours. At the risk of rendering some gross misbehaving and poor choice-making individuals not culpable for some despicable behaviours, I would argue quite strongly that when we treat individuals as though they are subhuman, then subhuman behaviours are likely to emerge.

I have never backed down from calling out such injustices from both sides of this relationship, but on this occasion let me reflect positively on the example I gave at the outset of this lecture with our two Indigenous NRL grand final captains after the game on that level playing field, embracing each other, and then embracing their families.

My simple point, as strange as this may sound, is this.

Our humanity exists!

Our humanity exists and it must be acknowledged. It is worth embracing and celebrating. Our humanity has existed for tens of thousands of decades on this land we now share, and it continues to exist proudly, despite the efforts of post-colonial governments to smash us and smash us and smash us. This is not an invitation to smash us even more, but rather an opportunity for you to understand that such efforts are futile and our humanity cannot ever be assimilated, nor destroyed. Nor should you want it to be because as we share ancient land, we share humanity.

When you embrace and celebrate the humanity of Indigenous Australians you embrace and celebrate your own humanity, because it is our humanity that we share at our core. To help us understand this more deeply, let me reflect on some of my earlier work inspired by the late and very great modern day philosopher, my dear friend Roy Bhaskar.

Bhaskar discusses the concept of the ‘concrete universal’ which has four dimensions. At its base is the notion of a ‘core universal human nature’. We are all of the human race and this should ensure unquestionable grounds for human rights.

At a higher level this basic core is acted upon or mediated through a variety of ‘differentiae’ such as gender, sexuality, age, ethnicity or culture et cetera. The core and the mediations result in a ‘concretely singularised individual’. The fourth dimension to this concept is that of ‘processuality’ or the rhythms of time in action.

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The key to understanding the importance of the concept of the concrete universal is that it is part of a stratified ontology, or stratified insight into our sense of being. Put simply, each of us has layers or stratifications of being. As well, the notion of processuality allows one to recognise that at differing times in the life of the individual, the mediations or the individuality upon the core humanity can be of greater or less salience. If we can accept the terms of Bhaskar's insights here, then we have hope of being liberated from those toxic dynamics that are quintessential to the binary of 'mainstream' and 'other', whereby mainstream is somehow 'superior'.

Put simply, all of us are set free from the pressures of being one or the other as it becomes the case that we can be content with who we actually are, knowing that at some times we actually can have strong resonance with a sense of being mainstream, and at other times in other contexts, we can have equally as strong resonance with a sense of being 'other'.

Let me explain.

When I stand on the land of my father's people, my people, at the village of Miglianico, in the province of Abruzzo, Italia, my sense of being Italian resonates strongly for me. When I stand before the graves of my father's parents, speaking Italian with my half-brother, Gulio, my sense of being Italian continues to resonate strongly and he embraces me as such. At my core I am human and the resonance of my Italian ethnic differentiae is dramatically enhanced by processuality, which sees me on my father's country, Italia, in that moment in time. Significantly, my sense of being Aboriginal or Australian is not relinquished here; it simply does not resonate so strongly.

When I am at home fishing in the Burnett River in Bundaberg knowing my people have done this for many thousands of years, my sense of being Aboriginal is very strong. In this place in this point in time, I often look across the river to Paddy's Island, a place where many of my ancestors were massacred, and wonder what life must have been like for them before, during and after the slaughter of so many. At my core here I am human and my sense of being Aboriginal resonates very strongly; enhanced by the sense of time and place that locates me here. I have not relinquished my sense of being Italian, nor my sense of being Australian.

As I reflect on times when my sense of being Australian resonates more strongly I think of rugby league, of barbeques and the beach. In a deeper sense I think of when my mum's house in Bundaberg was completely flooded by the devastating January 2013 floods and a 'mud army' of volunteers who I didn't even know, turned up to help my family clean up and rebuild. At my core here I remain human and this

humanity is shared with those around me. My sense of being Australian resonates strongly here, given the time, place and context. In such times when tragedy strikes we stick together as Australians and we just get in and help. It's what we do. In this circumstance I have not surrendered my sense of being Aboriginal or my sense of being Italian.

Understanding and embracing the notion of a stratified ontology not only liberates Aboriginal people from the toxic dynamics of being forced to be mainstream, it is indeed an intellectual concept that is emancipatory for white Australians. Many white Australians have experienced this also, perhaps unknowingly. Many have experienced a strong and very powerful sense of 'spirituality' when visiting the graves of their ancestors in England, Scotland or Ireland for instance. At their core they remain human, while the differentiae of their ancestral ethnicity, enhanced by the processuality of their time and place, are the very dynamics that 'fills a hole inside them' as they sometimes describe. Importantly they have not surrendered their sense of being Australian, but their sense of humanity is enhanced.

Acknowledging, embracing and celebrating our humanity means you would never let our communities continue to be neglected at the end of the vine or characterise our sustained existence in remote parts of Australia as some form of flippant 'lifestyle choice'.

Acknowledging, embracing and celebrating our humanity means you would never amend the Racial Discrimination Act especially to inflict policy approaches on us in a way that would never be inflicted upon other Australians.

It means you would acknowledge us as the original custodians in our nation's Constitution.

Acknowledging, embracing and celebrating our humanity means you would find the courage to contemplate some form of a treaty, a document upon which we both agree, no matter how long or complex this task is.

**Bring us policy approaches that nurture hope and optimism rather than entrench despair**

Again as we watched the NRL grand final, won by the Cowboys, we witnessed Indigenous excellence manifested, and borne out of the seeds of hope, sown many years earlier. It is one of the things I love about being an NRL Commissioner. I get to see very solid young men and women, playing rugby league for their country at the elite level, knowing that at some stage many years earlier, they dreamed of being a

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Kangaroo, or a Jillaroo. These dreams can only manifest when they are nurtured by hope.

If politicians and other policy makers operate from a philosophical basis that acknowledges and embraces the humanity of Indigenous Australians, there is scope for policy approaches and programs to nurture hope and optimism rather than entrench despair.

When it comes to constructively aligning people, philosophy, policy and programs, we must understand that ultimately we are dealing with a relationship. The relationship is of course the one between Indigenous and non-Indigenous Australians. Both parties have a responsibility to tend that relationship and to ensure that it is healthy and a source of mutual benefit.

My own research, triangulated by our shared instincts, shows that the relationship is not as healthy as it should be. It empirically unveils a world of ambient racism and unhelpful yet persistent negative stereotyping of Aboriginal people. Persistent to the extent that non-Aboriginal and, regrettably, Aboriginal Australians subscribed to it as if it were some kind of 'truth', when in fact it was not. Too many of us are blasted by this singled-barrelled so-called reality, calling this inaccurate, yet prolific 'reality' into some form of 'being'. Too many of us don't realise we actually have a choice, but then unwittingly choose to collude with this toxic 'reality', nurturing it, to make it appear more real than it actually is.

Sometimes non-Aboriginal people do this because it readily fits with the narrative of Aboriginal people as, what I have described in other papers, a despised 'other'. Sometimes non-Aboriginal people do it because they might inadvertently think they are being 'culturally sensitive' when in fact they are simply colluding with a negative stereotype.

Sometimes Aboriginal people collude with this stereotype, thinking they are reinforcing their 'cultural' identity, when in fact they are simply reinforcing a negative stereotype and/or clinging to victim status that no longer serves us in a modern society.

Sometimes Aboriginal and non-Aboriginal people collude with and nurture this toxic negative stereotype because, bluntly, there is lots of money and power in keeping this 'industry' alive, as we entrench the despair of Aboriginal people while pretending to do otherwise.

These dynamics of stereotyping and collusion are what Nobel Laureate Daniel Kahneman calls 'fast thinking'. This fast thinking consists of slurs, insults, names, sayings, jokes, opinions, metaphors, metonyms, and slogans. There is no need for me to rehearse with you the world of fast thinking about Indigenous Australia. The problem is that fast thinking is almost immune to logic and the rationality of what Kahneman calls 'slow thinking'. People still believe that Aboriginal Australians have lots of privileges despite all rational and statistical evidence to the contrary. The language of fast thinking is a house of being and it determines how we think and act. This is why fast thinking is influenced, not by rational slow thinking, but by alternative fast thinking.

It seems clear our current Prime Minister knows this. During the Rudd/Abbott years we were spooked and then paralysed by incessant bleating, or fast thinking about a budget crisis. Today, after being offered alternative fast thinking, and told this is a time for hope and optimism and there has never been a more exciting time to be Australian, we find ourselves as a nation tentatively embracing a more authentic dialogue about tax reform.

In fast thinking on Indigenous affairs we often hear things like 'We've tried everything and nothing has worked' when actually we haven't tried everything, and we certainly haven't seriously tried a high expectations relationships policy approach. We say things like 'We've spent billions in Aboriginal communities', when most of the dollars are more likely spent on bureaucracies and consultants before it even gets to communities. We have a catchy mantra of 'Closing the Gap', which in many ways suggests that as blackfullas we are here and other Australians are there, with a big gap in the middle that leaves us blackfullas with some catching up to do if we are to be as good as the average Australian. When in fact the truth is reflected in the less catchy notion of 'shifting the bell curve to the right', a notion that reminds us all that many Aboriginal people are as exceptional as our fellow Australians.

My simple point here is that the fast thinking, or the policy rhetoric if you like, often does more to entrench a sense of hopelessness and despair rather than nurture a sense of hope and optimism. Even big spending and 'well intentioned' silk purse policy approaches fail dismally on this measure and are exposed as the filthy pig's ear that they are.

In my memoir, *Good Morning Mr Sarra*, published in 2012 by University of Queensland Press, I recalled an encounter with a proud, yet almost deflated Aboriginal man in Alice Springs at the time of the juggernaut that was the Northern Territory Intervention. In our encounter the young man said to me with a deep sense of hurt in his voice, 'Chris, you don't know just how hard it is to be an Aboriginal

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man in this town! You walk down the street here and these people just look at you like you're some kind of paedophile or like you're just comin' from bashing your woman at home'.

It is impossible to argue that such an approach, which saw signs erected to brand Aboriginal communities as they did, while sending the army in from the outside to 'fix' them, could instil a sense of hope and optimism. I am not denying for a moment that toxic and subhuman behaviours exist in some Aboriginal communities and must be flushed out. You will argue that such toxic and subhuman behaviours exist and I will agree with you.

I will then challenge you to wonder about why such behaviours exist and remind you that when you treat people as though they are subhuman, then subhuman behaviours emerge.

What I find grossly offensive is this dynamic in which we home in on extremely toxic and subhuman behaviours and conflate their existence as if all Aboriginal people are behaving in such ways. Roy Bhaskar would call this the epistemic fallacy. Briefly, this is the reduction of being or reality to our knowledge of it; or, if you like, the refusal to make a distinction between ontology and epistemology.

Another way of explaining this is that makers of Indigenous policy, including government-anointed so-called leaders, do not understand the fundamental importance of a strength-based approach to community and individual transformation. Even those who enjoy choreographed visits to Aboriginal communities cannot fully understand the depth of complexity required to be useful, especially if they listen and observe simply to confirm their own way of thinking, rather than listening and observing to really understand.

Policy makers may be great at spending taxpayers' money conjuring expensive yet ineffective government programs and quasi-bureaucracies. Yet their unsophisticated, deficit-based elucidations expose them as impotent amidst the profound need for stratified, strength-based approaches to individual and community transformation, and almost completely ignorant amid the profound need for deep and compassionate understanding of the stratified ontology of Aboriginal people and their communities.

When I worked as school principal in Cherbourg for six and a half years, we fixed attendance with a sophisticated and stratified strength-based approach. Thirty-eight per cent of children were not attending school. We didn't immediately resort to cutting welfare payments of all parents as if 100 per cent of children were disengaged. We recognised that 62 per cent actually were engaged and if we celebrated and

reinforced this great strength both extrinsically and intrinsically, then we were likely to positively influence most, but probably not all, of the remaining 38 per cent. By acknowledging and celebrating the strengths on display, attendance went to 94 per cent. The remaining six per cent had more hardcore needs and so we pursued this as best as we could, in a more low-key way. It was an approach simple to understand, yet hard work to execute, but one that was effective and cost less than one per cent of the taxpayers' money we see spent in some schools today in deficit approaches that assume all students are chronically disengaged.

I was in Warburton in remote Western Australia as recently as last week. The week before I was in Wiluna and the week before that in Ampilatwatja in the Northern Territory. The conversations there remind me that such frustrations and such despair persist with policy and program approaches that simply conflate single-barrelled understandings about Aboriginal people and communities, and offer ineffective, unsophisticated blanket approaches that simply don't make sense. Not only do they not make sense, they are causing an even greater sense of despair and disengagement from Australian society.

This is an aspect of the stratified ontology of Aboriginal people that your makers of Indigenous policy simply do not understand. As blackfullas you can bring on your policies and programs and bash us and bash us and bash us! We will not change. We will not become the people you want us to be. We will submit in some way but in a way that will see us become passive, simply disengage or readjust because we are so accustomed to you smashing us and our communities. I am sure some of you may have seen this passivity and disengagement, without even knowing you have seen it.

Some of you have been tricked into believing that such passivity is the result of welfare, when in fact it is the result of chronic disengagement from a local and vibrant economy. Welfare and a basic social security structure did not cause chronic disengagement from the economy. A lack of desire to pay equal wages to Aboriginal people in the late 1960s caused chronic disengagement from the economy. A lack of desire to invest substantially into innovative, vibrant and sophisticated localised economies entrenches ongoing chronic disengagement.

But you have never been seriously challenged to understand the deep complexities here! You have never been challenged because in order to seduce you, it is better to pretend you are not culpable in any way for the challenges we face. If I can make it seem like Aboriginal people are entirely to blame here, you will describe me as a hero and you will throw millions at me and never seriously question the efficacy of my approaches, even if they take us back to the policy approaches of the last century. You have never been challenged because frankly there is great power and money to be had

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from the entrenched despair of Aboriginal people. Personally I think this reluctance to challenge underestimates your intelligence and your humanity, leaving us all floundering with limited hope of transcending the challenges we face together.

Today I challenge the Prime Minister!

Not to pick a fight with him, but because I respect his interest in a positive future for all of us. I respect his intellectual and emotional capacity to embrace and be honest about the extent to which he is culpable in a high expectations relationship with Aboriginal Australia and I am committed to the same.

And you, Prime Minister, and your policy makers have a choice. You can choose the more expensive and ineffective option of continuing to devise policy approaches that continue to demonise us and entrench despair. You can bring policy approaches to bash us and bash us and bash us. Or you can bring policy approaches that offer hope, and a sense of pride, and a feeling that we can trust and walk with you into what I would call a stronger, smarter, more honourable future, where your emancipation is bound up in mine.

**Do things with us, not to us!**

When Cowboys coach Paul Green set about conjuring a way to win the NRL grand final, he collaborated seriously with his Indigenous captain, Johnathan Thurston. He did this because Thurston has wisdom and sophisticated insights to offer. He did this because he had an authentic belief in the strengths and knowledge that were obvious, and sometimes not so obvious, in his team's captain.

A key pillar of the stronger smarter approach is high expectations relationships as opposed to high expectations rhetoric. Sometimes high expectations rhetoric espouses lofty ideals that are often imposed with good intentions from the outside rather than negotiated with the individuals to be affected.

I mentioned earlier the fundamental importance of understanding that as we contemplate the challenges we face together, we are in a relationship in which we must ensure that it is healthy and a source of mutual benefit. My greatest intellectual insight of the last two years, I think, is understanding the profound difference between high expectations *of* Aboriginal people versus the notion of high expectations *with* Aboriginal people; high expectations rhetoric versus a high expectations relationship. I can assure you that we as Aboriginal people want to be on a journey with you. This journey, however, must be one that enables us to be the best that *we* want to be, not a journey in which we are forced to be who *you* want us to be. Let me assure you that as Aboriginal people we have an interest in being the exceptional people that we can be



and often are. None of us aspire to be downtrodden, uneducated, disempowered and dysfunctional.

It is often the case that sometimes well-intentioned non-Indigenous Australians make fatal mistakes at the very genesis of their relationship with Aboriginal Australians. Imagine you and me preparing for an important journey together, standing alongside each other, and calibrating our compasses for a stronger smarter destination. Even just to stand together, we must have purged from our relationship the toxic stench of low expectations, mistrust, and stifled perceptions of each other. From this point we have a chance of getting our compasses aligned.

If you stand beside me well intentioned, but in this relationship feeling sorry for me, as if I have to be rescued, the relationship is contaminated from the start, leaving us a few degrees out from each other and destined to become parted in the long run.

You might come to the relationship assuming that I must change my ways and become 'like' you in every way, emulating your way of existing—assimilated if you like. In this circumstance you assume you are superior to me and I am inferior to you. With this as our starting point the relationship is again contaminated and we calibrate our compass in a way that gives us no chance of taking an honourable journey together.

In some ways this analogy explains why we spend billions on Aboriginal affairs and achieve no appreciable gains.

If, however, we start the relationship in which our strengths and humanity are acknowledged and embraced, and we are convinced of an authentic sense of hope for all, then our hearts can truly beat closely together, and our compasses can be calibrated for an exciting, sometimes bumpy, yet honourable journey into the future.

In a practical sense this means identifying and embracing local community leadership that is proven, rather than anointing Aboriginal leadership that will only tell you what you want to hear.

On the Aboriginal education landscape, if we have the courage, it means acknowledging that Aboriginal parents *do* want the best for their children. It means being bold enough to offer those parents who work in partnership with schools to get their children to school for more than 85 per cent of the school year, the guarantee that their child will achieve the national minimum standard on all years 3, 5, 7 and 9 benchmarks.

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Beyond year 9, if we are bold enough, it means offering a guaranteed service outcome in the form of a job, a place in training, or a place in a university to all Indigenous students who complete year 12 with better than 85 per cent school attendance.

It means doing whatever it takes to inject exceptional school leadership into remote Aboriginal community schools.

This is honouring and embracing humanity. This is offering hope. This is doing things with people not to them.

## **Conclusion**

In some ways the three things I have articulated here can in essence be seen as the triple bottom line for Indigenous policy analyses. My critics may well want to accuse me of being overly philosophical but after 17 years as a very successful educator on the Indigenous education landscape, I have nothing to prove.

As an educator I said I wanted to change expectations of Aboriginal children and today expectations have changed. Today there is no place to hide for any teacher with low expectations in any classroom in any school in Australia. Of course they are still out there, but it is only a matter of time before they are exposed and challenged.

Whilst these three points might seem philosophical to some, the truth is this is the very approach that enabled me to work with staff, students and community at Cherbourg State School some years ago to deliver transformational change.

The formula for success here was very simple, but as is always the case, the work was always very hard. There are no silver bullets or quick fixes here. Notwithstanding, the formula was so simple that we have proven it is able to be extrapolated by those who are prepared to work extremely hard and apply the stronger smarter, high expectations relationships approach which acknowledges, honours and embraces a positive sense of Aboriginal identity and works *with* positive Aboriginal leadership that is beyond victim status. Beyond Cherbourg the Stronger Smarter Institute has for the last 10 years worked with more than 500 schools and communities and more than 2,000 educators and community leaders with an exponential reach of more than 38,000 Indigenous Australian students.

In North Queensland at Yarrabah State School:

- 83 per cent of year 3 students at national minimum standards for reading
- 56 Indigenous youth (10 per cent of the student population), re-engaged with school

- the percentage of parents who think the school is providing a good education for their children increased from 60 per cent in 2009 to 96 per cent in 2014.

Aitkenvale State School in Townsville reduced student suspensions by 70 per cent within one term.

At Pormpuraaw State School in Cape York:

- year 5 students have the highest reading results within their group of similar schools in 2013 and 2014, and this continues to improve and outperform nearby Cape York schools that are seeing millions of dollars invested in them
- 44 per cent increase in students 'at or above national minimum standards' on NAPLAN spelling results for the same cohort from 2009 to 2013.

In the Kimberley Region Wyndham District High School:

- a 16 per cent improvement in school attendance over a three-year period
- 25 per cent improvement in year 3 reading to be above the national benchmark within a year.

At Broome Senior High School 100 per cent retention of Aboriginal students through year 8 to year 12.

At Fitzroy Valley District High School suspensions for poor behaviour were reduced by 74 per cent in two years.

At Dawul Remote Community School they see up to 100 per cent parent attendance at parent engagement activities.

At Kalumburu there was a 700 per cent increase in the number of Aboriginal people actively employed at the school within three years.

Mount Margaret Remote Community School saw 94 per cent attendance and a 37.5 per cent improvement in reading levels over a two-year period.

In northern Victoria, Swan Hill Primary School has introduced a local Indigenous language program for year 1. They have also seen a 10 per cent increase in Koori student attendance since 2010.

Mildura Primary School has closed the gap on NAPLAN results and 84 per cent of year 5 students are achieving national minimum standards, the highest within the region.

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In New South Wales at Glenroi Heights Public School they saw attendance jump to 90 per cent, up from 77 per cent just four years earlier. They also saw a dramatic reduction in Aboriginal student suspensions from 274 learning days lost in 2007 down to just 13 days lost in 2011.

Above and beyond these significant returns for Aboriginal children—this I am more than delighted to say—the stronger smarter approach delivers much needed positive change for poor white children, who in many ways are just as infected by the toxic stench of low expectations.

In closing I would love to talk with you more about rugby league, the greatest game of all, but instead let me conclude on a more sombre and profound note. While Johnathan Thurston and Justin Hodges, two of the great sons of Australian Rugby League, rose to the challenge and delivered excellence on a level playing field—a field where others worked with them to nurture a sense of hope, where their excellence was acknowledged, embraced and celebrated—it is the great Oodgeroo Noonuccal (Kath Walker), in a message to her son, who offers us all as a nation, an even greater challenge:

Son of Mine (To Denis)

My son, your troubled eyes search mine,  
Puzzled and hurt by colour line.  
Your black skin as soft as velvet shine;  
What can I tell you, son of mine?  
I could tell you of heartbreak, hatred blind,  
I could tell you of crimes that shame mankind,  
Of brutal wrong and deeds malign,  
Of rape and murder, son of mine;  
But I'll tell instead of brave and fine  
When lives of black and white entwine,  
And men in brotherhood combine—  
This would I tell you, son of mine.

I suspect Prime Minister Malcolm Turnbull is right when he says there has never been a more exciting time to be an Australian and that this is a time for hope. Let us share in that sense of hope in three profoundly simple ways:

1. Acknowledge, embrace and celebrate the humanity of Indigenous Australians
2. Bring us policy approaches that nurture hope and optimism rather than entrench despair

3. Do things with us, not to us!



**Question** — You have reminded us how important sport can be as a factor in society. I am from Victoria so I do not know much about rugby league, but I would be really interested to hear a bit more about what you are doing to empower women to compete professionally and to play, and also any initiatives to support the prevention of violence against women and their children.

**Chris Sarra** — Let me answer your question in two parts because it is a very important question. As a Rugby League Commissioner, we take very seriously the need to stamp out domestic violence so that it is not a part of our game. We understand very well the potential for our high-profile players to be able to say to people who follow them in communities in every corner of Australia, ‘This is not acceptable’. So we do what we can in that space to make use of the profile and the sense of connectedness to our elite players.

You will also see quite a dramatic shift in the profile of women in the game of rugby league. That has been increased dramatically under the NRL brand through greater participation and through a partnership with Touch Football Australia, but it has also been improved—and I am really pleased to watch this—through the elevation of the profile of the Jillaroos and the Queensland and New South Wales women’s rugby league teams. So that is that part.

From an educator’s perspective, we used to contemplate this question when I was at Cherbourg school. We talked to kids about being strong and being smart. I did talk with them about what that actually meant. It meant being strong enough to understand that, when we encounter conflict, there are other ways to deal with those issues. It means we have to be strong internally, rather than use our fists or think that we have to inflict physical pain on people.

Look, it is a really complex question and, in part, I hope that answers it.

**Rosemary Laing** — Chris, those were astonishing results that you were reading out to us at the end. You, as principal of Cherbourg, were there implementing these approaches to education. When you work with the schools you mentioned, how do you actually get into the schools and work with them? Do you train teachers or do you have staff or associates who can go and work in the school? How does it work?

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**Chris Sarra** — It is important to understand that, although all of the results are fantastic and I really love the fact that we have been a part of that journey, I have been in schools myself and I know how hard it is to achieve those sorts of outcomes. So I acknowledge all of those school and community leaders who are the true heroes in delivering those outcomes. From our perspective, we work with school and community leaders to get them to understand what we call the stronger smarter approach and the things that underpinned the success at Cherbourg. So it is not really about saying to them, ‘We did this at Cherbourg so you need to do this in your community’. It is about getting them to understand the overarching philosophical concept and understand the importance of simple things like, when you break it down in a micro sense, engaging children and having conversations with teachers, analysing the intellectual integrity of our classrooms and asking questions like: is this classroom environment, is this teacher, performing, or is the essence of that teacher–student relationship of the kind that I would accept for my own child? If the answer is no, then we should not be asking anybody else to accept it. To understand that is very simple, but to execute a response to that is very hard work.

**Question** — About 12 years ago some premiers commissioned Dr Vince FitzGerald to examine and report on the GST and horizontal fiscal equalisation. What happens is that state governments come in and put in bids to the Grants Commission saying they need to provide services, particularly to Aboriginal communities, and they will get extra money in the carve-up because it is a lot more expensive to provide those services. But then they do not provide them. It has been going on for 20 or 30 years. It was one of the key findings that FitzGerald made in his report and then the premiers put the report in the draw and did not really want to talk about it. How do you feel? Do you feel that, when you see state governments competing for extra funding to provide services and then not providing them, we are dropping the ball completely as a nation?

**Chris Sarra** — I think it is pretty easy to imagine how I would feel about that circumstance. In many ways I go back to the conversation with the Prime Minister about the need to just execute excellent policy and program approaches. That is all we are asking for. These dynamics and circumstances that you describe exist, but they only exist because, if you go to my original point, the humanity of Aboriginal people is not acknowledged. What enables that kind of behaviour from bureaucrats and politicians is this sense that, ‘Oh well, it is only black kids in remote communities, so what the hey’. If a policeman causes the death of an Aboriginal man, it is only an Aboriginal man. If it is only a remedial product, which might be costing tens of millions of dollars off the shelf from the US, and it can only ever deliver remedial outcomes even when it is executed superbly, ‘It is only black kids so what the hell. As long as we look like we are making big policy announcements, that is all we care

about.’ Those ways of behaving signal to me that there is a lack of acknowledgement of the humanity that we bring to the country. When we are perceived in this way, those sorts of behaviours are manifested. If we can do the three things that we talked about, one would hope that those behaviours will be flushed out.

**Question** — Would you care to comment on the role of homeland centres, particularly with this latest development in Western Australia?

**Chris Sarra** — I think it is worth understanding the richness of what Aboriginal Australia brings to the nation. My very strong belief is that there is good reason for all of us to celebrate the fact that we have Aboriginal people living in homeland centres and it is worth paying for that because when we do that we play our part as a society in retaining a human connection to the land that has existed for tens of thousands of years. In some circles it is thought about as the oldest form of human existence on the planet. So why the hell would we undermine that circumstance? Why would we want to be seen as a nation that housed the longest human connection to country and then set about, through policy approaches that try to force them into provincial centres, cutting that connection off after it has existed for tens of thousands of years? To me it does not make sense. It represents a lack of appreciation of the humanity of Aboriginal people in those places and it represents a lack of insight into the value that we bring to the country. When Desmond Tutu was asked about what black South Africans bring to Africa, he said they bring the *ubuntu*, which in some ways is kind of like the spunk or the thing that enchants our nation. That is what having Aboriginal people connected to country in the way that has been done brings to the country and that should never be underestimated.

**Question** — You have issued some really important challenges to the Prime Minister and you have mentioned bureaucrats as the deliverers of the politicians’ commitments. There is obviously a large bureaucracy out there in state, federal and local government. Can you perhaps expand a little bit more on the skills, knowledge and attitudes you think we need to be seeing from bureaucrats in order to inject that humanity in the sense that you have been enunciating so well today?

**Chris Sarra** — I think it comes down to that very micro kind of insight—that is, would we accept this way of behaving for non-Aboriginal Australians? We see some crazy things happen in the Indigenous policy space. I am sure they happen in other policy spaces as well. But all I am asking for is to deliver policy rhetoric and policy programs that are considered excellent and logical policy processes. You see, it does not make sense that Pormpuraaw school, which I mentioned earlier, is achieving excellent outcomes and outperforming a school up the road where they have been forced into having to endure a product that is bought off the shelf. Pormpuraaw school

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is outperforming that school after the other school has had \$8 million poured into it to execute this remedial direct instruction approach. If you read the papers, you would assume that approach is fantastic, but the actual data is saying that it is not working. So they have poured \$8 million into that. Policy logic would say: ‘This school is outperforming that school. \$8 million has gone into that school. Maybe we should have a closer look at what is happening here.’ What actually did happen, three weeks before the NAPLAN results were due to come out—I need to check my facts on this—the federal minister for education announced a \$22 million rollout of this program here. In a policy logic sense, that just does not make sense. Policy logic would say, ‘Why don’t we have a look at what the data is saying?’ That is all I am saying—just good policy execution.

**Question** — Bringing together a number of different things that you have talked about today, I wondered if you could speak to the ideas of humanity and celebrating Aboriginality while not perpetuating a victim mentality. In the educational realm, what does that look like when we implement programs and resources specifically for Aboriginal students? I wondered if you could speak to that?

**Chris Sarra** — Thank you for your question. I think it is best encapsulated in the sort of approach that we took. I don’t like to talk ourselves up too much, but I reflect on the children at Cherbourg school and the elders and the parents in the Cherbourg community. I just look at the way that, when I challenged those kids to stand up and to be strong and proud to be Aboriginal and to work hard so that we could be smart enough to mix it, they rose to the challenge because they saw value in being both strong and smart. It was not about getting black kids in and trying to turn them into being like white kids; it was about getting the strength that existed in them and drawing that out. It is a wonderful thing to reflect on that because effectively that is the place where the ripple started which ultimately created a tide that would change expectations of Aboriginal children right across Australia. I think of those kids and I am really proud of their efforts to stand up and embrace the challenge. That is what it is about: it is about being strong and being smart.



## **Representation of Commonwealth Territories in the Senate**

*Michael Sloane*

The two largest mainland Commonwealth territories, the Northern Territory and the Australian Capital Territory (ACT), have both enjoyed representation in the Senate since 1975. The 40th anniversary of their first election falls in December 2015. The legitimacy of the presence of territory representatives in the Senate—often characterised as a ‘states’ house’—no longer attracts much comment. However, the legislation to enable this representation was the subject of great rancour, only passing the Commonwealth Parliament following affirmation at a joint sitting of the two houses and subsequently surviving two High Court challenges.

The extraordinary means required to pass this legislation in 1974 can in part be attributed to the fine balance of Senate numbers and the tense political atmosphere between the major parties at the time. However, it must also be recognised that the introduction of territory representation to the Senate was felt by many to endanger the ‘federal balance’ of the Constitution in a way that the earlier introduction of territory members in the House of Representatives did not. The Northern Territory gained representation, in a limited form, in the House of Representatives in 1922, as did the ACT in 1948. Although voting restrictions were initially imposed on these representatives, these restrictions were gradually removed.

At the heart of the controversy over the legitimacy of allowing territory representation in the Senate, leaving aside allegations of potential party-political advantage, lay popular conceptions of the Senate as designed to protect the interests of the original six states, in particular the interests of the less populous states against those of the more populous states. Under this view, it was thought that the presence of non-state representatives in the Senate would undermine this function. However, the actual provisions of the Constitution concerning the composition of the Senate are ambiguous, appearing both to limit representation in the Senate to the states while also providing the parliament with total discretion as to the extent and nature of representation it may grant to territories in both houses. The High Court was ultimately asked twice to rule on this matter, which it did in favour of allowing territory representation, although the reasoning underpinning these decisions reveals the difficulty the court had in resolving the issue.

While the senators for the Northern Territory and the ACT are the most prominent form of territory representation in the Senate, more indirect representation is also afforded to Australia’s inhabited external territories. This takes the form of allowing

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eligible voters in these external territories to vote in Senate and House of Representatives elections in the Northern Territory and the ACT.

The fact of Commonwealth territory representation in the Senate, while no longer a matter of controversy, is interesting both in terms of the legislative process by which it was brought about, which exhausted the dispute-resolution mechanism under section 57 of the Constitution and was tested twice in the High Court, and in terms of its implications for our understanding of the constitutional limitations on the composition of the Senate.

### **Constitutional provisions**

The number and distribution of representatives in the Senate is governed by several sections of the Constitution, as well as by legislation that has been passed pursuant to these sections. Section 7 of the Constitution states:

The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate.

...

Until the Parliament otherwise provides there shall be six senators for each Original State. The Parliament may make laws increasing or diminishing the number of senators for each State, but so that equal representation of the several Original States shall be maintained and that no Original State shall have less than six senators.

The six original states at the time of Federation are therefore each guaranteed a minimum of six senators. The original states are also guaranteed that, although parliament may increase the number of senators for each state above this original allocation of six per state, it must maintain parity in the representation of the original states. The parliament has in fact increased the number of senators chosen by each state twice since Federation, from six to 10 in 1948, and from 10 to 12 in 1983.<sup>1</sup>

Section 7 sets a foundational limit for the composition of the Senate which must be met until the parliament otherwise provides and, as noted, also sets limits within which the parliament may vary this original arrangement for the original states. However, the Constitution also contains another provision which allows the parliament to vary the composition of the Senate. Section 122 provides:

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<sup>1</sup> Harry Evans and Rosemary Laing (eds), *Odgers' Australian Senate Practice*, 13th edn, Department of the Senate, Canberra, 2012, p. 115.

The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

Read in isolation, this section appears to allow the parliament unlimited power to determine how Commonwealth territories may be represented in either of its houses, if at all, and on what terms this representation will take place. The parliament relied on this section to allow the election of two senators each from the Northern Territory and the ACT in 1975. Whether section 122 in fact provides such an unlimited scope to the parliament to determine the representation of Commonwealth territories, or whether it is rather to be read as allowing the parliament to determine territory representation only such that it does not disturb the balance outlined in the provisions of part II of chapter I, is a matter that the High Court clarified in 1975 and 1977.

Through the effects of legislation passed in accordance with sections 7 and 122 of the Constitution, the size of the Senate has stood at four distinct levels since Federation: 36 senators from 1901 to 1949, 60 senators from 1950 to 1975, 64 senators from 1976 to 1984, and 76 senators from 1985 onwards.<sup>2</sup> The present complement of 76 senators can be divided according to their distinct constitutional foundations—ultimately, 72 senators can be attributed to section 7 of the Constitution, while the four territory senators can be attributed to section 122.

### **Commonwealth territories—internal and external**

By population, the Northern Territory and the ACT are, by a great margin, the largest of the Commonwealth's territories and they are the only territories to have been allocated representatives in either house of the parliament.<sup>3</sup> Nevertheless, the remaining Commonwealth territories are not entirely excluded from representation in parliament, albeit they enjoy it only in attenuated form.

The Constitution mentions three methods by which the Commonwealth may acquire a territory. As section 111 states, a state may surrender territory to the Commonwealth:

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<sup>2</sup> *ibid.*

<sup>3</sup> As at 2011, the populations of Australia's inhabited territories were: Christmas Island, 2,072; Norfolk Island, 1,796; Territory of Cocos (Keeling) Islands, 550; Australian Capital Territory, 356,586; Northern Territory, 211,945. See Australian Bureau of Statistics, 2011 Census of Housing and Population, [www.abs.gov.au/websitedbs/censushome.nsf/home/census?opendocument&navpos=10](http://www.abs.gov.au/websitedbs/censushome.nsf/home/census?opendocument&navpos=10), accessed 20 August 2015.

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The Parliament of a State may surrender any part of the State to the Commonwealth; and upon such surrender, and the acceptance thereof by the Commonwealth, such part of the State shall become subject to the exclusive jurisdiction of the Commonwealth.

Section 122, quoted earlier, expresses the Commonwealth's law-making powers for any territory that is surrendered to it by a state, as in section 111, or placed under its authority by the Queen, or 'otherwise acquired'.<sup>4</sup>

Commonwealth territories are commonly divided into external and internal territories.

### ***Internal territories***

The Commonwealth currently possesses the following internal territories: Northern Territory, Australian Capital Territory and Jervis Bay Territory. The Northern Territory was formally transferred from South Australia to the Commonwealth under the *Northern Territory Acceptance Act 1910*.<sup>5</sup> In accordance with section 125 of the Constitution, the Australian Capital Territory, originally called first the Territory for the Seat of Government and then the Federal Capital Territory, was transferred to the Commonwealth from New South Wales by the *Seat of Government Acceptance Act 1909*.

It is notable that the populations of both territories, although small at that early stage, were stripped of all political representation in the process of transferral to the Commonwealth. Whereas they had previously been represented in the parliaments of South Australia and New South Wales respectively, they subsequently had no representation in the federal parliament and no form of local government. They were

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<sup>4</sup> For a summary of the acquisition processes followed in the case of each external territory see Alan Kerr, *A Federation in These Seas: An Account of the Acquisition by Australia of Its External Territories*, Attorney General's Department, Canberra, 2009, p. 400, <http://regional.gov.au/territories/publications/>. For an account of the legal regimes applying to each external territory see also Australian Law Reform Commission, 'External territories' in *Legal Risk in International Transactions*, ALRC report 80, 1996, [www.alrc.gov.au/publications/alrc-80-legal-risk-international-transactions/10-external-territories](http://www.alrc.gov.au/publications/alrc-80-legal-risk-international-transactions/10-external-territories).

<sup>5</sup> The high cost of administering and developing the Northern Territory made its surrender to the Commonwealth an attractive prospect for South Australian politicians, while federal politicians considered that the development of the Northern Territory was vital to the defence of the new federation and would also be of economic advantage. Alistair Heatley comments that the transfer of control to the Commonwealth was: 'a lengthy process, extending for almost a decade (1901 to 1910); it was characterised by hard bargaining, political vacillation on both sides, and a splendid amount of posturing.' (Alistair Heatley, *Almost Australians: The Politics of Northern Territory Self-Government*, ANU North Australia Research Unit, Darwin, 1990, p. 4.)

also unable to vote in constitutional referendums until this right was granted by a constitutional amendment in 1977.<sup>6</sup>

Jervis Bay Territory is included as part of the ACT federal electorate of Fraser and its residents are counted towards the total ACT population for the purposes of calculating the ACT's quota of House of Representatives seats. Jervis Bay Territory residents are also able to vote in elections for the two ACT Senate positions.<sup>7</sup>

### ***External territories***

The Commonwealth also possesses the following external territories, listed with their date of establishment: Christmas Island (1959) and Cocos (Keeling) Islands (1955), known collectively as the Indian Ocean Territories; Ashmore and Cartier Islands (1933); Coral Sea Islands (1969); Australian Antarctic Territory (1933); Heard and McDonald Islands (1953); and Norfolk Island (1914).<sup>8</sup> Of these external territories, Ashmore and Cartier Islands, the Coral Sea Islands, the Australian Antarctic Territory, and the Territory of Heard and McDonald Islands are considered uninhabited and are not represented in any form in the federal parliament.<sup>9</sup>

The Indian Ocean Territories and Norfolk Island are both afforded some measure of representation in the federal parliament via association with mainland territory electorates. The Indian Ocean Territories are included in the Northern Territory federal electorate of Lingiari and residents in those territories are able to vote in Senate elections for the Northern Territory.<sup>10</sup>

The relationship of Norfolk Island with the federal parliament is currently a more complex variation on that of the Indian Ocean Territories. Under current arrangements

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<sup>6</sup> Margaret Healy, 'Territory representation in the Commonwealth Parliament', *Research Note* (Department of the Parliamentary Library), no. 8, 2000–01, p. [1], [http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/GRC26/upload\\_binary/grc265.pdf](http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/GRC26/upload_binary/grc265.pdf).

<sup>7</sup> Australian Electoral Commission, 'Calculating representation entitlements of states and territories', 13 November 2014, [www.aec.gov.au/electorates/Redistributions/calculating-entitlements.htm](http://www.aec.gov.au/electorates/Redistributions/calculating-entitlements.htm), accessed 17 August 2015.

<sup>8</sup> Brian Opeskin, 'Constitutions and populations: how well has the Australian Constitution accommodated a century of demographic change?', *Public Law Review*, vol. 21, no. 2, June 2010, p. 131. The Commonwealth also possessed the following external territories for various periods during the twentieth century: Papua (1906–42), New Guinea (1920–42), Papua and New Guinea (1942–71), Papua New Guinea (1971–75), Nauru (1920–68). See Kerr, *op. cit.*, pp. 12–121, 160–95.

<sup>9</sup> Australian Law Reform Commission, *Legal Risk in International Transactions*, ALRC report 80, 1996, paragraphs 10.18–10.20, [www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC80.pdf](http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC80.pdf), accessed 17 August 2015.

<sup>10</sup> Australian Electoral Commission, 'Profile of the electoral division of Lingiari', 23 September 2013, [www.aec.gov.au/profiles/nt/lingiari.htm](http://www.aec.gov.au/profiles/nt/lingiari.htm), accessed 17 August 2015; Australian Electoral Commission, 'NT Division—Lingiari', 10 October 2013, <http://results.aec.gov.au/17496/website/SenateDivisionPollingPlaces-17496-306.htm>, accessed 17 August 2015.

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eligible residents of the island, who are not required to enrol but can do so if they wish, are able to nominate a mainland electoral division in which to vote. Their choice of electorate may be based on where they were last eligible to be enrolled, or their next of kin is currently enrolled, or they were born, or they have the closest connection. If none of these criteria apply, Norfolk Islanders can enrol in the division of Canberra in the ACT or Solomon in the Northern Territory, but are excluded from enrolling in Fraser in the ACT or Lingiari in the Northern Territory.<sup>11</sup> Norfolk Islanders also participate in ACT Senate elections.<sup>12</sup>

In 2015, however, the federal government, having reached the conclusion that the ‘current governance arrangements have been unable to deliver an adequate level of services to the community or an effective safety net for those most vulnerable in this small isolated community’, introduced a package of eight bills intended to reform the governance arrangements of Norfolk Island.<sup>13</sup> This package of bills passed the federal parliament on 14 May 2015.<sup>14</sup> These reforms include the abolition of the Norfolk Island Legislative Assembly and Executive Council and the establishment of an Advisory Council in its place, the application to the island of New South Wales law as Commonwealth law, and the extension of certain mainland health, social security and immigration arrangements to the island.<sup>15</sup> It is also intended that, from 1 July 2016, it will become compulsory for Norfolk Island residents to vote in federal elections and they will be required to vote in the electorate of Canberra.<sup>16</sup>

A central feature of these reforms to the governance of Norfolk Island is the revocation of the current self-government arrangements, which were originally granted by the *Norfolk Island Act 1979*. The Legislative Assembly of Norfolk Island expressed its opposition to this change in a recent remonstrance addressed to the Speaker of the House of Representatives and the President of the Senate, which requested that:

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<sup>11</sup> Australian Electoral Commission, ‘Norfolk Island electors’, 23 April 2013, [www.aec.gov.au/Enrolling\\_to\\_vote/special\\_category/Norfolk\\_Island\\_electors.htm](http://www.aec.gov.au/Enrolling_to_vote/special_category/Norfolk_Island_electors.htm), accessed 17 August 2015.

<sup>12</sup> Australian Electoral Commission, ‘Polling place—Norfolk Island’, 10 October 2013, <http://results.aec.gov.au/17496/website/SenatePollingPlaceFirstPrefs-17496-65739.htm>, accessed 17 August 2015.

<sup>13</sup> Explanatory Memorandum to Norfolk Island Legislation Amendment Bill 2015 (Cth) and associated bills, p. 2.

<sup>14</sup> *Journals of the Senate*, 14 May 2015, p. 2606.

<sup>15</sup> Rather than drafting a large volume of Commonwealth legislation from scratch to address responsibilities ordinarily covered by state legislation, the Commonwealth has in the past adopted state laws and applied them as its own to external territories. See Explanatory Memorandum to Norfolk Island Legislation Amendment Bill 2015 and associated bills, pp. 2–3.

<sup>16</sup> Department of Infrastructure and Regional Development, ‘FAQs—governance’, 20 March 2015, [www.regional.gov.au/territories/norfolk\\_island/reforms/faq/governance.aspx](http://www.regional.gov.au/territories/norfolk_island/reforms/faq/governance.aspx); for discussion of the relationship between Norfolk Island electors and the mainland divisions of Canberra and Lingiari, see also Ms Gai Brodtmann, *House of Representatives Hansard*, 12 May 2015, pp. 3720–2, and the Hon. Mr Warren Snowdon, *House of Representatives Hansard*, 12 May 2015, pp. 3714–16.

... the Commonwealth Parliament affirm the rights of the people of Norfolk Island to self government by re-examining those aspects of the Norfolk Island Legislation Amendment Bill 2015 that result in the removal of the Norfolk Island Legislative Assembly and call on the Prime Minister to confer on the people of Norfolk Island the right to freely determine their political status, their economic, social and cultural development and be consulted at referendum or plebiscite on the future model of governance for Norfolk Island before such changes are acted on by the Australian Parliament.<sup>17</sup>

In summary, insofar as residents of inhabited external territories and the internal Jervis Bay Territory participate in elections for House of Representatives and Senate seats, they have some small measure of influence in the composition of the federal parliament and also specified parliamentarians to whom they can take their grievances. However, the electorates into which they are subsumed are geographically distant and far larger in population, making the influence of these small territories minimal.

A further difficulty with this arrangement stems from the practice of applying state law to external territories as Commonwealth law in that the territories have no representation in the state jurisdiction under which those laws are determined. For example, Western Australian law applies to the Indian Ocean Territories, but those territories are not represented in any way in the state parliament. The same situation will occur on Norfolk Island after the implementation of New South Wales law as part of current reforms.<sup>18</sup>

### **House of Representatives representation for the Northern Territory and the ACT**

Various pieces of legislation to allow representation of the Northern Territory and the ACT in the House of Representatives were passed by the parliament with relatively little controversy, despite such legislation relying on section 122 of the Constitution, which in the case of Senate representation created great controversy. The Joint Select Committee on Electoral Reform observed in its 1985 report *Determining the Entitlement of Federal Territories and New States to Representation in the Commonwealth Parliament*:

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<sup>17</sup> Legislative Assembly of Norfolk Island, *Minutes of Proceedings*, 20 May 2015, p. 126, <http://norfolkisland.gov.nf/la/Minutes%20of%20Proceedings/14th%20Legislative%20Assembly/>.

<sup>18</sup> This point was noted in the second reading debate on the Norfolk Island Legislation Amendment Bill 2015 by the Hon. Mr Warren Snowdon, *House of Representatives Hansard*, 12 May 2015, p. 3716.

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The full potential of section 122 was not realised, despite the fact that the Northern Territory had been represented in the House of Representatives since 1922, until the issue was brought to a head by the enactment of the *Senate (Representation of Territories) Act 1973*.<sup>19</sup>

Although the Northern Territory was granted representation by a single member in the House of Representatives in 1922, the terms of this representation were strictly limited. Section 5 of the *Northern Territory Representation Act 1922* set out a series of restrictions, including that the member: not be allowed to vote on any question, not be taken into account when determining if a quorum is present, not be capable of being chosen as Speaker or Chairman of Committees, and not be counted in the determination of absolute majorities.<sup>20</sup> Sir Granville Ryrie, Member for North Sydney, noted at the commencement of the second reading debate in the House that the disabilities listed above had been modelled on the position of representatives for the territories of Alaska and Hawaii in the US Congress at that time, namely that they could be present and speak, but had no power to affect the outcome of votes or quorums.<sup>21</sup>

The *Northern Territory Representation Act 1922* was amended in 1936 to allow the member for the Northern Territory to vote on a motion for the disallowance of a Northern Territory ordinance, and again in 1959 to allow a vote on any matter relating solely to the Northern Territory. A further amendment in 1968 removed all remaining restrictions on the Northern Territory representative.<sup>22</sup>

A similar staged introduction of representation in the House of Representatives occurred for the ACT. The ACT was not granted a representative in the House until the enactment of the *Australian Capital Territory Representation Act 1948*. The voting rights of the ACT representative were initially restricted to disallowance motions for ordinances of the ACT. A 1959 amendment expanded these rights to cover all matters relating solely to the ACT, and a 1966 amendment removed all remaining restrictions.<sup>23</sup>

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<sup>19</sup> Joint Select Committee on Electoral Reform, *Determining the Entitlement of Federal Territories and New States to Representation in the Commonwealth Parliament*, November 1985, p. 18.

<sup>20</sup> *Northern Territory Representation Act 1922*, section 5, [www.comlaw.gov.au/Details/C1922A00018](http://www.comlaw.gov.au/Details/C1922A00018).

<sup>21</sup> *House of Representatives Hansard*, 13 September 1922, p. 2199 (Sir Granville Ryrie).

<sup>22</sup> See amended versions of the *Northern Territory Representation Act 1922* at: [www.comlaw.gov.au/Series/C1922A00018/Amendments](http://www.comlaw.gov.au/Series/C1922A00018/Amendments).

<sup>23</sup> See amended versions of *Australian Capital Territory Representation Act 1948* at: [www.comlaw.gov.au/Series/C1948A00057/Amendments](http://www.comlaw.gov.au/Series/C1948A00057/Amendments).



The ACT gained a second House of Representatives seat in 1974 and briefly had a third seat between the 1996 and 1998 elections.<sup>24</sup> The Northern Territory gained a second seat in 2000. A 2003 determination by the Australian Electoral Commission removed this second seat, a decision which was set aside by the passage of the *Commonwealth Electoral Amendment (Representation in the House of Representatives) Act 2004*, which restored the second Northern Territory seat.<sup>25</sup>

### **Senate representation—1920 Northern Territory proposal**

While the Northern Territory was first granted representation in the House of Representatives in a limited form in 1922, the first attempt to provide for territory representation under section 122 of the Constitution in fact came in 1920 and aimed to provide for Senate representation for the Northern Territory. The 1920 legislation was put forward by the Hughes Government to attempt to address local concerns regarding the lack of Northern Territory representation in the federal parliament—a complaint expressed in shorthand as ‘no taxation without representation’.<sup>26</sup>

The Northern Territory Representation Bill 1920 was introduced in the Senate on 9 September 1920 by Senator Edward Russell, Vice-President of the Executive Council, and debated on 15 and 16 September. The bill proposed to allow a single representative for the Northern Territory to be elected to the Senate for three-year terms aligned with those of the House of Representatives. The bill also stipulated that this representative not have the right to vote.<sup>27</sup>

In debate, senators raised the constitutionality of the proposal, questioned whether it would not be better to grant a greater measure of self-government to the Northern Territory, debated the effect of including territory senators on the balance of state representation in the chamber, argued that it would be better to introduce representation in the House of Representatives, and compared the size of the population of the Northern Territory with that of the various states. In this respect it was argued by some that the bill was worthy of support despite the Northern Territory possessing only ‘2,800 white people, less about seventy-six foreigners’.<sup>28</sup> This estimate excluded the Aboriginal population of the Northern Territory, which at the time stood at around 19,500—over 80 per cent of the total population.<sup>29</sup>

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<sup>24</sup> Healy, *op. cit.*

<sup>25</sup> Australian Electoral Commission, ‘Electoral newsfile 115: two electoral divisions in the Northern Territory’, 7 February 2011, [www.aec.gov.au/About\\_AEC/Publications/Newsfiles/2004/No\\_115.htm](http://www.aec.gov.au/About_AEC/Publications/Newsfiles/2004/No_115.htm), accessed 17 August 2015.

<sup>26</sup> Heatley, *op. cit.*, p. 9.

<sup>27</sup> *Senate Hansard*, 9 September 1920, p. 4336, 15 September 1920, pp. 4527–30, 16 September 1920, pp. 4587–615, 4617–25.

<sup>28</sup> *Senate Hansard*, 15 September 1920, p. 4529 (Senator the Hon. Edward John Russell).

<sup>29</sup> Heatley, *op. cit.*, p. 2.

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This early attempt to provide for Senate representation for a territory did not progress beyond the second reading stage, which concluded when the motion that the bill be read a second time was amended in the following terms:

That the Senate is of the opinion that residents of the Northern Territory who would under ordinary circumstances be entitled to a vote under the Commonwealth Electoral laws, should for that purpose be attached to the State of South Australia and accorded the right to vote at the election for Senators for that State, thus being granted representation in the Commonwealth Parliament.<sup>30</sup>

The proposal put forward in this motion was not taken up by the parliament.

### **Territory governance to 1968**

Following the abortive 1920 proposal, no further legislative attempts were made to allow for the representation of territories in the Senate until 1968, when Gough Whitlam, initially as Leader of the Opposition, again made attempts to territory senators. In the intervening period territory representation, with various forms of restriction, was allowed in the House of Representatives. The populations of both the Australian Capital Territory and the Northern Territory had increased greatly over those 48 years. According to Australian Bureau of Statistics figures, at the time of the debate on the 1920 legislation, the Northern Territory included only 3,989 people (excluding the Aboriginal population), and the ACT the even smaller population of 1,972. By the time legislation on this matter was again introduced in the federal parliament in 1968, the Northern Territory had grown to include 70,223 people and the ACT had grown to 116,604, and went on to approach double this figure in the following 10 years.<sup>31</sup> Although the populations of both territories had increased in the intervening period, governance arrangements within the territories had not yet evolved into the forms of self-government that currently exist.

#### ***Northern Territory governance***

The Northern Territory, from the time of its surrender to the Commonwealth in 1911 up until 1946, with several short exceptions, was governed by an administrator appointed by the Governor-General, who was subject to instruction by the Commonwealth minister and aided by a Council of Advice consisting of six appointed

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<sup>30</sup> *Journals of the Senate*, 16 September 1920, p. 156.

<sup>31</sup> These figures include estimates of the Indigenous population of the two territories at the time. See note (a), Australian Bureau of Statistics, Australian Historical Population Statistics 2014, Population size and growth, 1.1 Population by sex, states and territories, cat. No. 3105.0.65.001 2014, [www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/3105.0.65.0012014?OpenDocument](http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/3105.0.65.0012014?OpenDocument), accessed 25 August 2015.

members. Legislation for the territory was made by the federal minister and the Commonwealth Parliament.<sup>32</sup> In 1947 a legislature was established for the Northern Territory in the form of a Legislative Council, which consisted of a mix of appointed and elected members and the Administrator, the make-up of which varied up to 1974, when a fully elected Legislative Assembly of 19 members was established. Self-government, with certain restrictions on responsibilities, was conferred on the Northern Territory in 1978.<sup>33</sup>

These arrangements, along with a perceived lack of economic development in the Northern Territory, were the subject of considerable political agitation prior to the grant of self-government in 1978. In 1962 the Northern Territory Legislative Council presented a remonstrance to the two houses of the federal parliament detailing a list of eight grievances regarding the governance of the territory. The first three of these grievances illustrate the dissatisfaction caused by a lack of effective self-government and restricted representation in the federal parliament:

1. The political rights of the citizens of the Northern Territory are inferior to those of other citizens of Australia.
2. The Commonwealth Government has failed to develop the Northern Territory to the reasonable limits of the capacity of the Commonwealth and the Territory itself.
3. The Legislative Council for the Northern Territory, although responsible for the making of laws for the peace, order and good government, has no voice in the allocation or expenditure of government moneys in the Territory.<sup>34</sup>

### ***ACT governance***

The Australian Capital Territory, established in 1909, was administered by the federal Minister for Territories with the assistance of advisory bodies from 1920 onwards. These advisory bodies included both elected and appointed members, in varying

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<sup>32</sup> Between 1926 and 1931 the Northern Territory ceased to exist and was replaced by two territories, Northern Australia and Central Australia. Following the bombing of Darwin, the Northern Territory was under military administration from 1942 to 1946. See Nicholas Horne, 'A chronology of Northern Territory constitutional and statehood milestones 1825–2007', Parliamentary Library, 31 May 2007, [www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/Publications\\_Archive/online/NTConstitutionalMilestones](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/online/NTConstitutionalMilestones), accessed 17 August 2015; also see Heatley, *op. cit.*, pp. 9–11.

<sup>33</sup> Legislative Assembly of the Northern Territory, 'History of the Northern Territory Parliament', [www.nt.gov.au/lant/about-parliament/history-of-nt-parliament.shtml](http://www.nt.gov.au/lant/about-parliament/history-of-nt-parliament.shtml), accessed 17 August 2015; Horne, *op. cit.*

<sup>34</sup> Legislative Council for the Northern Territory, 'The Remonstrance', 26 February 1962, [www.territorystories.nt.gov.au/bitstream/10070/213543/3/Remonstrance\\_1962.pdf](http://www.territorystories.nt.gov.au/bitstream/10070/213543/3/Remonstrance_1962.pdf), accessed 18 August 2015.

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combinations; however the first fully elected body, known initially as the Legislative Assembly and subsequently as the House of Assembly, began in 1974. The minister responsible for the administration of the ACT was under no obligation to follow the advice provided by any of these bodies. Legislation to establish self-government for the ACT was passed by the federal parliament in 1988, with the new ACT Legislative Assembly commencing in 1989.<sup>35</sup>

The prospect of self-government was not universally embraced by ACT residents. The dominant Commonwealth department in the administration of the ACT in the period prior to self-government was the National Capital Development Commission, which was established in 1958 to oversee the rapid development of Canberra. It was initially admired but came to be a source of dissatisfaction due to the ‘pervasive intrusiveness’ of its planning powers.<sup>36</sup> Schemes for self-government had been discussed throughout the history of the ACT; however, it was the Hawke Government that pressed ahead with its implementation in the face of considerable local opposition. Philip Grundy et al summarise the attitude of ACT residents towards self-government as follows:

At a time when people in other parts of the world were fighting for the right to govern themselves, the majority of the people of Canberra had, by their opposition to self-government, effectively perverted the cry of the American revolution into: “No representation if it involves taxation”. While democracy in Europe emerged because the governed imposed their wishes on the governors, in Canberra’s case the governors “imposed” democracy on a largely reluctant populace whose only apparent concern was to avoid paying any more for the administration of their city.<sup>37</sup>

### **Senate representation—Whitlam era reforms, 1968-75**

The process of legislating for Senate representation for the Northern Territory and the ACT occurred over a period of six years from 1968 to 1974. Pursued by the Whitlam-led ALP, first in opposition and then in government, this reform took place in the context of rising populations and governance regimes that had not yet delegated powers to local democratic institutions.

Whitlam brought forward legislation to provide for territory representation in the Senate in line with the then Labor Party platform, which otherwise expressed the party’s critical attitude towards the very existence of the Senate. The 1967 platform

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<sup>35</sup> Legislative Assembly for the Australian Capital Territory, ‘The establishment of self-government in the ACT’, [www.parliament.act.gov.au/\\_\\_data/assets/pdf\\_file/0007/367018/Assembly-Factsheet-3-June-2013.pdf](http://www.parliament.act.gov.au/__data/assets/pdf_file/0007/367018/Assembly-Factsheet-3-June-2013.pdf), accessed 20 August 2015.

<sup>36</sup> Philip Grundy, Bill Oakes, Lynne Reeder, Roger Wettenhall, *Reluctant Democrats: The Transition to Self-Government in the Australian Capital Territory*, Federal Capital Press, Canberra, 1996, p. 2.

<sup>37</sup> *ibid*, p. 3.

listed among the methods by which the party hoped to achieve ‘democratic socialisation’ several constitutional amendments including ‘to abolish the Senate’ and, pending the achievement of this end, ‘to remedy defects as they appear and to keep the Constitution abreast of changing conditions’.<sup>38</sup> The intention to abolish the Senate remained in the platform until 1979.<sup>39</sup> In line with the intention to ‘remedy defects as they appear’, a further element of the platform was to provide:

Full voting rights for the representative of the Northern Territory in the House of Representatives and full voting rights for representatives of the Northern Territory and the Australian Capital Territory in the Senate.<sup>40</sup>

On 7 November 1968 Whitlam, then the Leader of the Opposition, introduced the Territory Senators Bill 1968. He explained the democratic motivation behind it:

The Bill represents the culmination and consummation of the process of representation of the two mainland Territories in the Australian Parliament. For as long as the Australian Parliament is bicameral, it is in accordance with all our political tenets and instincts that all portions of Australia and all people of Australia should be represented in both Houses of the Parliament. It is proper that the governed should have a share in choosing their governors and calling them to account. The Constitution requires this as regards the States; it permits it as regards the Territories. We should not permit the position to continue any longer where residents and electors of the Northern Territory and the Australian Capital Territory can choose representatives in one alone of the two chambers of this Parliament.<sup>41</sup>

In this bill, and in all subsequent attempts to pursue this matter, Whitlam proposed that two territory senators be elected each from the Northern Territory and the Australian Capital Territory. In contrast to the initial restricted representation granted to the territory members in the House of Representatives, these four senators would have full voting rights on all questions arising in the Senate, have all the powers privileges and immunities of senators for the states, and be included in the calculation to determine a quorum.

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<sup>38</sup> Australian Labor Party, *Platform, Constitution and Rules*, 1967, pp. 9–10, [http://parlinfo.aph.gov.au/parlInfo/download/library/partypol/1040068/upload\\_binary/1040068.pdf](http://parlinfo.aph.gov.au/parlInfo/download/library/partypol/1040068/upload_binary/1040068.pdf), accessed 18 August 2015.

<sup>39</sup> Paul Kelly, ‘Labor goes in to bat for its old nemesis’, *Australian*, 20 August 2003; Alan Ramsey, ‘Abolish the Senate? The no’s have it’, *Sydney Morning Herald*, 30 October 2004, pp. 42–3.

<sup>40</sup> Australian Labor Party, *op. cit.*, p. 31.

<sup>41</sup> *House of Representatives Hansard*, 7 November 1968, pp. 2581–2 (Mr Gough Whitlam).

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Whitlam noted, however, that under his proposal, ‘there are some differences between the extent and nature of representation of each Territory and those which the Constitution requires for the States’. These differences, beyond that of the number of senators elected, were that territory senators would not enjoy six-year terms commencing on 1 July following the election. Rather, they would have terms equivalent to those of members of the House of Representatives—that is, a maximum of three years without a fixed start or end date. Furthermore, and as a consequence of the shortened terms, they would not be elected according to the half-Senate rotation system set out for senators of the original states. Rather, both senators in each territory would face an election at the conclusion of each House of Representatives term.<sup>42</sup>

Whitlam’s stated rationale for setting the number of senators for each territory at two was that it would all but ensure, given the operation of the proportional representation system in Senate elections, that there would be representation of both major political parties from each territory:

I have suggested 2 senators because I believe it would be proper to have an even number representing the Territories. If there was one senator alone representing each Territory, almost certainly the one party would be represented for long periods. It is very probable that both senators would belong to the same Party.<sup>43</sup>

He further commented that this parity would probably be maintained with four senators from each territory, but that six senators may lead to ‘unequal representation as between the two major parties’. As noted in *Odgers’ Australian Senate Practice*, it is a strength of the Senate’s proportional representation system that it recognises both majority and minority interests in the parliament.<sup>44</sup> However, the proposal for two senators for each territory appears to have also been settled on in order that, barring highly unusual voting patterns, the new senators would not disturb the balance of power between the major parties in the upper house.

*Odgers’* notes that this element of the proposal, once implemented, has operated largely as intended in that the two Senate positions in the ACT and the Northern Territory have generally been divided between the major parties, in contrast to their House of Representatives seats:

Given that each territory’s representation is currently limited to two senators, the practice of electing both at the one election by proportional

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<sup>42</sup> *ibid.*, p. 2583.

<sup>43</sup> *ibid.*

<sup>44</sup> Evans and Laing, *op. cit.*, p. 11.

representation preserves the Senate's role as a House which enhances the representative capacity of the Parliament and provides a remedy for the defects in the electoral method used for the House of Representatives ... [S]ince the 1980 general election all members of the House of Representatives for ACT electorates have usually been members of the Australian Labor Party. Throughout much of this period, one senator has been a member of the ALP, the other senator from the Liberal Party. One-party representation in the House has also been common for the Northern Territory, so that its two senators are also essential to providing that territory with balanced representation.<sup>45</sup>

The decision to tie the terms of territory senators to the terms of the House of Representatives was based on a policy position of the ALP at the time that elections for the House of Representatives and the Senate ought to be held simultaneously. This position was based on a recommendation of the Joint Committee on Constitutional Review made in 1958:

The Committee recommends that the Constitution be altered to omit the provision now made for senators to be chosen for terms of six years and to provide instead that senators should hold their places until the expiry or dissolution of the second House of Representatives after their election, unless the Senate should be earlier dissolved under the provisions of section 57 of the Constitution.<sup>46</sup>

As Whitlam explained, his intention was to implement this measure in the case of territory senators, as it was in the power of the parliament to do so, whereas constitutional change was required to align the terms of state senators with elections for the House of Representatives:

It was believed by that Committee that this would cut down the number of elections, that it would avoid the situation which has now obtained ever since the premature election for the House of Representatives in 1961, and that it would also promote concentration on the same issues for elections for both Houses. It would minimise the distraction of elections; it would minimise the differences between the Houses.

The Parliament can make this provision as regards the Territories. Accordingly I have suggested that both senators for each Territory should be elected every time there is a general election for the House of

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<sup>45</sup> *ibid.*, pp. 137–8.

<sup>46</sup> Joint Committee on Constitutional Review, *Report*, October 1958, p. 10.

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Representatives. The Acts which give representation to each Territory in this chamber provide that there shall be an election for the member for each Territory if there is a general election for members of the House of Representatives for the States. So at least in the two Territories there would be an election for both Houses of the Parliament at the same time.<sup>47</sup>

It should be noted, however, that Whitlam's proposal did not in fact correspond to that proposed by the joint committee as the territory senators would serve for only one House of Representatives term, rather than two.<sup>48</sup>

The proposed amendment to the Constitution outlined by the joint committee to tie Senate terms to two House of Representative terms, was later defeated at three referendums, first on 18 May 1974 and again on 21 May 1977 and 1 December 1984. As noted in Whitlam's explanation, much of the determination to alter the terms of senators arose because of the series of unsynchronised elections held in the course of the 1960s—half-Senate-only elections were held in 1964, 1967 and 1970. A half-Senate-only election was not held again until 2014, and then only in Western Australia due to the voiding of the 2013 half-Senate election result in that state.<sup>49</sup>

Finally, Whitlam noted an apparent conflict between sections 7 and 122 of the Constitution regarding the composition of the Senate, but made the following argument regarding how this conflict ought to be interpreted:

It might be thought, looking at section 7 in isolation, that the Senate could never be other than a States House. However section 122, being later and more specific, would override it to the extent of any representation of the Territories in the Senate. It will be noted that this Parliament determines the extent and the terms of Territory representation in either chamber. I have detailed the history of that representation in this chamber. But similarly both Houses of this Parliament can determine the extent and terms of representation of all the Territories in the Senate.<sup>50</sup>

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<sup>47</sup> *House of Representatives Hansard*, 7 November 1968, p. 2584 (Mr Gough Whitlam).

<sup>48</sup> On the topic of three-year terms for territory senators, the sixth edition of *Odgers'* contains the following commentary: 'it is a pity that the terms of service of territory Senators (the life of the House of Representatives) are out of step with State Senators. The purpose of six year terms for members of the Upper House is as important for territory Senators as for State Senators, the question of rotation aside. It is suggested for consideration that the *Senate (Representation of Territories) Act 1973* be amended to provide six year terms for territory Senators.' (J.R. Odgers, *Australian Senate Practice*, 6th edn, Royal Australian Institute of Public Administration, Canberra, 1991, p. 123.)

<sup>49</sup> Parliamentary Library, 'Federal election results 1901–2014', [www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp1415/FedElect](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1415/FedElect), accessed 18 August 2015.

<sup>50</sup> *House of Representatives Hansard*, 7 November 1968, p. 2583 (Mr Gough Whitlam).



When pushed by an interjection on the constitutionality of the proposal, Whitlam further noted:

I know of no decisions, but I have consulted the academics in this field and the view which they unanimously express is that section 122, being later and specific, extends the provisions of section 7.<sup>51</sup>

### ***Legislation history***

Whitlam's Territory Senators Bill 1968 was introduced and debated on 7 November 1968. Time expired during the second reading debate and the bill was never returned to. However, the proposals it contained for territory representation in the Senate eventually became law after a convoluted and highly contested journey through the parliament. While still in opposition, Whitlam reintroduced the same legislation in 1970 and, once again, time expired during the second reading debate and the bill was not brought on again.

Having achieved a majority in the House of Representatives in the 1972 election and thereby forming government, the ALP introduced the Senate (Representation of Territories) Bill 1973, which again contained essentially the same proposal for territory representation in the Senate as it had put forward from opposition in 1968 and 1970. On this occasion, the bill was accompanied by a further piece of legislation, the Representation Bill 1973, which was intended to exclude the proposed territory senators from nexus calculations set out by section 24 of the Constitution, which states in part:

The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators.

Fred Daly, the Minister for Services and Property, when introducing this legislation, explained the necessity for this accompanying legislation:

A short time ago I introduced the Senate (Representation of Territories) Bill which provides for senatorial representation for the Australian Capital Territory and the Northern Territory. The Government's legal advice is that section 24 of the Constitution does not have application in relation to senators who may be provided for a Territory under the provisions of section 122 of the Constitution. In other words, the requirement contained

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<sup>51</sup> *ibid.*

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in section 24 for the number of members of the House of Representatives to be as nearly as practicable twice the number of senators does not relate to Territory members or senators provided under section 122 of the Constitution. Furthermore, ‘the people of the Commonwealth’ in the context of section 24 are the people of the States.<sup>52</sup>

Thus, the bill sought to amend the Representation Act, which contained the formula for determining the number of members for the House of Representatives to be chosen from each state, to clarify that the people of the Commonwealth are the people of the states in this case, and that territory senators are excluded from the formula for determining the number of members of the House of Representatives.<sup>53</sup>

Both the Senate (Representation of Territories) Bill 1973 and the Representation Bill 1973 passed the House of Representatives on 30 May 1973.<sup>54</sup> However, as the ALP did not command a majority in its own right in the Senate at this time, the two bills failed to progress beyond the second reading in the Senate. Having been introduced on 31 May 1973, taken together by leave and debated on 7 June 1973, the second reading motion was negated.<sup>55</sup>

This process was repeated later that same year. The bills were reintroduced in the same form in the House of Representatives on 25 September 1973, and debated and passed on 27 September.<sup>56</sup> They were then reintroduced in the Senate on 9 October 1973, debated, and the second reading motion negated on 14 November 1973.<sup>57</sup>

In accordance with section 57 of the Constitution, these two bills, along with four others, having been twice rejected by the Senate, were used by the Whitlam Government as the basis on which to advise the Governor-General to dissolve both houses of parliament. A general election for both houses occurred on 18 May 1974. Labor again achieved a majority in the House but again fell shy of a majority in the Senate. Thus, while the six bills were reintroduced and passed in the House of Representatives on 10 and 11 July 1974, they were each negated at the second reading in the Senate over the course of the following two weeks.<sup>58</sup>

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<sup>52</sup> *House of Representatives Hansard*, 22 May 1973, pp. 2430–1 (the Hon. Mr Fred Daly).

<sup>53</sup> *ibid.* The provisions for these calculations are now located in the *Commonwealth Electoral Act 1918*, section 48.

<sup>54</sup> House of Representatives, *Votes and Proceedings*, 30 May 1973, p. 240.

<sup>55</sup> *Journals of the Senate*, 7 June 1973, pp. 273–5.

<sup>56</sup> House of Representatives, *Votes and Proceedings*, 25 September 1973, p. 379, 27 September 1973, pp. 397–8.

<sup>57</sup> *Journals of the Senate*, 14 November 1973, pp. 480–1.

<sup>58</sup> House of Representatives, *Votes and Proceedings*, 10 and 11 July 1974; *Journals of the Senate*, 10–11 July 1974, 16–18 July 1974, 23–24 July 1974.

The parliament thereby moved to the final phase of the dispute-resolution process contained in section 57 of the Constitution, with a joint sitting held on 6 and 7 August 1974 to consider the six pieces of legislation. To date, this is the only joint sitting of the Senate and House of Representatives held to resolve a legislative deadlock between the two houses. The two pieces of legislation of interest in this context, the *Senate (Representation of Territories) Act 1973* and the *Representation Act 1973* were both affirmed on 6 August 1974.<sup>59</sup>

### ***Themes of debate***

The sixth edition of *Australian Senate Practice* provides a brief summary of the arguments raised in favour of, and in opposition to, the proposal to introduce territory representation in the Senate. It states:

Factors advanced in support of territorial Senators included the increased territory population; payment of taxes in accordance with the law; and the right of the people of the Australian Capital Territory and the Northern Territory to have presented to the Senate the views of the residents of their respective territories.<sup>60</sup>

As an amplification of the final point above, it is important to note that the lack of self-government in the mainland territories at this point meant that much of the law by which they were governed took the form of Commonwealth secondary legislation, more specifically ordinances. Although both territories had representation in some form in the House of Representatives, the Senate has historically been the chamber, through its committee system, where significant scrutiny of delegated legislation takes place and, as such, a strong argument could be put forward at that time that territory residents ought to have a representative who could participate in this process.<sup>61</sup>

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<sup>59</sup> *Joint Sitting Hansard*, 6 August 1974, pp. 87–8; *Minutes of Proceedings of Joint Sitting*, 6 August 1974, pp. 3–5. The bills in question were ‘affirmed’ at the joint sitting rather than ‘agreed to’ in accordance with the terminology of section 57 of the Constitution, which states in part:

‘The members present at the joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one House and not agreed to by the other, and any such amendments which are affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives shall be taken to have been carried, and if the proposed law, with the amendments, if any, so carried is affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives, it shall be taken to have been duly passed by both Houses of the Parliament, and shall be presented to the Governor-General for the Queen’s assent.’

<sup>60</sup> Odgers, *op. cit.*, p. 120.

<sup>61</sup> This argument was put forward during debate on the Territory Senators Bill 1970 by the Member for the Australian Capital Territory, Mr Kep Enderby. See *House of Representatives Hansard*, 20 August 1970, p. 289. The Senate has taken the lead role in scrutinising delegated legislation since establishing the Standing Committee on Regulations and Ordinances in 1932. See discussion at Evans and Laing, *op. cit.*, pp. 416–18.

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Aside from accusations that the proposal would lead to a political advantage for the ALP, and that it was motivated by this possible outcome, arguments raised in opposition to the introduction of territory senators during debate in the Senate included the following:

- (1) Territorial Senators might undermine the constitutional concept of the Senate as a States House.
- (2) The Constitution was a compact between the Commonwealth and the States and a principle of the agreement was that, by equal representation of the original States in the Senate, the three numerically big States could not ride roughshod over the interests of the three numerically smaller States, which were heavily outnumbered in the House of Representatives.
- (3) The States, which agreed to federate on the basis that State rights would be safeguarded, had not been consulted on the effect of the proposed territory representation in the Senate.
- (4) Although provision is made in the Constitution for representation of territories in the Federal Parliament, the founding fathers did not envisage that such representatives would have voting rights. In fact, in the Convention debates concern was expressed that the provision did not specifically preclude such representatives having the right to vote.
- (5) The Bill proposed tying the terms of territory representatives to the life of the House of Representatives and this was the thin edge of the wedge to tying the terms of all Senators to the life of the Lower House, thus destroying the Senate's independence.
- (6) Once territory representation in the Senate began, where would it end, having in mind other territories, including Australian Antarctic, Christmas Island, Cocos (Keeling) Islands, Coral Sea Islands, Heard Island and McDonald Islands, and Norfolk Island.
- (7) Doubts were expressed whether the Bill, if passed would be held to be legally valid. It was considered a nice legal question whether the power given in section 122 of the Constitution to give representation to the territories would allow the appointment of a person who actually becomes a voting Senator and one who is counted in a quorum.

There was an inconsistency between section 7 which provided for a States House only and section 122 which related to territory representation in either House of the Parliament.

- (8) The Australian Senate was largely modelled on the Senate of the United States of America, where territories have never been represented in the Senate. In 1967, a Congressional Committee considered the proposal that the District of Columbia be represented by two Senators, but the Constitution was not so amended. One of the arguments advanced against the proposal was that small State influence in the Senate could be defeated as effectively by according senatorial representation to a non-State as by according more representation to a larger State.<sup>62</sup>

Several of these arguments touch on fundamental conceptions of the function of the Senate and interpretation of the Constitution. The conception of the Senate as a states' house and the constitutionality of the legislation were the two most fundamental issues raised in debate and they are discussed in turn below. Both of these issues were at play in the subsequent High Court challenges to the *Senate (Representation of Territories) Act 1973*.

#### *Senate as a states' house*

That the Senate is a states' house, a status incompatible with the introduction of voting territory senators, was perhaps the view put most regularly by opponents of the Whitlam legislation. The debate in the Senate makes it clear that senators understood the term 'states' house' to mean that the Senate had been conceived as a place where the interests of particular states would be expressed. This view was summarised in 2001 by the then Clerk of the Senate, Harry Evans:

Because the framers used the shorthand expression 'States' House' in relation to the Senate, it is assumed that they intended that senators vote in state blocs and according to the effect of proposed measures on the interests of particular states. Because senators have never voted in this way, it is assumed that the Senate has not achieved its original purpose.<sup>63</sup>

Much of the debate over territory senators occurred against the background of such an assumed view. Thus opposition senators argued that, as a states' house, the Senate should contain only senators from the states as it is exclusively the interests of the

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<sup>62</sup> Odgers, *op. cit.*, pp. 120–1.

<sup>63</sup> Harry Evans, 'The role of the Senate', *Reform*, issue 78, 2001, pp. 16–20, [www.austlii.edu.au/au/journals/ALRCRefJl/2001/4.html](http://www.austlii.edu.au/au/journals/ALRCRefJl/2001/4.html), accessed 18 August 2015.

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states that should be represented there. In opposition to this view, Labor senators argued that the Senate was no longer a states' house, if it ever was, because senators do not vote as state blocs.

However, it has been argued by Evans that this understanding of the role of the Senate is mistaken. He argued that the fundamental constitutional principle underlying the Senate is that of a 'geographically distributed majority':

The purpose of the Senate was to ensure, by securing equal representation of the states, regardless of their population, in one House of the Commonwealth Parliament, that the legislative majority would be geographically distributed across the Commonwealth. In other words, it would be impossible to form a majority in the legislature out of the representatives of only one or two states. Without that equal representation in one House, the legislative majority could consist of the representatives of only two states, indeed, of only two cities, Sydney and Melbourne, and this would lead to neglect and alienation of the outlying parts of the country.<sup>64</sup>

*Odgers'* also emphasises the vital role this second majority plays in preventing regional alienation from central government in a geographically large nation:

In such a nation, particularly a nation occupying a large geographical area, a central legislature elected by the people as a whole necessarily involves the danger that a majority within that legislature could be formed by the representatives of only one or two regions, leading to neglect of the interests of other regions and their consequent alienation from the central government. The solution to this problem is to have one house of the legislature elected by the people as a whole, representing regions in proportion to their population, and one house elected by the people voting in their separate regions, and representing those regions equally.<sup>65</sup>

Dr John Cockburn's statement during the Australasian Federal Convention of 30 March 1897, makes the point well, and illustrates that the importance of preventing more populous states from entirely dominating the federal parliament was well understood at the time the Constitution was framed:

... the great principle which is an essential, I think, to Federation—that the two Houses should represent the people truly, and should have co-ordinate

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<sup>64</sup> *ibid.*

<sup>65</sup> Evans and Laing, *op. cit.*, p. 1.

powers. They should represent the people in two groups. One should represent the people grouped as a whole, and the other should represent them as grouped in the States. Of course majorities must rule, for there would be no possible good government without majorities ruling, but I do not think the majority in South Australia should be governed by the majority in Victoria, or in New South Wales. In every case the majority should rule, but that does not mean that the majority of one colony is to coerce the majority of another. If we wish to defend and perpetuate the doctrine of the rule of majorities, we must guard against the possibility of this occurring.<sup>66</sup>

Thus, at the time of Federation, the six original states were the political entities entering into the federal compact and the goal of geographically distributing the majority in the second chamber was, naturally enough, identified with protecting the interests of the less populous states against those of the more populous. However, with the gradual development of the populations of the two large mainland territories, the Northern Territory and the ACT, it is possible to argue that the introduction of senators with voting rights from beyond the original six states better accords with the concept of a geographically distributed majority than does their permanent exclusion.

This case can be strengthened by noting that the two large mainland territories arose from alterations to the geographic coverage of two of the original states—South Australia and New South Wales. Thus, the geographical boundaries of states are changeable and populations can be, and have been, shifted from states to Commonwealth territories. Population centres can also grow very rapidly, as occurred in the ACT in the post-war period. An inflexible constitution that prevents any alteration in the composition of the parliament, in particular the Senate, to reflect such demographic changes presents the danger of generating precisely that regional alienation from central government discussed above.

#### *Constitutionality of appointing voting senators*

As noted above, the constitutionality of legislation admitting territory senators with full voting rights was the second major theme of debate in the Senate. Following the affirmation of the Senate (Representation of Territories) Bill 1973 and the Representation Bill 1973 at the 1974 joint sitting, this matter was tested in a series of High Court challenges between 1975 and 1977. These challenges clarified the power of the parliament to determine the extent and terms of territory representation in both the Senate and the House.

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<sup>66</sup> Dr John Cockburn, *Debates of the Australasian Federal Convention*, 30 March 1897, p. 340.

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Initially, in *Western Australia v Commonwealth* (1975) (the *First Territories Representation Case*) three states with non-Labor governments, Western Australia, New South Wales and Queensland, challenged the validity of the *Senate (Representation of Territories) Act 1973*, the *Commonwealth Electoral Act (No 2) 1973* and the *Representation Act 1973* on the ground that each Act had not been duly passed by both houses of the parliament within the meaning of section 57 of the Constitution, and further that the *Senate (Representation of Territories) Act 1973* was invalid as it was beyond the legislative power of the Commonwealth Parliament.<sup>67</sup>

The three Acts were found to have been duly passed in accordance with section 57. The court also held, by a majority of four to three, that the Commonwealth had the power to enact legislation which provided for two senators each for the ACT and the Northern Territory with full voting rights. Professor Leslie Zines summarised this aspect of the case:

The main issue was which of s 7 and s 122 of the Constitution prevailed over the other. Section 7 provides in part that ‘The Senate shall be composed of senators for each state ...’ and s 122 provides in part that ‘The Parliament may make laws for the government of any territory ... and may allow the representation of such territory in either House of the Parliament to the extent and on the terms it thinks fit’. It was recognised that if one had regard only to the broad language of s 122 the provision of territory senators with full voting rights would clearly come within that section. The dissenting judges, however, considered that the ‘federal’ nature of the Constitution prevented s 122 being interpreted that way.<sup>68</sup>

The legal reasoning by which the justices determined which of section 7 and section 122 ought prevail over the other is a complex matter,<sup>69</sup> but, as noted in this summary, a significant consideration for the dissenting justices was their emphasis on what they took to be the overriding federal character of the Constitution. For example, Barwick CJ argued that as section 122, on which the legislation in question relied, is in a part of the Constitution dealing with the creation of new states and the acquisition of territories, it is ‘in its nature incidental, in a sense peripheral, to the central and dominant purpose of the Constitution’. In a later passage, the Chief Justice explained:

Some lesser connotation of the word “representation” must be found to make the Constitution, basically federal in nature, consistent throughout.

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<sup>67</sup> *Western Australia v Commonwealth* (1975) 134 CLR 201; see also ‘High Court decision: senators for ACT upheld’, *Canberra Times*, 11 October 1975, p. 1.

<sup>68</sup> Leslie Zines, *The High Court and the Constitution*, 4th edn, Butterworths, Sydney, 1997, p. 440.

<sup>69</sup> For a summary and discussion of the various arguments deployed in this case see Leslie Zines, *The High Court and the Constitution*, op. cit., pp. 467–71.



To fit Pt VI into the Constitution as a whole, in my opinion, the expression “allow representation” must be construed so as to be consonant with and indeed to preserve and not to endanger or destroy an essential feature of federation, namely the maintenance of the Senate as the State House.<sup>70</sup>

As noted in the previous section, the concept of a ‘states’ house’ is itself a matter of interpretive difficulty, but it is clear that the Chief Justice took it to mean at least that representation in the Senate with voting rights must be forever restricted to senators for the states. In contrast Mason J, part of the majority in this case, argued that:

The apparent opposition which arises from the reference to representation of the territories in s. 122 and the absence of any such reference in ss. 7 and 24 is irreconcilable only if it be assumed that Ch. I in making provision for the composition of the Senate and the House is necessarily speaking for all time. To my mind this assumption is misconceived. Sections 7 and 24 should be regarded as making provision for the composition of each House which nevertheless, in the shape of s. 122, takes account of the prospective possibility that Parliament might deem it expedient, having regard to the stage which a Territory might reach in the course of its future development, to give it representation in either House by allowing it to elect members of that House.<sup>71</sup>

Jacobs J took the view that, although the original states were guaranteed equality of representation in the Senate, this equality among the original states would not be disturbed by the addition of senators representing new states or territories:

... it is said that the admission of Territories to the full franchise would upset the delicate balance of State power intended in the constitution of the Senate. This is not correct. The intention was that the original States, large and small, would have equal representation. The purpose was to ensure that the larger States did not overbear the smaller States. Neither full representation of new States nor full representation of Territories in the Senate would affect this objective unless the numbers of new senators completely submerged the original intention. And that is the suggestion which has been made to us on this hearing.<sup>72</sup>

It is a measure of the ambiguity of the Constitution on this issue that Professor Zines uses this case as an example to illustrate the point that:

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<sup>70</sup> *Western Australia v Commonwealth* (1975) 134 CLR 201, 227, 232.

<sup>71</sup> *Western Australia v Commonwealth* (1975) 134 CLR 201, 270.

<sup>72</sup> *Western Australia v Commonwealth* (1975) 134 CLR 201, 275.

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It is increasingly being recognised by some judges that in many cases a decision either way cannot be regarded in any objective sense as “right” or “wrong” but only as preferable or undesirable having regard to a number of complex factors.<sup>73</sup>

The issue of territory representation in the Senate was revisited by the court in 1977. Initially, this occurred in *Attorney-General (NSW) ex rel McKellar v Commonwealth* (1977), in which the High Court ruled that section 24 of the Constitution did not apply to the people or the representatives of the territories. This decision held the following significant implications regarding territory representation:

... territory representatives need not be “directly chosen by the people”. The Parliament may, for example, provide for them to be appointed or to be indirectly chosen, for example, through an electoral college system. Also the number of members a territory has in the House of Representatives does not have to be in proportion to its population. On the other hand the last paragraph of s. 24 giving each original State a minimum of five members in the House also does not apply. Similarly the Commonwealth is at large in determining the number of senators for any territory. The term of office of territory senators is not governed by s. 13 of the Constitution and the casual vacancy provisions in s. 15 do not apply. As s. 24 is inapplicable, there is no constitutional “nexus” between the number of senators that may be provided for to represent the people of the territories.<sup>74</sup>

In addition, comments made by Barwick CJ in his judgment regarding the court’s decision in the *First Territories Representation Case* appeared to encourage an attempt to recontest that matter.<sup>75</sup> Later that same year, Queensland and Western Australia initiated *Queensland v Commonwealth* (1977) (*Second Territories Representation Case*).<sup>76</sup> This case explicitly raised and dealt with the question of

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<sup>73</sup> Leslie Zines, *The High Court and the Constitution*, op. cit., p. 467.

<sup>74</sup> Leslie Zines, ‘Representation of territories and new states in the Commonwealth Parliament’, a paper prepared for Standing Committee D for the Australian Constitutional Convention, published as Appendix H in volume 2 of the 4th Report of Standing Committee D of the Australian Constitutional Convention, August 1982, pp. 5–6.

<sup>75</sup> ‘Before indicating my opinion as to the correct answers to these questions, it should be noted that two States during the argument of these proceedings questioned the propriety of the court’s decision in *Western Australia v. the Commonwealth*. However, unfortunately as I think, neither State proffered any argument in support of this questioning. I say unfortunately because, if the decision is to be reconsidered, that reconsideration should take place before what, with due respect to the opinion of others, appears to me to be a serious departure from the federal nature of the Constitution, becomes entrenched in constitutional practice by the mere passage of time.’ *Attorney-General (NSW) ex rel McKellar v Commonwealth* (1977) 139 CLR 527, 533 [4].

<sup>76</sup> *Queensland v Commonwealth* (1977) 139 CLR 585.

representation of territories in the House of Representatives alongside that of representation in the Senate. Although the court upheld, by a five to two majority, the decision in the *First Territories Representation Case*, this was not because a majority of the court believed that the legislation was valid. In fact a majority of the court (four to three) maintained that the legislation was invalid, but Gibbs and Stephen JJ nevertheless refused to overrule the earlier decision as they felt bound by the principle of *stare decisis*. Under this principle a court ‘is bound to follow previous decisions, unless they are inconsistent with a higher court’s decision or wrong in law’, a restriction that promotes certainty in the law.<sup>77</sup> Thus, in an unusual set of circumstances, the *Senate (Representation of Territories) Act 1973* survived this second challenge despite being considered unconstitutional by a majority of the court.<sup>78</sup>

### **Post 1977 legislative reforms**

Although section 122 of the Constitution had been relied on to provide territory representation in the House of Representatives from 1922 onwards, it was only through this series of High Court judgments that the scope of action granted to the parliament by that section was apparent. These judgments have established that the representation of territories in the federal parliament in accordance with section 122 is independent of the provisions of chapter I of the Constitution dealing with the composition and operation of the parliament. As noted by the Joint Committee on Electoral Reform in 1985, the following possibilities emerged from this determination:

- under section 122 of the Constitution the Commonwealth may be able to provide that a Territory Senator has more than one vote
- there are no limits to the number of Representatives in either Chamber that the Parliament may “see fit” to grant the Territories
- Territory representatives need not be directly chosen by the people. The Parliament may, for example, provide for them to be appointed or indirectly chosen

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<sup>77</sup> *Encyclopaedic Australian Legal Dictionary*, ‘stare decisis’, LexisNexis Australia, January 2011.

<sup>78</sup> Leslie Zines, ‘Representation of territories and new states in the Commonwealth Parliament’, op. cit., p. 3; For a discussion of the reasons given, both for and against, relying on the principle of *stare decisis* in this case, see Leslie Zines, *High Court and the Constitution*, op. cit., pp. 440–1. Zines notes the following reasons in favour of not overturning the decision in the *First Territories Senators Case*: it was a recent decision, it had been fully argued, there were no new arguments presented in the *Second Territories Senators Case*, and senators had in fact been elected. Justifications for overturning the decision included the following: it was a recent decision, it had not been followed in other cases, it was by a narrow majority, and it was of great constitutional importance.

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- as section 24 does not apply, there is no Constitutional “nexus” between the number of Members of the House of Representatives and the number of Senators representing the Territories.<sup>79</sup>

While constitutionally possible, the prospect of parliament agreeing to measures that would allow more than one vote to territory senators or of the appointment of non-elected senators or indeed of the appointment of greatly increased numbers of territory senators, is practically remote.<sup>80</sup> In the *First Territories Representation Case*, Jacobs J argued that such a possibility should not influence the court’s interpretation of the Constitution:

The Parliament, it is said, might create fifty or a hundred senators for a Territory with multiple voting to boot and that could never have been intended. It is a preposterous suggestion in that it puts the cart before the horse. It is the Parliament which must make the law for representation of Territories and the framers of the Constitution trusted a system of parliamentary government in which they were mostly immersed. Those who were lawyers were mostly parliamentarians as well and if as lawyers they might scan a document for its hidden traps or loopholes, their sense as parliamentarians would tell them that the Parliament itself was the safeguard against the absurd possibility. We likewise should construe the words of the Constitution by its plain terms and not by some distorting possibility.<sup>81</sup>

Mason J further pointed out that section 121 of the Constitution also presents the possibility of ‘swamping’ the Senate, although with senators from new states in this case. He too argued that the parliament must be relied on to employ its powers responsibly:

The first is the grim spectre conjured up by the plaintiffs of a Parliament swamping the Senate with senators from the Territories, thereby reducing the representation of the States disproportionately to that of an ineffective minority in the chamber. This exercise in imagination assumes the willing participation of the senators representing the States in such an enterprise, notwithstanding that it would hasten their journey into political oblivion. It disregards the assumption which the framers of the Constitution made, and

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<sup>79</sup> Joint Select Committee on Electoral Reform, *op. cit.*, p. 18.

<sup>80</sup> The fear that territory senators may ‘swamp’ the parliament was a matter raised by some justices in High Court judgments, but others countered with the view that this was equally possible via section 121 in the case of new states, and that this possibility was not something the court should concern itself with. Rather, it must be assumed the parliament will act responsibly. See Mason J argument at *Western Australia v Commonwealth*, 134 CLR 201, 271.

<sup>81</sup> *Western Australia v Commonwealth*, 134 CLR 201, 275.

which we should now make, that Parliament will act responsibly in the exercise of its powers.

Furthermore, such significance as the plaintiffs' argument may have is diminished when it is appreciated that the Constitution provides no safeguard against the pursuit by Parliament of a similar course at the expense of the original States in allowing for the representation of new States in the Senate. Although s. 7 provides that equal representation of the original States shall be maintained in that chamber, neither the section nor the remaining provisions of Pt II of Ch. I place any restriction on the number of senators which Parliament may accord to a new State as its representation in the Senate. Here, again, the assumption is that Parliament will act responsibly.<sup>82</sup>

Nevertheless, the new understanding of the very broad scope of section 122 that emerged from these High Court challenges was a source of concern throughout the following decade, during which time various attempts to formulate restrictions were made, either through constitutional amendments or legislation.

For example, a committee of the 1982 Constitutional Convention discussed proposed amendments to the Constitution intended to ensure that representation of territories and new states would be governed by restrictions similar to those for the original six states. It was proposed that the Constitution be amended to ensure that territory or new state representatives be chosen by the people, that such representatives in the House of Representatives be in the same proportion to population as those chosen by the original states, and that representation in the Senate beyond the current two be in a ratio of one senator for every two members of the House.<sup>83</sup>

The matter was taken up in 1985 by the Joint Select Committee on Electoral Reform, which conducted an inquiry into the options for establishing 'fixed formulae for determining the number of Senators and Members of the House of Representatives to which the Australian Capital Territory, the Northern Territory and other territories are entitled'.<sup>84</sup>

With regard to the House of Representatives, the committee proposed that the ACT and the Northern Territory be entitled to at least one member and that, thereafter, additional representation shall be in proportion to the population of the territory, using the same quota employed to determine the number of seats for each state. The people

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<sup>82</sup> *Western Australia v Commonwealth*, 134 CLR 201, 271.

<sup>83</sup> Australian Constitutional Convention, Standing Committee D, 4th report, 1982, p. 46.

<sup>84</sup> Joint Select Committee on Electoral Reform, op. cit., p. 2.

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of territories other than the ACT and the Northern Territory shall be entitled to separate representation when their population exceeds one half of a quota and that, until that time, they should be included in electoral divisions of the Northern Territory and the ACT.<sup>85</sup>

With regard to Senate representation, the ACT and the Northern Territory will have at least two senators, and beyond this they will have one senator for every two members of the House of Representatives they are entitled to. Other Commonwealth territories shall have one senator for every two members.<sup>86</sup>

The committee further concluded that:

... constitutional change is required so that representation of territories and new states in the Parliament in future occurs according to principles acceptable to the Australian community. Constitutional amendments along the lines of the formulae we have proposed for inclusion in the Electoral Act ... would meet the problems and anomalies that have been disclosed to exist under the Constitution at present.<sup>87</sup>

Although not directly the subject of this paper, it is noteworthy that this committee recommended that 'no new State should be admitted to the Federation on terms and conditions as to representation in the Parliament more favourable than those prescribed for representation of Territories in the Electoral Act'.<sup>88</sup> This aspect of the report appears to have been directed at preventing the Northern Territory from gaining greater representation should it achieve statehood and was strongly criticised in a dissent by Senator Michael Macklin.<sup>89</sup>

The recommendations of this report regarding the formula for territory representation were incorporated into the Electoral and Referendum Amendment Bill 1989, which provided among other matters:

... fixed formulae for the representation of Territories in the Federal Parliament. The Joint Standing Committee examined this issue, following concern that it would be possible for a government with a majority in both Houses to increase the representation of the Australian Capital Territory and the Northern Territory out of proportion to their populations. The Government has accepted the Committee's conclusion that fixed formulae

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<sup>85</sup> *ibid.*, pp. 46–7.

<sup>86</sup> *ibid.*, pp. 47–8.

<sup>87</sup> *ibid.*, p. 49.

<sup>88</sup> *ibid.*, p. 45.

<sup>89</sup> *ibid.*, p. 55.

for the representation of Territories should be prescribed. Accordingly, this Bill provides for the Australian Capital Territory and the Northern Territory to be entitled to be represented by at least one member of the House of Representatives, and that representation thereafter be in proportion to its population. Other Commonwealth Territories will be entitled to separate representation when their population exceeds more than one half of a quota as determined by section 48 of the Electoral Act.

The Bill also provides that where the numbers of members of the House of Representatives to be chosen in the Australian Capital Territory or the Northern Territory is six or more, that Territory will be entitled to representation in the Senate on the basis of one senator for every two members of the House of Representatives. However, each will be entitled to a minimum of two senators. Other Commonwealth Territories will be entitled to representation in the Senate on the basis of one senator for every two members of the House of Representatives.<sup>90</sup>

To date no attempt has been made to amend the Constitution in line with the recommendations of the 1985 Joint Standing Committee on Electoral Reform report. As such, the passage of this amendment bill set the parameters that currently govern the representation of territories in the Commonwealth Parliament. As noted in earlier discussion, the only significant departure from these formulae came in 2004 with the passage of the Commonwealth Electoral Amendment (Representation in the House of Representatives) Bill 2004, which restored a second House of Representatives seat in the Northern Territory after it had been removed by a determination of the Electoral Commissioner that it had fallen below the necessary population quota.

A curious feature of the current arrangements contained in the Commonwealth Electoral Act for determining House and Senate representation is that they reverse the direction of the nexus provisions in section 24 of the Constitution. In that section, now replicated in section 48 of the Commonwealth Electoral Act, the number of senators is doubled and used to divide the population of the Commonwealth to attain a quota, and the population of each state is divided by that quota to attain the number of House of Representatives members to be elected in each state. In the case of the territories, however, the quota obtained in the above manner (with reference only to the 'People of the Commonwealth', which excludes the territories for this purpose) is first used to determine the number of House of Representatives seats for each territory, and the number of House of Representatives seats is then used to determine the number of senators—i.e. one senator for every two House of Representatives members.

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<sup>90</sup> *House of Representatives Hansard*, 22 December 1989, p. 3536 (Mr Stewart West).

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## Conclusion

Senators for the Northern Territory and the ACT have been a fixture of the Commonwealth Parliament for 40 years and, although they enjoy full voting rights and participate in chamber and committee activities just as other senators do, the constitutional foundation of their presence is distinct from that of senators representing the original six states. As established via a series of High Court challenges, section 122 of the Constitution provides the parliament with total discretion to determine the size and nature of territory representation in the Senate and the House of Representatives. Senators for the territories are not governed by the provisions of part II of chapter I of the Constitution.

The distinct constitutional basis provided by section 122 has enabled the parliament to respond to the increasing populations of the Northern Territory and the ACT by granting these territories two Senate seats each, but it has also allowed the parliament to establish these seats on terms distinct from those for state senators. This has led to an assimilation of territory senators' terms to those of members of the House of Representatives, rather than a reproduction of those terms granted to state senators. Thus, the three-year terms of territory senators mirror those of members of the House of Representatives and the number of senators to be elected for each territory is based on their House of Representatives entitlement, which is the reverse of the situation with the original states. This latter arrangement ties the number of Senate seats allocated to the territories to their population, a connection that does not exist in the case of the original states. Finally, with the terms of both senators from each territory ending simultaneously, the territories are not afforded the continuous Senate representation enjoyed by the states under the half-Senate rotation system.

While the constitutionality and desirability of admitting senators for the territories now appear to be settled questions, the terms of their service remain a matter of concern. As detailed above, when first introducing legislation to enable territory representation in the Senate, Whitlam stated that his proposal tied their terms to those of the House of Representatives because he believed this reform should be enacted for the entire Senate—that is, he believed that Senate terms should be equivalent to two consecutive House of Representatives terms. Although the Whitlam Government was ultimately able to introduce a one-term version of this arrangement for territory senators as this did not require constitutional change, proposed constitutional amendments affecting the whole Senate have been defeated at referendums on three occasions. The prospect of the rest of the Senate moving to terms tied to those of the House of Representatives therefore appears remote.



Furthermore, whatever the practical prospects of achieving such a reform, there are strong reasons to resist closer ties between the two chambers. As *Odgers*' argues, such a change would:

... fundamentally alter the nature of bicameralism in the Commonwealth Parliament by removing one of its essential features, the principle of fixed, periodical elections, with a fixed, autonomous electoral cycle for the Senate. To lock the Senate into an electoral cycle dependent upon general elections for the House of Representatives, which can occur at any time, would significantly weaken its position as an independent house, and dilute its capacity to embrace electoral opinion which goes unrepresented in the method used for electing members of the House of Representatives. It would also remove a significant restraint on governments holding early elections for partisan reasons.<sup>91</sup>

While this aspect of territory representation in the Senate may have appeared 40 years ago as a harbinger of constitutional change affecting the fixed electoral cycle of the entire Senate, it now appears as an anomaly. Given the importance of maintaining the distinct electoral cycles of the two chambers of the federal parliament, a case could be made for aligning the terms of territory senators with those of senators for the states.

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<sup>91</sup> Evans and Laing, *op. cit.*, p. 33.



## **The *Williams* Decisions and the Implications for the Senate and its Scrutiny Committees\***

Patrick Hodder

This paper focuses on the principal response of parliament to the High Court's decision in the case of *Williams v Commonwealth* (2012) which is referred to as *Williams (No. 1)*.<sup>1</sup> The response was the enactment of a regulation-making mechanism as a means to authorise Commonwealth expenditure on a range of programs, and has had implications for the work of the Senate Standing Committee on Regulations and Ordinances (the committee). The broader implications for the parliament of the High Court decisions in the two *Williams*<sup>2</sup> cases were considered in the Glenn Ryall paper 'Commonwealth Executive Power and Accountability Following *Williams (No. 2)*'.<sup>3</sup>

Beginning with some background and context, the paper notes the key differences between primary and delegated legislation and the factors that led to the establishment of the committee, and briefly outlines how the parliament has maintained control over delegated legislation via the role of the committee. This context provides the basis for an examination of how the committee has interpreted its scrutiny principles in its examination of the regulations giving effect to the parliament's legislative response to *Williams (No. 1)*, and to thereby apply a measure of accountability to the executive. The final part of the paper explores a number of issues related to the sufficiency of parliamentary scrutiny of the executive, including the ramifications for parliamentary scrutiny of greater executive reliance on intergovernmental agreements, criticism of the parliament's response to *Williams (No. 1)*, and the practicality of remedies to improve parliamentary and committee scrutiny of the executive.

### **Establishment of the committee**

The parliamentary enactment of a statute has various stages that allow for detailed consideration and amendment of a bill by elected representatives. By contrast, delegated legislation is essentially law made by the executive—usually ministers and other executive office holders (unelected public officials)—without parliamentary enactment. As noted in *Odgers' Australian Senate Practice*, delegated legislation therefore has fundamental implications for parliamentary sovereignty and democratic

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\* The author acknowledges Maureen Weeks, Ivan Powell, Glenn Ryall, Jackie Morris and Jessica Strout for their invaluable advice and assistance.

<sup>1</sup> *Williams v Commonwealth* (2012) 248 CLR 156 (*Williams (No.1)*).

<sup>2</sup> *Williams v Commonwealth* (2012) 248 CLR 156 (*Williams (No.1)*); *Williams v Commonwealth (No. 2)* (2014) 309 ALR 41 (*Williams (No.2)*).

<sup>3</sup> *Papers on Parliament*, no. 63, July 2015, pp. 109–34.

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accountability because it appears to violate the constitutional principle of the separation of powers: that is, the principle that laws should be made by parliament and administered or enforced by the executive.<sup>4</sup>

It is important to note that while the use and acceptance of delegated legislation is ubiquitous today, historically this apparent diminution of parliamentary sovereignty and accountability has excited powerful concerns. A signal example of these concerns, and one which forms the backdrop to the establishment of the committee in March 1932,<sup>5</sup> was the 1929 book by the Lord Chief Justice of England, Lord Hewart, *The New Despotism*, a title which clearly equates the delegation of the parliament's legislative powers to a return of sorts to the prerogative excesses of monarchs prior to the English constitutional settlement. Meanwhile, in Australia, the Select Committee on the Standing Committee System established by the Senate to inquire into delegated legislation (among other matters) proposed a committee to review regulations and ordinances. This proposal was doubtless informed by the repeated remaking of regulations under the *Transport Workers Act 1928* that had been disallowed by the Senate and which, despite Address by the Senate, were subsequently approved by the Governor-General. Against this backdrop, the Senate resolved in 1931 to require the appointment of a dedicated Standing Committee on Regulations and Ordinances at the commencement of each parliament.<sup>6</sup> Thus it may be seen that it is the Senate that has principally developed the parliamentary mechanisms required to ensure oversight of executive law-making via delegated legislation, and to thereby effectively preserve the principle of the separation of powers.

### **The committee's role and mode of operation**

The scope of the committee's scrutiny function is formally defined by Senate standing order 23,<sup>7</sup> which requires it to scrutinise each disallowable instrument of delegated legislation to ensure:

- (a) that it is in accordance with the statute
- (b) that it does not trespass unduly on personal rights and liberties

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<sup>4</sup> Harry Evans and Rosemary Laing (eds), *Odgers' Australian Senate Practice*, 13th edn, Department of the Senate, Canberra, 2012, p. 413.

<sup>5</sup> Rosemary Laing (ed.), *Annotated Standing Orders of the Australian Senate*, Department of the Senate, Canberra, 2009, Chapter 5—Standing and Select Committees, p. 110.

<sup>6</sup> Evans and Laing, *op. cit.*, pp. 416–17.

<sup>7</sup> Parliament of Australia, *Standing Orders and Other Orders of the Senate*, [www.aph.gov.au/Parliamentary\\_Business/Chamber\\_documents/Senate\\_chamber\\_documents/standingorders](http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/standingorders) (accessed 14 January 2016). The standing orders of the Senate derive their authority from sections 49 and 50 of the Constitution, which provide, respectively, for the powers, privileges, and immunities of the Senate and House of Representatives; and that each house may make rules and orders for the exercise of those powers, privileges, and immunities, and the order and conduct of business.

- (c) that it does not make the rights and liberties of citizens unduly dependent on administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal and
- (d) that it does not contain matter more appropriate for parliamentary enactment.

The committee's work may be broadly described as technical legislative scrutiny as, by convention, it does not extend to the examination or consideration of the merits of the policy underpinning an instrument of delegated legislation.

While today there are numerous formalities and legislative requirements attendant upon the making of delegated legislation (principally through the *Legislative Instruments Act 2003*)<sup>8</sup>, the foundation of parliamentary control of executive law-making resides in the ability of parliament to move to disallow (in effect, to veto) instruments of delegated legislation.<sup>9</sup> Such disallowance motions based on the recommendation of the committee, while infrequent, have without exception been agreed to by the Senate.<sup>10</sup>

Where an instrument raises a concern referable to the committee's scrutiny principles, the committee usually writes to the responsible minister seeking an explanation, or seeking an undertaking for specific action to address its concern. This dialogue is generally conducted within the period that the instrument is open to the possibility of disallowance, which ensures that the committee is able, if necessary, to recommend to the Senate the disallowance of an instrument about which it has concerns. If the 15 sitting days available for giving a notice of motion for disallowance is likely to expire before a matter is resolved, the committee may give such a notice in order to protect the Senate's ability to disallow the instrument (the notice has the effect of providing a further 15 sitting days in which the motion can be moved). Such motions are therefore referred to as 'protective notices'.

As noted above, disallowance is an uncommon end to a committee inquiry into a particular instrument of delegated legislation. In most cases, the relevant instrument maker (usually a minister) provides sufficient information to address the committee's concern, but instrument makers may also provide an undertaking to address the committee's concern through the taking of steps at some point in the future

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<sup>8</sup> The *Legislative Instruments Act 2003* will become the *Legislation Act 2003* on 5 March 2016 with the commencement of the *Acts and Instruments (Framework Reform) Act 2015*.

<sup>9</sup> See Evans and Laing, op. cit., p. 413. The disallowance process is prescribed by section 42 of the *Legislative Instruments Act 2003*. Although both houses have the ability to disallow certain instruments of delegated legislation, the power is more commonly exercised in the Senate (where the government of the day generally does not have a majority).

<sup>10</sup> Evans and Laing, op. cit., p. 424.

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(undertakings typically relate to the making of changes to primary or delegated legislation). The acceptance of such undertakings has the benefit of securing an outcome agreeable to the committee, without the significant interruption of the executive's implementation and administration of policy that would be caused by disallowance.<sup>11</sup>

### **Committee scrutiny of regulations following the *Williams* case**

As noted, the response of parliament to *Williams (No. 1)* was the enactment of a regulation-making mechanism as a means to authorise Commonwealth expenditure on a range of programs. Several aspects of the committee's work described above are demonstrated in the committee's scrutiny of these regulations, which were initially made under the *Financial Management and Accountability Act 1997* (FMA Act) and subsequently under the *Financial Framework (Supplementary Powers) Act 1997* (FFSP Act).

The decision in *Williams (No. 1)* cast doubt on the validity of government expenditure involving direct payments to persons other than a state or territory, the only authority for which being an item of appropriation in an appropriation Act. In response, on 27 June 2012 parliament passed the *Financial Framework Legislation Amendment Act (No. 3) 2012* (FFLA Act), which added section 32B to the FMA Act. Section 32B gave legislative authority to the executive to make, vary or administer any arrangement under which public money is paid out by the Commonwealth, and to grant financial assistance to any person, provided that the arrangement or grant is specified in the FMA Act regulations.<sup>12</sup> In simple terms, this has since allowed the executive to authorise expenditure on programs and grants by making regulations adding the particulars of those programs and grants to Schedule 1AB of the FFSP Act regulations,<sup>13</sup> rather than including those matters in primary legislation.<sup>14</sup> An inescapable consequence of the use of regulations in response to the decision in *Williams (No. 1)* was that any such instruments would be subject to scrutiny by the

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<sup>11</sup> *ibid.*, pp. 432–3.

<sup>12</sup> The FFLA Act initially added over 400 items to Schedule 1AA of the FMA regulations. However, because these items were added by the FFLA Act (that is, by primary legislation) they fell outside the scope of the committee's scrutiny.

<sup>13</sup> Programs were initially added to Schedule 1AA, but this was effectively superseded by Schedule 1AB, which, for technical reasons, was added to the FMA regulations in December 2013 (see the *Financial Management and Accountability Amendment (2013 Measures No. 1) Regulation 2013* [F2013L02089]).

<sup>14</sup> Programs were initially added to a schedule of the FMA Act. However, the *Public Governance, Performance and Accountability Act 2013* repealed most of the FMA Act and renamed it the *Financial Framework (Supplementary Powers) Act 1997* (FFSP Act). The FFSP Act retained section 32B to authorise the Commonwealth to make, vary and administer arrangements and grants specified in the FFSP regulations (which had previously been specified in the FMA regulations (see previous note)).

committee in accordance with Senate standing order 23 and the scrutiny principles set out above.

### **Matters raised by the committee**

The committee first reported on Financial Management and Accountability Amendment Regulation 2012 (No. 8) [F2012L02091] on 7 February 2013.<sup>15</sup> Since that time, the committee has identified the following three issues referable to its scrutiny principles in the FMA/FFSP regulations (henceforth referred to just as the FFSP regulations).<sup>16</sup>

#### *Absence of review of decisions*

The first issue raised by the committee relates to scrutiny principle (c), requiring the committee to ensure that delegated legislation does not make rights and liberties unduly dependent on administrative decisions which are not subject to review. In simple terms, the question for the committee was whether decisions made in connection with authorised programs would be subject to review.

The committee's analysis on this front drew on the examination of the FFLA Act by the Senate Standing Committee for the Scrutiny of Bills, which questioned the appropriateness of, and limited justification for, the wholesale exclusion from judicial review of all decisions made pursuant to programs and grants authorised by addition to Schedule 1AA (now Schedule 1AB) from the *Administrative Decisions (Judicial Review) Act 1997* (ADJR Act). The committee pursued this line of inquiry by seeking advice from the Minister for Finance on whether the characteristics of specific programs and grants justified the exclusion of decisions from merits review. The committee ultimately reported its expectation that explanatory statements include a description of the policy considerations and program or grant characteristics relevant to the question of whether or not decisions should be subject to merits review.<sup>17</sup> The minister advised in response that future explanatory statements would include such information,<sup>18</sup> which has since been consistently provided.

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<sup>15</sup> Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor*, no. 1 of 2013, 7 February 2013, pp. 36–7.

<sup>16</sup> The committee's findings are reported in its main publication, the *Delegated Legislation Monitor* (the monitor), available at [www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regulations\\_and\\_Ordinances/Monitor](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Monitor). The monitor is generally published each Senate sitting week.

<sup>17</sup> Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor*, no. 1 of 2014, 12 February 2014, pp. 5–6.

<sup>18</sup> Senator the Hon. Mathias Cormann, Minister for Finance, letter to Senator Sean Edwards, Chair, Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor*, no. 4 of 2014, 26 March 2014, Appendix 3.

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*Authorising of certain expenditure by regulation*

The second issue raised by the committee relates broadly to scrutiny principle (d), requiring the committee to ensure that delegated legislation does not contain matters more appropriate for parliamentary enactment. The committee interprets its scrutiny principles broadly, and this principle may therefore be understood as pertaining more generally to questions related to the legislative form used. This matter was taken up by the committee at the request of the then Committee on Appropriations and Staffing. The Chair of that committee, the President of the Senate, wrote to the committee in March 2014 and requested that the committee begin to monitor executive expenditure being authorised by the *Williams* ‘solution’, and report on any such expenditure to the Senate.

In making this request, it was noted that the authorising of expenditure via regulation in this way had effectively reduced the scope of the Senate’s scrutiny of government expenditure, and in particular the constitutional ability of the Senate to examine and, if desired, to amend certain expenditure proposals. Some irony may be seen in this outcome due to the fact that the decision in *Williams (No. 1)* had effectively reaffirmed the fundamental role of the parliament and the Senate in authorising revenue and expenditure proposals of the executive, reflecting as it does the terms of the federal settlement as expressed in the relationship between the two houses of the parliament.

Specifically, section 83 of the Constitution provides that no money shall be drawn from consolidated revenue ‘except under appropriation made by law’; and that, while the Senate may not amend proposed laws appropriating revenue or moneys for the ordinary annual services of the government (that is, for the maintenance of the administrative departments and continuing programs of the Commonwealth),<sup>19</sup> the Senate may directly amend an appropriation bill not for the ordinary annual services of the government.<sup>20</sup> Because an appropriation bill for ordinary annual services must contain only those appropriations,<sup>21</sup> the executive is effectively prevented from ‘tacking on’ to the non-amendable appropriation bill items of new expenditure. By thus ensuring that expenditure on new works and programs is kept separate from ordinary annual services, and permitting the Senate to amend new expenditure proposals, the Senate has the means to prevent the inequitable or disproportionate distribution of new expenditure between the states.<sup>22</sup>

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<sup>19</sup> Expenditure on ordinary annual services is contained in appropriation bills no. 1 (budget estimates) and no. 3 (additional estimates).

<sup>20</sup> Section 53 of the Constitution.

<sup>21</sup> Section 54 of the Constitution.

<sup>22</sup> In June 2010, the Senate restated by resolution its constitutional right to amend proposed laws appropriating revenue or monies for expenditure on all matters not involving the ordinary annual



In light of this, a concern arising from the regulation-making mechanism under section 32B of the FFSP Act is that items of expenditure, which previously should properly have been contained within an appropriation bill not for the ordinary annual services of the government (and subject to direct amendment by the Senate), may now be authorised by regulation without being subject to amendment or direct approval by the Senate.<sup>23</sup> For example, new expenditure could be purportedly authorised by a program previously listed in the regulations (and perhaps in relatively broad or imprecise terms) and thus contained in an appropriation bill for the ordinary annual services of government. Given that it appears this arrangement is now occurring, there is, therefore, a risk that the use of the regulations in this way could undermine the constitutional rights of the Senate.<sup>24</sup>

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services of the government. In particular, it stated that appropriations for expenditure on new policies not previously authorised by special legislation, and grants under section 96 of the Constitution, are not appropriations for the ordinary annual services of the government, and shall be presented to the Senate in a separate appropriation bill subject to amendment by the Senate. A core function of the Senate is therefore to monitor the allocation of matters between the appropriation bills, and the President of the Senate, as Chair of the Senate Standing Committee on Appropriations and Staffing, accordingly draws to the attention of the Minister for Finance any apparently incorrectly classified expenditure following both budget and additional estimates (see Senate Standing Committee on Appropriations and Staffing, *50th Report: Ordinary Annual Services of the Government*, June 2010, [www.aph.gov.au/~media/wopapub/senate/committee/app\\_ctte/completed\\_inquiries/2008\\_10/50th\\_report/report\\_pdf.ashx](http://www.aph.gov.au/~media/wopapub/senate/committee/app_ctte/completed_inquiries/2008_10/50th_report/report_pdf.ashx) (accessed 31 March 2015)). A form of the Senate's June 2010 resolution was first enunciated in the Compact of 1965 following a refusal by the Senate to accept the government's decision to roll the appropriation bills into one appropriation bill: see Evans and Laing, *op. cit.*, p. 369 and J.R. Odgers, *Australian Senate Practice*, 6th edn, Royal Australian Institute of Public Administration (ACT Division), Canberra, 1991, pp. 580–3).

<sup>23</sup> Appropriation bills no. 1 (budget estimates) and no. 3 (additional estimates) contain the expenditure on ordinary annual services. Appropriation bills no. 2 (budget estimates) and no. 4 (additional estimates) contain the expenditure not for the ordinary annual services (new money).

<sup>24</sup> For example, on 16 November 2014, the Group of Twenty (G20) Leaders agreed to establish a Global Infrastructure Hub (the Hub) in Sydney to help implement the G20 multi-year infrastructure initiative. The Financial Framework (Supplementary Powers) Amendment (2014 Measures No. 3) Regulation 2014 [F2014L01697] (the Regulation) added one new item to Part 4 of Schedule 1AB to the FF(SP) regulations to establish legislative authority for expenditure on the Hub. The Commonwealth government will contribute \$30 million over four years to the establishment and operation of the Hub to be administered by Treasury (see *Mid-Year Economic and Fiscal Outlook 2014–15*, Appendix A: Policy decisions taken since the 2014–15 Budget, Global Infrastructure Hub (December 2014), p. 199). For the 2014–15 budget year, Treasury sought \$4.1 million (comprised of departmental expenses of \$0.7 million and administered funding of \$3.4 million) in the 2014–15 additional estimates. There were no funds for the Department of Treasury in Appropriation Bill No. 4 2014–2015 (see *Particulars of Certain Proposed Additional Expenditure in Respect of the Year Ending on 30 June 2015*, p. 38). The *Treasury Portfolio Additional Estimates Statements 2014–15* (p. 11) stated that the departmental and administered funding for this measure was included in Appropriation Bill No. 3 2014–2015 (that is, in the non-amendable appropriation bill for the ordinary annual services of government) (see also *Particulars of Proposed Additional Expenditure in Respect of the Year Ending on 30 June 2015*, p. 70). Several elements of the arrangements in this case merit consideration. First, given the Hub is a new initiative and not an ongoing activity, it appears the expenditure was inappropriately included in Appropriation Bill No. 3 (and should instead have been included in Appropriation Bill No. 4). Second, it appears that the only legislative base for the expenditure on the Hub was through the Regulation. Third, the Regulation was registered on 12 December 2014, some two months before the appropriation bills were introduced in the House of Representatives on 12 February 2015. The legislative authority for

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The committee's response to the Appropriations and Staffing Committee's request was therefore to commence examining the arrangements, grants and programs specified in the FFSP regulations to ascertain whether expenditure has been previously authorised or appears to be new expenditure. In this task, the committee's work complements that of the eight Senate legislative and general purpose standing committees, which are similarly tasked with examining the allocation of proposed expenditure between the appropriation bills. However, it is important to note that in both cases the allocation of expenditure can be difficult to determine with any certainty, because budget papers and portfolio budget statements do not allow a 'clear read' between appropriations and specific items of expenditure. Typically, money is appropriated for broad and even vague outcomes, rather than for specific programs and purposes, which means that money may be reallocated between programs within the same broad statement of outcomes. The lack of sufficiently specific outcomes can make it difficult to determine whether the allocation actually involves 'new' money and indeed which bill contains the appropriated funds.

Notwithstanding the inherent difficulties of the task, the committee has since reported on several occasions that certain programs authorised by regulation have appeared to involve new expenditure,<sup>25</sup> and noted that, prior to the enactment of the FFLA Act, such items of new expenditure should properly have been contained within an appropriation bill not for the ordinary annual services of the government (and thus subject to direct amendment by the Senate).<sup>26</sup>

### *Constitutional authority for expenditure*

The third issue examined by the committee relates to scrutiny principle (a), requiring the committee to ensure that an instrument is made in accordance with statute (again, interpreted broadly by the committee as applying to all possible legal formalities).

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the expenditure (in this case, the Regulation) was therefore in place before the appropriation bills were laid before parliament. Given this timeline, it could be argued that the Regulation signified that the expenditure on the Hub had been previously approved by the parliament and therefore could legitimately be included in Appropriation Bill No. 3. However, it should be noted that, although it was registered on 12 December 2014 (and therefore entered into force on 13 December 2014), the Regulation was not tabled in parliament until 9 February 2015 (the first sitting day of 2015). The Regulation was therefore still open to disallowance up until and including 26 March 2015. Given the disallowance period extended beyond both the date upon which the appropriation bills were introduced in the House of Representatives and the date (17 March 2015) upon which the bills were passed by both houses, it seems reasonable to question any assumption that the expenditure on the Hub had been previously approved by the parliament, and therefore reasonable to question why the expenditure on the Hub was included in the non-amendable appropriation bill.

<sup>25</sup> Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor*, nos 5, 6, 10 and 17 of 2014 and no. 1 of 2015.

<sup>26</sup> See, for example, *Delegated Legislation Monitor*, no. 10 of 2014 (27 August 2014), Financial Management and Accountability Amendment (2014 Measures No. 6) Regulation 2014 [F2014L00841], pp. 5–10, in which the committee drew attention to 34 schemes that appeared to involve previously unauthorised expenditure.

This issue relates to the question of whether constitutional authority exists for the expenditure on programs being authorised by regulation under section 32B.

The committee's attention to this particular line of inquiry was galvanised by the High Court's findings in *Williams (No. 2)*, and particularly its reinforcement of the notion that Commonwealth expenditure is restricted to those areas where there is explicit constitutional authority. Notably, the High Court insisted that section 32B cannot validly authorise programs or grants in the absence of relevant constitutional authority:

... [section] 32B should be read as providing power to the Commonwealth to make, vary or administer arrangements or grants *only where it is within the power of the Parliament* to authorise the making, variation or administration of those arrangements or grants [emphasis added].<sup>27</sup>

The first example of this inquiry was the Financial Management and Accountability Amendment (2014 Measures No. 6) Regulation 2014 [F2014L00841], registered on 27 June 2014,<sup>28</sup> which specified 54 arrangements, grants or programs across eleven portfolios. Citing *Williams (No. 2)*, the committee stated its view that explanatory statements for instruments specifying programs for the purposes of section 32B of the FFSP Act should explicitly state, for each new program, the constitutional head of power that supported the expenditure, and accordingly requested this information from the Minister for Finance. On 3 September 2014, the committee placed a protective notice on the instrument in order to preserve the Senate's ability to subsequently disallow the instrument in the event that the minister's response proved unsatisfactory (thereby extending by 15 Senate sitting days the time for the matter to be resolved). In his response of 11 November 2014, the minister provided the committee with the requested information, but with the significant rider that in referencing the constitutional authority or head(s) of power for each of the items in the regulation, the government was 'not purporting to provide any comprehensive statement of relevant constitutional considerations'. Further, the minister noted that there was no strict legal requirement for explanatory statements to identify the constitutional basis for expenditure, and advised that the government did not intend to provide such information in relation to future regulations.<sup>29</sup>

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<sup>27</sup> *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416, 457 [36].

<sup>28</sup> The instrument was made on 26 June 2014 following the High Court's judgment in *Williams (No. 2)*.

<sup>29</sup> Senator the Hon. Mathias Cormann, Minister for Finance, letter to Senator John Williams, Chair, Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor*, no. 15 of 2014 (19 November 2014) Appendix 1.

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In response, the committee acknowledged the substantial effort of the minister and department in providing what was a comprehensive and informative response to the committee's inquiry. However, in respect of the minister's perhaps unfortunate intimation that the committee could insist only on that which is prescribed by law, the committee took the opportunity to point out that its expectation that explanatory statements identify a constitutional head of power for expenditure on programs and grants was, in fact, derived from the Senate standing orders, as well as the committee's own determinations as to what is required to faithfully fulfil the function delegated to it by the Senate.<sup>30</sup>

The committee noted that in the regulation and inquiry at hand, it appeared a case had been made that each of the 54 programs was supported by a relevant constitutional head or heads of power.<sup>31</sup> On this basis, the committee concluded its examination of the instrument and withdrew the protective notice of motion to disallow the instrument (on 19 November 2014). The committee's language could perhaps be taken as some indication that it did not necessarily reach a definitive conclusion about the constitutional validity of the expenditure on the basis of the information provided by the minister, and it is germane to note that the constitutional validity or otherwise of expenditure could only be determined as a result of a challenge in the High Court. Equally, it should be said that the extent to which section 32B of the FFSP Act is a valid delegation of legislative power to authorise the expenditure of monies remains an open question; at this stage, the High Court has determined only that there exists a requirement for government expenditure to have constitutional authority, and that the National School Chaplaincy Program was not supported by any of the constitutional heads of power.

### **Broader ramifications of the parliament's response to the *Williams* cases**

The final part of this paper draws on the preceding description of parliament's response to the *Williams* cases to explore a number of issues related to the sufficiency of parliamentary scrutiny of the executive.

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<sup>30</sup> Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor*, no. 15 of 2014 (19 November 2014), p. 6. See also 'Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 3) Regulation 2015 [F2015L00572]', *Delegated Legislation Monitor*, no. 13 of 2015 (13 October 2015), pp. 3–14.

<sup>31</sup> *ibid.*

*Executive reliance on intergovernmental agreements to secure funding for particular programs in areas of state competence*

In the paper ‘*Williams v Commonwealth—A Turning Point for Parliamentary Accountability and Federalism in Australia?*’,<sup>32</sup> Glenn Ryall notes that, in reaching its decision in *Williams (No. 1)*, the High Court pointed to both the centrality of federalism and the distinctive role of the Senate as a necessary part of the Commonwealth’s legislative power. The High Court noted that the system of responsible and representative government underpinned by the Constitution gives rise to the principle that the executive should be accountable to the parliament for both the supply *and* expenditure of public money, and that the passage of a bill through parliament enables the Senate to be engaged in the formulation, amendment and termination of a spending program. This level of parliamentary involvement in oversight of expenditure is to be contrasted with previous assumptions that an appropriation bill was a sufficient basis for the executive to spend public money in reliance on a broad executive power. The High Court also noted that, considered alone, the appropriation of revenue is a process that provides for only limited involvement of the Senate (particularly where, as with the National School Chaplaincy Program, an appropriation is included in the non-amendable Appropriation Bill No. 1).

Drawing on these considerations, the High Court’s key conclusions were that the executive power to contract and spend is necessarily constrained<sup>33</sup> and that executive expenditure typically requires a statutory or constitutional basis.<sup>34</sup> The government’s response to *Williams (No. 2)* was simply to re-establish the chaplaincy program under an intergovernmental agreement effectively authorised by the power of the Commonwealth to make tied grants to the states under section 96 of the Constitution. This response demonstrates a clear alternative to the authorising of expenditure via section 32B, and one that is undoubtedly supported by the Constitution.

During 2008 and 2009, the Commonwealth’s power to disburse monies to the states and territories under section 96 of the Constitution was formalised (and simplified) by the Intergovernmental Agreement on Federal Financial Relations, agreed to by the Commonwealth and all state and territory governments at the Council of Australian Governments. The intergovernmental agreement took effect from 1 January 2009 and was augmented by the *Federal Financial Relations Act 2009* (FFR Act), which commenced on 1 April 2009. Under these two instruments, various mechanisms were

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<sup>32</sup> Glenn Ryall, ‘*Williams v Commonwealth—a turning point for parliamentary accountability and federalism in Australia?*’, *Papers on Parliament*, no. 60, March 2014, pp 131–48.

<sup>33</sup> *Williams v. Commonwealth* (2012) 248 CLR 156, 351–2 [516].

<sup>34</sup> *Williams v. Commonwealth* (2012) 248 CLR 156, 232–3 [136] and 355 [534].

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established to transfer Commonwealth money to the states and territories, including national partnership payments (NPPs), national specific purpose payments (National SPPs), and general purpose financial assistance (GPFA) payments.<sup>35</sup>

Clearly, while securing the funding for the National School Chaplaincy Program in this way (via NPPs) satisfies the requirement for due legal (constitutional) authorisation, it is apparent that it does not reflect a level of parliamentary control of executive expenditure that accords with the importance of the principle as expounded by the High Court in *Williams (No. 1)* and *(No. 2)*. It has become commonplace that the use of NPPs and National SPPs has enabled the Commonwealth to become involved in areas beyond those heads of power enumerated in the Constitution, raising concerns about accountability and duplication of administration, as well as arguments about the benefits of such arrangements. There is also an apparent lack of parliamentary scrutiny of the expenditure negotiated via intergovernmental agreements of this type. Although constitutionally valid, such expenditure has been for most practical purposes immune to parliamentary control because typically it is negotiated between federal and state executives without the need for parliamentary imprimatur (or, where legislation is required, it is effectively presented as pre-agreed, uniform legislation that resists amendment). NPPs and National SPPs therefore represent a deficit in executive accountability for expenditure (and one compounded by the fact that the vast majority of total Commonwealth expenditure (over 80 per cent) is already contained within special appropriations not subject to annual parliamentary scrutiny and approval in the annual appropriation bills).<sup>36</sup>

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<sup>35</sup> Such intergovernmental mechanisms provide for the payment of considerable funds to the states and territories. The drawing limits for GPFA payments and NPPs are specified in Appropriation Bill No. 2 (see *Federal Financial Relations Act 2009*, sections 9 and 16 respectively) and for 2014–15 were \$5 billion and \$25 billion respectively (see *Appropriation Act (No. 2) 2014–2015* (Cth), subsections 13(4) and 13(5)). National SPPs have a standing appropriation established under section 22 of the FFR Act, which also sets the total expenditure for each category of National SPP (see *Federal Financial Relations Act 2009*, sections 10–14). A standing appropriation is a special appropriation contained within a bill that, once enacted, authorises the expenditure of money for a defined period or until it is repealed. The Commonwealth currently makes payments through three National SPPs: the National Skills and Workforce Development SPP, the National Disability Services SPP and the National Affordable Housing SPP. The indexation, total amount and allocation amongst the states and territories are determined by disallowable legislative instrument (see, for example, Federal Financial Relations (National Specific Purpose Payments) Determination 2012–13 [F2014L00323]).

<sup>36</sup> Special appropriations were already identified as a serious problem over twenty years ago, when 70 per cent of Commonwealth government expenditure was not subject to annual parliamentary scrutiny and approval in the annual appropriation bills (see, for example, Harry Evans, ‘Constitution, section 53—amendments and requests—disagreements between the houses’, *Papers on Parliament*, no. 19, May 1993, p. 12). In 2002–03, special appropriations accounted for more than 80 per cent of all appropriations (see Senate Standing Committee on Finance and Public Administration, *Transparency and Accountability of Commonwealth Public Funding and Expenditure* (March 2007), p. 15). The current Clerk of the Senate has also noted that the extensive use of special appropriations has eroded parliamentary control of executive expenditure (see Rosemary Laing, ‘Is less more? Towards better Commonwealth performance’, Commonwealth

In bare terms, despite the High Court having twice declared the Commonwealth's direct funding of the National School Chaplaincy Program as beyond power, section 96 has allowed the Commonwealth to validly use an NPP to indirectly continue that funding. Such a use of special appropriations via the FFR Act has seen the parliament's control of executive expenditure further eroded by its own actions in passing the enabling legislation, and further compounded the irony of the response to the High Court's emphasis on the importance of parliamentary oversight in this regard. In light of section 96 of the Constitution, it is not clear that any significantly greater level of parliamentary scrutiny will flow from the court's more restrictive view of the scope of the executive power, and more exacting interpretation of the parliament's constitutional role in the oversight of executive expenditure.

*Criticism of the parliament's response to Williams (No. 1)*

In discussing the constitutional implications of the executive government's response to *Williams (No. 1)*, the then Shadow Attorney-General, Senator the Hon. George Brandis QC, appeared to express significant concerns about the section 32B mechanism for authorising expenditure via regulation, including that the response was 'inept' and insufficient to meet the test of constitutional validity. Despite these serious reservations, Senator Brandis noted that the then opposition would vote in favour of the legislation.<sup>37</sup>

Criticism of the parliament's response also came from further afield, and included concerns that the parliament had failed to engage critically with the constitutionality of the legislation, that party discipline had restrained parliamentary oversight, and that the parliament had surrendered its powers of financial scrutiny to the executive.<sup>38</sup>

Professor Anne Twomey, for example, noted that the authorising of expenditure by regulation under section 32B had reduced the level of parliamentary scrutiny in two key ways. First, the FFLA Act had retrospectively validated over 400 programs by adding them to Schedule 1AA of the regulations without any real scrutiny of whether they were supported by constitutional authority—indeed, Twomey noted that there was 'no opportunity at all for prior consideration or scrutiny' before the bill entered the House of Representatives and parliamentarians had appeared ignorant of the full

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Financial Accountability Review Discussion Paper (March 2012), *Submission no. 7*, [pp. 5–6], [www.pmra.finance.gov.au/files/2012/03/No.07-Clerk-of-the-Senate.pdf](http://www.pmra.finance.gov.au/files/2012/03/No.07-Clerk-of-the-Senate.pdf) (accessed 31 March 2015).

<sup>37</sup> Senator the Hon. George Brandis, *Parliamentary Debates*, Senate, 27 June 2012, pp. 4651–4.

<sup>38</sup> Anne Twomey, 'Bringing down the House? Keeping school chaplains means a surrender to the executive', *The Conversation*, 27 June 2012, <http://theconversation.com/bringing-down-the-house-keeping-school-chaplains-means-a-surrender-to-the-executive-7926> (accessed 31 March 2015); Gabrielle Appleby and Adam Webster, 'Parliament's role in constitutional interpretation', *Melbourne University Law Review*, vol. 37, 2013.

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effects of the legislation.<sup>39</sup> Second, section 32B had provided the executive with ‘carte-blanche’ to henceforth expend monies on programs without parliamentary scrutiny (if the expenditure could be ascribed to one of the existing (broadly described) programs in the schedule to the regulations), or with only limited oversight (via the scrutiny process and possibility of disallowance) through the addition by regulation of new programs to the schedule.<sup>40</sup>

In a similar vein, Gabrielle Appleby and Adam Webster have noted the parliament’s apparent failure to engage critically with the question of the constitutionality of the FFLA bill, which they ascribe to the rigid party discipline that, in place of objective and informed consideration, commonly dictates the fate of legislation in the Commonwealth Parliament. To address this, Appleby and Webster suggest that either party discipline should be relaxed to allow dissenting opinions on constitutional matters to be expressed and voted accordingly, or political parties should adopt best practice approaches to consideration of legislation, including robust assessments of the constitutionality of proposed laws.<sup>41</sup>

Such an approach would require parliamentarians to be provided with both the time and means to acquire a rigorous understanding of the key elements of a bill, and in this respect the support for the FFLA bill from the independent Member for Lyne, Mr Rob Oakeshott, is instructive. As noted by Twomey,<sup>42</sup> Mr Oakeshott, while commending the *Williams (No. 1)* decision as re-establishing the primacy of parliament over the executive and recognising the service-delivery role of the states within the federation,<sup>43</sup> promptly voted for legislation that could be said to further erode parliamentary scrutiny, cede financial power to the executive and ignore the role of the states in program and service delivery. That is no individual criticism as such when one considers that the bill’s expedited passage is but an instance of the often extremely short timeframes provided for the scrutiny of proposed legislation. This broader question of whether the parliament is generally afforded sufficient time to adequately consider legislation is ultimately relevant to any proposal for improved legislative outcomes, and the procedural and political factors that dictate such timeframes are certainly deserving of closer inspection.

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<sup>39</sup> Twomey, op. cit.

<sup>40</sup> *ibid.*

<sup>41</sup> Appleby and Webster, op. cit., p. 294.

<sup>42</sup> Twomey, op. cit.

<sup>43</sup> Mr Rob Oakeshott, *Parliamentary Debates*, House of Representatives, 26 June 2012, pp. 8073–4.



*The role of the Senate Standing Committee on Regulations and Ordinances*

In light of the renewed attention paid to parliamentary responsibility following the High Court decision in *Williams (No. 1)*, Professor Geoffrey Lindell has explored ways to enhance the role of parliament in authorising ‘certain executive activities and transactions’.<sup>44</sup> Pointing to the ability of either house to disallow regulations made under the FFSP Act, Lindell has considered the question of whether there is a need to provide for ‘systematic guidance and advice’ on such matters to either or both houses,<sup>45</sup> or for explicit consideration of such issues to be added to the existing functions of the committee, or else given to a new committee specifically established for that purpose.<sup>46</sup>

Recalling the earlier discussion of the committee’s character, mode of operation and scrutiny of FFSP regulations, it would appear that the committee’s scrutiny work already provides a useful but sometimes overlooked vehicle for parliamentary scrutiny. Lindell’s suggestion provides a useful platform from which to consider the extent to which the committee’s scrutiny of regulations made under the FFSP Act may be regarded as affording a sufficient level of parliamentary oversight and control of executive expenditure following *Williams (No. 1)* and *(No. 2)*, and whether there is any potential to enhance its operation in this regard. To summarise, the committee has raised three particular issues arising from its examination of regulations effecting the parliament’s response to the *Williams* cases: the availability of review of decisions made pursuant to authorised programs, the question of whether expenditure in relation to such programs may be properly classified as ‘new’, and whether constitutional authority exists for any such programs or grants, as the case may be. All of these issues have been and continue to be pursued by the committee within the surrounding context of the initial, and apparently continuing, bipartisan support for the enactment of section 32B in response to the *Williams* cases.

Taking the issue of constitutional authority as an illustration, it could be asked: in what circumstances might the committee utilise the full extent of its power and recommend the disallowance of an instrument on the basis that a program or arrangement specified in a regulation appeared to lack a constitutional basis or authority? That situation loomed over the horizon at the end of the 2015 sitting year when the dialogue between the Minister for Finance and the committee continued over the 15 sitting days that the protective disallowance motion remained before the Senate. The matter was ultimately never tested in the Senate, as a last minute reprieve

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<sup>44</sup> Geoffrey Lindell, ‘The changed landscape of the executive power of the Commonwealth after the *Williams* case’, *Monash University Law Review*, vol. 39, no. 2, 2013, p. 383.

<sup>45</sup> *ibid.*

<sup>46</sup> *ibid.*, p. 384.

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and a special meeting of the committee ensured that the assurances required by the committee were considered and the Senate was informed of its deliberations, allowing the notice of disallowance to be withdrawn.<sup>47</sup>

The first point to make is that the issue is one that demonstrates the committee's ability to flexibly encompass new issues and developments in the legal and parliamentary landscape, by applying its existing scrutiny principles (in this case the requirement to ensure that delegated legislation is made 'in accordance with statute') to the evolving circumstances. In pursuing the matters the committee, on behalf of the Senate, is working to establish the new boundaries within which it will accept the executive's new actions in the expenditure of public money. While it may be true that the power to recommend disallowance is best used to encourage the executive to engage and co-operate with the committee, the Senate's ability to disallow remains a

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<sup>47</sup> The Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 3) Regulation 2015 [F2015L00572] added new programs to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for those programs. These included the Mathematics by Inquiry program (to provide mathematics curriculum resources for primary and secondary schools) and the Coding across the Curriculum program (to support the introduction of algorithmic thinking and computer coding across different year levels in Australian schools and the implementation and teaching of the Australian Curriculum: Technologies in classrooms). The constitutional authority for these programs was identified as the external affairs power (namely, implementing obligations under the Convention on the Rights of the Child (CRC) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)) as well as the executive nationhood power and the express incidental power. However, the committee queried whether these were valid grounds, noting that (a) to rely on the external affairs power the programs would need to implement relatively precise obligations under the CRC and ICESCR; and (b) the nationhood power provided for the executive to engage only in enterprises and activities peculiarly adapted to the government of a nation, and which could not otherwise be carried out for the benefit of the nation (see Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor* no. 6 of 2015 (17 June 2015), pp. 10–14). The minister's response merely advised that legal advice had been obtained in relation to the constitutional authority for the programs, prompting the committee to request that the minister provide a copy of that legal advice, or respond to its initial request for the minister's assurance that the programs were in fact supported by the constitutional grounds cited (see *Delegated Legislation Monitor* no. 8 of 2015 (12 August 2015), pp. 19–23). On 13 August 2015, the Chair of the committee (Senator Williams) placed a protective notice of motion on the regulation to extend the last day for disallowance to 14 October 2015. In his second response, the minister again did not directly address the committee's concerns, and rejected the committee's request for the legal advice on the matter, prompting the committee to repeat its requests (*Delegated Legislation Monitor* no. 8 of 2015 (10 September 2015), pp. 8–14). The minister's third response again did not address the committee's concerns or provide the requested legal advice, prompting the committee, on 12 October 2015, to issue a final request that the minister provide either the legal advice obtained or his personal assurance that the programs were in fact supported by the constitutional grounds cited. Noting that the last day for disallowance was 14 October 2015, the committee took the unusual step of requesting the minister's response within 24 hours (see *Delegated Legislation Monitor* no. 12 of 2015 (12 October 2015), pp. 4–14). The response was duly provided within this timeframe, and enabled the committee to conclude its examination of the regulation on the basis of the minister's assurance that the government's legal advice was that the programs were 'supported by the external affairs power and/or the executive nationhood power (coupled with the express incidental power)'. The committee left aside the question of whether the minister's refusal to provide the requested legal advice was based on a valid public interest immunity claim (see *Delegated Legislation Monitor*, no. 13 of 2015 (13 October 2015) pp. 3–14). The committee Chair subsequently withdraw the notice of motion to disallow the regulation on 14 October 2015.

powerful sanction. The ‘carte-blanche’ that was seemingly granted with the passage of section 32B could still be curtailed by a successful disallowance motion, but is certainly being defined by the continuing dialogue between the executive and the committee over the regulations.

## **Conclusion**

Together, the High Court’s judgements in *Williams (No. 1)* and *(No. 2)* have affirmed the constitutional importance of the parliament’s oversight of executive expenditure. The parliament’s legislative response to these judgments has illuminated the complexities of this principle. The parliament, in facilitating by enactment the executive’s use of the constitutional power of the Commonwealth to make section 96 grants, has seemingly stepped away from the High Court’s<sup>48</sup> view of the involvement of the parliament in the ‘formulation, amendment or termination’ of spending programs. However, this action was argued as a necessary correction<sup>49</sup> and has revealed some of the internal workings of the relationship between the executive and the Senate in the realm of the work of the committee in its scrutiny of delegated legislation.

Notwithstanding the areas of concern identified both in relation to both the committee’s scrutiny of regulations emanating from the parliament’s response to *Williams (No. 1)* and more generally, the work of the committee on the FFSP regulations demonstrates the value of the legislative scrutiny committees within the wider Senate committee system, particularly in instances where rigorous, critical and effective scrutiny in the chambers is either largely circumvented (such as by the use of intergovernmental agreements) or compromised by political pressures and inimical timeframes.

This suggests that the committee remains well placed to tackle these challenges, in reliance on its track record of exacting a measure of accountability from the executive, and both drawing and building upon its established culture of bipartisan technical inquiry. While there is clearly merit in seeking to foster best practice approaches amongst legislators, and to seek to innovate where this provides the better response, the factors outlined in this paper support the conclusion that the committee does and should continue to provide effective and practical scrutiny of executive expenditure authorised via section 32B and, more generally, of the vast volume of instruments made by the executive exercising the parliament’s delegated legislative powers.

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<sup>48</sup> *Williams v. Commonwealth* (2012) 248 CLR 156, 235 [145].

<sup>49</sup> Minister for Finance (Senator Penny Wong), *Parliamentary Debates*, Senate, 27 June 2012, p. 4648.

