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Edited by Ruth Barney

All editorial inquiries should be made to:

Director
Procedure and Research Section
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Telephone: (02) 6277 3232
Email: research.sen@aph.gov.au

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Contributors

Rosemary Laing was Clerk of the Senate from 2009 to 2016. Initially joining as Director of Research, she spent 26 years in the Department of the Senate. Among her significant contributions to Senate scholarship, Dr Laing edited the 13th and 14th editions of *Odgers' Australian Senate Practice*, and was editor and principal author of the *Annotated Standing Orders of the Australian Senate*.

Joo-Cheong Tham is a Professor at the Melbourne Law School, whose research spans the fields of labour law and public law with a focus on law and democracy. Professor Tham is the author of *Money and Politics: The Democracy We Can't Afford* and key reports on political funding and lobbying.

Andrew Murray represented Western Australia in the Senate from 1996 to 2008, where he championed accountability, budgetary transparency and electoral reform. Having played a key role in Parliament's investigation of children in institutional care, Mr Murray served as a Commissioner on the 2013–2017 Royal Commission into Institutional Responses to Child Abuse.

Maureen Weeks is the Deputy Clerk of the Senate. Prior to her appointment in 2017, Ms Weeks held a number of positions in the Department of the Senate, including as Clerk Assistant (Procedure), Clerk Assistant (Table) and Clerk Assistant (Committees). She has also occupied senior roles in the secretariat to the ACT Legislative Assembly.

Glenn Ryall is a Committee Secretary in the Legislative Scrutiny Unit of the Department of the Senate.

Richard Chaffey Baker and the Shaping of the Senate*

Rosemary Laing

It was Harry Evans who first introduced me to Sir Richard Chaffey Baker—or 'Dickie' Baker as he fondly called him—the first President of the Australian Senate. Baker, though a native-born South Australian, had been educated at Eton, Cambridge and Lincoln's Inn, but had gone on to be an influential delegate at the constitutional conventions of the 1890s, bucking the standard colonial obeisance to all things Westminster. Like Tasmanian Andrew Inglis Clark and a few others, Baker questioned the very rationale of the theory of responsible government while promoting something rather more republican in character, though always under the British Crown.[1]

When the Senate Department's major Centenary of Federation project, the four-volume *Biographical Dictionary of the Australian Senate*, began to get off the ground in the early 1990s under the indefatigable editorship of Ann Millar, four sample entries were prepared to illustrate how the project could be done and what the entries would look like. An entry on Baker, researched and written by Dr Margot Kerley, was one of those four pilot entries. Perhaps it was a strategic choice given Harry Evans' great interest in the subject, but Harry needed little convincing that this was a worthwhile contribution to the history of federation and he remained the dictionary's strongest supporter, particularly at Senate estimates. Harry also read all entries, continuing to do so even after retiring, bringing to the task his great critical faculties and his unrivalled knowledge of Australian political history. He saved us from untold howlers. More notably, he contributed three magisterial introductions to the first three volumes published while he was Clerk, providing an historical overview of the periods covered by each volume.

As retirement drew closer, Harry would sometimes talk about pursuing a full-length biography of Baker as a retirement project. Sadly, it was not to be but he had planted the seed of an idea. So this paper represents some first steps towards realising that

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* This paper was presented at the annual Harry Evans Lecture at Parliament House, Canberra, on 19 October 2018. The Harry Evans Lecture commemorates the service to the Senate of the longest serving Clerk of the Senate, the late Harry Evans. It explores matters Harry Evans championed 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.

1 For reflections on Baker as a republican, see Mark McKenna, 'Sir Richard Chaffey Baker—the Senate's First Republican,' *Papers on Parliament* 30 (November 1997), www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/~/~/link.aspx?_id=9D1C434B5DFB4DEAB72D0DC53126B971&_z=z.

objective on his behalf. It provides an opportunity to express my gratitude to Harry Evans not only for everything he taught me but for contributing to keeping me out of trouble in my own retirement. I suspect our approaches would have differed quite markedly, but one of the joys of working with Harry was his tolerance of different approaches. The *Journals of the Senate* aside, he rarely insisted that something be done his way and only his way.

In his introduction to the first volume of the *Biographical Dictionary*, Harry singled out Baker for his dogged but unsuccessful attempts during the conventions 'to steer the Constitution away from the cabinet system of government…whereby the executive power is exercised by ministers dependent on the support of the lower house of the Parliament alone'. Baker favoured the Swiss style of federal government with a separately constituted executive government 'no less accountable to one House than the other'.[2] Although he lost that battle, he was determined that the Senate should strike out on its own to interpret its constitutional role free of unnecessary dependence on British models and traditions, all this despite his quintessentially British education.

Although deeply conservative, Baker was a nationalist who did not regard what Harry Evans described as the 'Westminster cringe' as an essential element of his conservatism.[3] Above all, Baker was a federalist. His strong belief that federation was in the interests of all the colonies overcame his adherence to a particular model of federalism and allowed him to live with the resulting compromise. He was sufficiently original and flexible in his thinking to cleave to a new, peculiarly Australian model of governance in which a Senate, representing the people of the states, was a critical element. Before there was a nation, he had a deep sense of the national interest, largely founded on the economic benefits to the colonies of free trade between them and of a uniform tariff. And we must recall that Baker had a significant economic stake in the national interest, with pastoral and mining interests across several states.[4] He was a capitalist federalist. As a wealthy man and a South Australian to boot, he was fond of pointing out that he was the first native-born South Australian to achieve numerous offices.[5]

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2 Ann Millar, ed., *Biographical Dictionary of the Australian Senate*, vol. 1, 1901–1929 (Carlton South: Melbourne University Press, 2000), 2.

3 Ibid., 3.

4 For example, on two days in August and October 1881, he registered and paid just under 235 pounds per annum for 27 leases over nearly 10,000 square miles of the so-called 'waste lands' of the Crown, most of which were subsequently transferred to his company, the Musgrave Range and Northern Territory Pastoral Land Company Ltd. Records are held by the Darwin Office of the National Archives of Australia in series number E1652.

5 These included being the first South Australian-born member of both houses, minister, presiding officer, and recipient of Imperial decorations.

At an operational level, as President, Baker steered the Senate's standing orders, or operating rules, sufficiently away from the House of Commons bias of the Senate's first Clerk, Edwin Gordon Blackmore, to equip this bold new institution to exercise unprecedented powers in the world of parliamentary government. He was able to do this because he brought to the role a huge reputation as a highly effective and even-handed chairman from his background as a long-serving President of the South Australian Legislative Council but, more importantly, as the Chairman of Committees of the 1897–98 Australasian Federal Convention which meant he conducted the detailed stages of the convention, as opposed to the debates in plenary. In that role he wrangled hundreds of amendments that had come out of the colonial parliaments' earlier deliberations on the bill.[6] At the end of the arduous final session of the convention in Melbourne, when the details of the Constitution Bill had been exhaustively considered, convention leader and future Prime Minister Edmund Barton commended Baker's organisation of amendments in a very complex committee stage, and for ensuring all received a fair hearing and a vote. Barton noted the tact, skill and judgment with which Baker ran the proceedings, in addition to his devotion to the cause of federation. Delegates might also have fallen off their chairs to hear Convention President, Baker's deadly enemy, Charles Cameron Kingston, claim that it had been 'an undoubted pleasure to co-operate with Sir Richard Baker in the discharge of the business of this Convention'.[7] And when I say 'deadly', barely six years earlier, Kingston had challenged Baker to a duel, with pistols. Was he finally learning diplomacy or did he actually mean it?

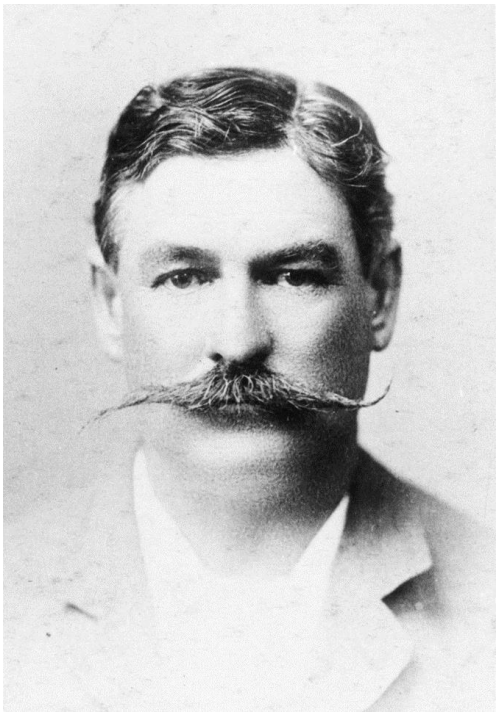
But it was one thing to be a talented chairman. Baker also contributed substance. Through his studies, readings and experience, he brought well-founded ideas about governance to each of his roles as a member of parliament, convention delegate and presiding officer. In particular, as Senate President, he fought to ensure that the Senate's significant financial powers as envisaged by the Founders remained—or at the very least, a significant proportion of them, specifically those representing the smaller colonies of South Australia, Western Australia, Tasmania and, to a lesser extent, Queensland. He did not always win. To Baker's mind, strong financial powers were the key to respect for a Senate that was virtually co-equal in power to the House of Representatives, as befitted the body charged with representing the federal elements of the Constitution. In the short to medium term, one would have to conclude that he failed but the foundations he laid remained available for rediscovery when interest in the Senate and what it could do revived in the second half of the

6 A question of process far more likely to be organised by clerks these days.

7 *Official Record of the Debates of the Australasian Federal Convention*, Third session, (Melbourne: 17 March, 1898): 2517, www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Records_of_the_Australasian_Federal_Conventions_of_the_1890s.

twentieth century. For this reason alone, Sir Richard Baker is someone we should know a lot more about.

While Dick Baker himself did not leave a great deal in the way of personal papers, there is a wealth of source material about his life and times.[8] Most of the big federation names knew him well.[9]



There are several portraits of Baker, both in oils and in photographs, but as Mark McKenna has noted,[10] we lack much in the way of pen portraits. Alfred Deakin, who described many of his contemporaries in arresting physical detail, avoids describing Baker's appearance and focuses instead on his knowledge of all matters federal, knowledge which Deakin assessed as 'in advance of all his colleagues'. We might wonder whether Deakin deliberately avoided mentioning one of Baker's most prominent features—his alarmingly excessive waxed mustachios. And he remained attached to them for decades!

Richard Chaffey Baker, c. 1860.
State Library of South Australia (SLSA): B 3692

8 There is family correspondence, including what have been described as rather 'priggish' letters to his parents from a young Dick at Eton and Cambridge—the description comes from Margaret Press, RSJ, in *Three Women of Faith: Gertrude Abbott, Elizabeth Anstice Baker and Mary Tenison Woods* (Kent Town: Wakefield Press, 2000), 37. His sister Bessie's memoirs, although largely an account of her spiritual journey towards Roman Catholicism, contain numerous family insights and anecdotes. See Elizabeth Anstice Baker, *A Modern Pilgrim's Progress*, (London: R.H. Benson, 1911); Baker Papers in the Mortlock Library; Bessie's papers in the Dominican History Centre.

9 Dick Baker moved in political circles whose members left many riches in the form of primary accounts and personal papers, who populate the parliamentary records of their colonies and who have been well covered by subsequent historians and biographers. To name but a few, his elders included Sir John Morphett, Sir Henry Ayers, Sir James Hurtle Fisher and Sir George Strickland Kingston. Among Baker's contemporaries were Alfred Deakin, Edmund Barton, Sir Samuel Griffith, John Cockburn, Sir John Downer, Sir Thomas Playford, Sir Josiah Symon, Bernard Ringrose Wise, Andrew Inglis Clark, Charles Cameron Kingston, Patrick McMahon Glynn, not to mention a host of other federation-era personalities, particularly South Australians, including newspaper proprietor, Sir John Langdon Bonython, who was a member of the first House of Representatives. Indeed, Bonython stood for a seat in the House after realising that the sheer quality and enormous standing of South Australia's Senate candidates frankly made them unbeatable, even by someone of his significant influence. See E.J. Prest, *Sir John Langdon Bonython: Newspaper Proprietor, Politician and Philanthropist* (North Melbourne: Australian Scholarly Publishing, 2011), 107.

10 McKenna, *Sir Richard Chaffey Baker*, 51.

There are, however, some other glimpses. An earlier South Australian colleague, W.B. Rounsevell, in 1915 recalled descriptions of the members of the Colton cabinet of 1884–85 as the 'Ministry of the Talents' or the 'Ministry of the Giants'. Apart from Chief Secretary Colton and Treasurer Rounsevell, the cabinet included Attorney-General Kingston, Jenkin Coles as Commissioner of Crown Lands and Immigration, Thomas Playford as Commissioner of Public Works and Richard Chaffey Baker as Minister of Justice and Education. All were around 6 foot tall except for Playford who was 6 foot 4 inches and Baker who, at 'about' 5 foot 9 inches, was 'the smallest man of the lot' and 'a clever, smart, subtle fellow' who never got on well with Kingston.[11] There are also some character sketches, including from George Pearce, a Labor member of the first Senate, Minister for Defence during the First World War and still the record holder for the longest-serving senator of all time. Having commended Baker's impartiality and fairness in the chair, he observed that Baker 'had a very peppery temper and did not suffer bores gladly'. He goes on to give an example of a very obsequious senator who craved the President's indulgence to make a few observations on a matter and was told sharply by Baker not to apologise to the President for his presence. He was not responsible—it was the electors of his state![12] In the chair, Baker mastered the acerbic put-down well.

Dick Baker was born in June 1841. He was from a large family, the eldest son of twelve children born to John and Isabella Baker. His father, John Baker, was himself the son of an earlier Richard Chaffey Baker. Born in Somerset, John migrated at 21 to northern Tasmania, with a brother and sister, and worked as a shipping clerk before starting a shipping business. He married the daughter of a wealthy Scottish businessman, George Allan, in Launceston in 1838 and the same year left for South Australia, his wife and siblings following in 1839. His mother and other siblings also emigrated to South Australia.

Initially, John Baker was in the business of shipping sheep and horses from Tasmania to South Australia but he soon became established in stock and land sales, with some whaling on the side. He formed the Adelaide Auction Company with partners, acquired numerous rural holdings and a substantial house in Brougham Place, on the north side of the Torrens River, and built 'Morialta' at Norton Summit near Magill in the Adelaide Hills a few years later. Neighbours there included Dr and Mrs Penfold in 'Grange Cottage'. With substantial business and civic influence, John was known as the 'King of Morialta'. He was a member, trustee or chairman of any Adelaide

[11] 'Peep into the Past: A Ministry of Talents and Giants', *The Journal* (Adelaide), 22 April 1915, 2. Rounsevell described the recently deceased Playford as 'a big man, mentally and physically, but ponderous. A slow thinker and a slow actor, but a sound politician, and a good square man. All his life he was dominated by Charley Kingston in politics'.

[12] Sir George Foster Pearce, *Carpenter to Cabinet: Thirty-seven Years of Parliament* (London: Hutchinson & Co, 1951), 51–52.

institution that mattered, as well as a benefactor of the Anglican Church. John Baker was also a politician, appointed to the Legislative Council prior to self-government and elected thereafter. He was South Australia's second Premier and although he was in office for only eleven days, during that time he negotiated what became known as the Compact of 1857. This was the financial understanding between the House of Assembly and the Legislative Council that would later become the model for the Compromise of 1891 and therefore the key to Australian federation and the financial powers of the Senate relative to the House of Representatives. In short, John Baker was a formidable man to have as a father, although he died at only 59.[13] He was the model of the capitalist politician.

On Boxing Day 1855, aged 13, young Dick Baker boarded the sailing ship *Victoria* (524 tons), under Captain Forss, on a voyage to England and school at Eton. His father had entrusted him to the care of Mrs John Morphett who was travelling to England with her 10 children, including her eldest son, John Cummins Morphett. John will reappear later in this story.

'Morialta' c. 1890–1900. SLSA: PRG 38/2/1

We know some things about the voyage from Morphett family records, compiled by George Cummins Morphett, son of the aforementioned John Cummins Morphett.[14] A rather more charming version of the story was passed down by the Morphett's third daughter Ada, aged 12 at the time of the voyage, to her granddaughter, Geraldine Pederson-Krag, who wrote it up as a children's adventure story, published in England in 1940 as *All Aboard for England!* and in America in 1941 as *The Melforts Go to Sea*.[15] Parading as thinly disguised members of the Morphett family, the numerous Melfort children make preparations to sail for England in the yearly packet, the *Regina*, under Captain Bond, where it is expected that the boys might spend a few

[13] John Baker died on 18 May 1872 after 'a long and painful illness'. Obituary, *South Australian Register*, 20 May 1872, 5.

[14] George C. Morphett, *The Life and Letters of Sir John Morphett* (Adelaide: The Hassell Press, 1936). 'Cummins' was the name of the Morphett's sprawling single-storey home in Morphettville, designed by George Strickland Kingston, father of Charles Kingston, and named after Sir John's mother's family home in Devon. Mrs Morphett's husband, later Sir John Morphett, was one of the original South Australian pioneers who would give his name to not one, but two Adelaide suburbs—Morphettville and Morphett Vale.

[15] In the American version, the ship retains its actual name, *Victoria*.

years at schools (although they don't).[16] Reflecting contemporary rates of infant mortality, the two youngest children are known only as the Old Baby and the New Baby.[17] Jack Melfort, aged 11, is delighted when his mother informs him that Dick Butler is to travel with the family to London. Indeed, 'Jack could not have been more delighted if he had been told that Robinson Crusoe himself was to be his fellow traveller'. Robinson Crusoe was one of his favourite heroes. The stage is set for a boys' own adventure story.

Two years older than Jack, Dick had 'a lively reputation for fun and deeds of daring'.[18] Jack imagines swimming and climbing the rigging with Dick but things do not begin well. The boys had not previously met. Having just parted tearfully from his own father who exhorts him to be kind to Dick because he does not have any of his family with him, Jack first sees Dick 'leaning pensively over the stern', 'a slender figure in immaculate nankeens and a black straw hat'. Jack makes a casually adult remark about the weather that he has heard his father make but Dick utters a queer sound and waves him away furiously with his hat. When Dick fails to join the Melforts for nursery tea, Jack assesses him as 'too grand or something' and resolves to hate him but later, seeing Dick's blotched face, the penny drops and, after some mandatory fisticuffs in their tiny four-berth cabin, the two boys become firm friends, as boys do in such tales.

While the story's focus is largely on Jack and Ada Melfort, Dick's distinguishing features are his wit and the map that his father has given him to mark the position of undiscovered islands and ships and other interesting things.[19] The map becomes an absorbing occupation as the boys decide what to include. At Dick's suggestion, they settle on a system of description with useful information for travellers. Given the boys' limited horizons, useful information comprises what to wear to describe latitude and what to eat, describing longitude. First they pass through the Calico latitudes, then into the Red Flannel latitudes, the All on by Night or Quick Bed latitudes and finally the All on by Day latitudes, the last three collectively described as the Scratchy latitudes.

As it becomes colder, and whales and icebergs appear, the captain surprises everyone by confirming that they are indeed sailing east rather than west and will round Cape

[16] Papa Melfort had impressed on his brood 'the importance of Australians being found to compare favourably with England's best, even though born and bred far from the centres of art and fashion'. See Geraldine Pederson-Krag, *All Aboard for England!* (London: William Heinemann, 1940), 11.

[17] In fact, they were James Hurtle Morphett who lived till 64 and Hurtle Willoughby Morphett who died at 83, both bachelors.

[18] Pederson-Krag, *All Aboard*, 31.

[19] Pederson-Krag, *All Aboard*, 53. Dick Butler's Map, the Voyage of the *Victoria*, forms the end papers of the American version of the novel.

Horn rather than the Cape of Good Hope. Of course, this turns out to be as perilous as it sounds. Food and water supplies rapidly dwindle from the Plentiful Longitudes through the Cold Meat, Potted Meat, and Jam and Tinned Fruit Longitudes respectively. As the boys await imminent shipwreck rounding the Horn, they polish off the last of the Plum Cake and Pudding from those longitudes before the ship breaks free of an iceberg and they turn north, enduring days of Mariners' Fare before entering the Very Little and Almost Nothing latitudes. Their first sight of land is Pernambuco at the eastern tip of Brazil, but the yellow fever flag is up and they must go further north to Olinda to re-provision. Mama Melfort, her letters of credit for Western Australia and the Cape of Good Hope utterly useless in these heathen lands, dons her finest clothes and takes her jewellery ashore to pawn to buy food for the little ones, the captain having swindled them again in loading poor quality stuff masked with a top layer of good stuff, just as he had done out of Adelaide. Adventures continue—the New Baby is briefly kidnapped by savages who board the ship before the clever Melfort children outwit them. Finally, they dock in London and Dick Butler is met by an uncle and aunt and carried away in a carriage after thanking the Melforts for their kindness.

It is a charming tale, enriched by the author's own childhood experiences of long sea voyages. There is no doubt some semblance of truth in the basic threads of the plot. Wealthier South Australian settlers, in particular, did decamp to the 'Motherland' for shorter or longer periods. Children were sent 'Home' to be educated, particularly to Oxford or Cambridge though less commonly to English schools. The voyage, by sailing ship, was long and perilous, and the Circle Route around the Horn saw ships venturing far into Antarctic latitudes to catch the strong westerlies. There are stories of settlers' babies being kidnapped in South American ports en route to South Australia, and subsequently rescued. My own feeling is that Dick's map and the types of information he populated it with are too good to be inventions. They strike an authentic note and reveal a character with a systematizing mind and a facility for structure and organisation, a mind that would later turn to constitutional and institutional design and operation, including the rationale of standing orders.

After four years at Eton, Dick went up to Trinity College, Cambridge, in 1860, and was admitted to Lincoln's Inn in 1861, graduating and being admitted to the Bar in 1864.[20] He then came straight home.

Little more than twelve months after his return to Australia, Dick married Katherine Edith Colley at St Peters, Glenelg, in a double wedding ceremony with

[20] Dick was a handy boxer and rower, hanging on to his rowing cups and medals and eventually bequeathing them to his younger son, Robert Colley Baker, along with his horseracing cups and medals.

Katherine's sister, Isabella, and grazier, William Reid. About ten months later, their first son, John Richard Baker, arrived in October 1866 and their second son, Robert Colley Baker, arrived in May 1879 after an unexplained gap of nearly 13 years. Two years later came a third son, George Chaffey Baker, who did not survive and, finally, a daughter, Adelaide Edith Baker in April 1884.[21] Addie, according to the Governor's wife Audrey Tennyson, was charming and amusing and much given to fashion,[22] but the younger children did not marry and there were never any grandchildren. Unlike the Morphetts, the Baker line now has no family story keepers of direct descent.

By 1868, at the age of 26, Dick Baker was a member of the House of Assembly for the district of Barossa.[23] He was appointed Attorney-General in John Hart's third ministry but resigned to look after his father's affairs when he sickened in 1871, before his death the following year.

Baker suffered his only electoral defeat in May 1875, when standing for his old seat of Barossa, but was elected to the Legislative Council in 1877 and was from then on a member of parliament continuously till his retirement from the Senate at the end of his term in 1906. In the 1877 campaign material, Dick's native-born status was highlighted, along with his late father's reputation, his previous experience as an MP and, interestingly in light of his later path, a perception of non-partisanship. A piece of doggerel published at election time referred to 'that clever young fellow, Dick Baker…Our longheaded, strongheaded Baker; A chip from the stock Of a famous old block…Our plain-dealing, right-feeling Baker…Straightforward in action, And free from all faction, Few members did better than Baker'.[24]

Notwithstanding periods of ministerial service,[25] Baker apparently preferred the freedom of being an individual member of the Legislative Council, a role possibly

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21 The birth notice in the *Register*, 23 April 1884, mistakenly described her as a son.

22 Audrey, Lady Tennyson, was the wife of the second Governor-General, Lord Tennyson, who had come to Australia as Governor of South Australia. She describes 'Addie' Baker's outfitting for the Indian Durbar in 1903 in a letter to her mother. See Alexandra Hasluck, ed., *Audrey Tennyson's Vice-Regal Days: The Australian Letters of Audrey Lady Tennyson* 1899–1903 (Canberra: National Library of Australia, 1978), 264.

23 During his first term, Baker took action that is credited with initiating the separation of the office of Auditor-General from the executive government and its recreation as an officer of the Parliament.

24 *Wallaroo Times and Mining Journal*, Wednesday 4 April 1877, 3.

25 After earlier service as Attorney-General, Baker was Minister for Justice and Education in the Colton Government (1884–85). His ministerial duties included posts and telegraphs. Before the fall of the Colton Government in June 1885, Baker travelled to Sydney and Melbourne to discuss arrangements for a joint mail service between Great Britain and the Australian colonies. On the back of this work, he was deputed by the new Downer Government in South Australia, and by Victoria and NSW, as a special representative to negotiate a postal union, including an arrangement for the equitable division of postal revenues between the parties. He was travelling to the USA and Great Britain in any case for his health (see 'Return of the

more compatible with his extensive business interests. From time to time he wrote opinion pieces for the press, including on industrial relations, individual taxation, socialism and, of course, federation. Given his views and his advocacy for federation from an early date, his choice as a delegate to the 1891 National Australasian Federal Convention in Sydney was not surprising and he took to the conference a comprehensive manual for the delegates on federal constitutions with comparative material about the USA, Canada and Switzerland. His contribution to the conference and the other delegates' use of the manual has been analysed by South Australian historian, Rob Van den Hoorn.[26] Although not heavily cited directly, the manual's influence on delegates' thinking is apparent from many references to information in it. The manual was one of only four pieces specifically prepared for the convention. The others were the draft constitutions prepared by Andrew Inglis Clark and Charles Cameron Kingston, and a collection of extracts and documents prepared by Tasmanian, Thomas C. Just, under the title, 'Leading Facts Connected with Federation', primarily for the Tasmanian delegates.[27] The manual was unique as a constitutional text.

Baker's status changed at the end of 1893 when he succeeded Sir Henry Ayers (of Ayers Rock fame) as President of the Legislative Council. Sir Henry, among many other things, was the father-in-law of his childhood shipmate, Ada Morphett.

It is worth contemplating what led Baker to the chair in the first place.[28] He had held ministerial office and seen the revolving door of colonial politics—his refusal of

Hon. R.C. Baker', *South Australian Advertiser*, 18 June 1886, 5). In what must be one of the first examples of practical federalism, the scheme, known as the 'Baker Agreement', was adopted by the House of Commons and Baker was recognised for his efforts with a CMG, again claiming to be the first native-born South Australian to be so honoured.

26 Rob Van den Hoorn, 'Richard Chaffey Baker: A South Australian Conservative and the Federal Conventions of 1891 and 1897–98', *Journal of the Historical Society of South Australia*, 7, 1980: 24–45.

27 Ibid., 28 and 44, note 7.

28 Baker came to exercise considerable skill in the chair, but it was something he had to learn. On his second day as President, controversy flared when he exercised his vote in committee against the government in relation to a mining bill, an industry in which he had significant interests. The Chief Secretary, J.H. Gordon, complained that, as he had to be his own Whip, not knowing whether the President was voting or not made things difficult. He asked the Chairman to rule that if the President was not voting he should withdraw from the chamber, but the Chairman declined to so rule. Members accused Gordon of trying to prevent the President voting, others defended the Chief Secretary and another said that the President's retiring room was not fit for a dog—not even for two minutes (see Legislative Council Proceedings, *South Australian Register*, 21 December 1893, 6).The next day, the President made a statement about his undoubted right to vote but conceded that it was incompatible with his new office for him to take 'a leading and active part in Committee' and, in future, he would exercise his right to vote 'only on important issues in which it appears to me that my advice and assistance may be of benefit to the Committee'. Otherwise, he proposed to withdraw to the robing room during divisions (see Legislative Council Proceedings, *South Australian Register*, 22 December 1893, 6). The question soon became academic. A report from the Standing Orders Committee presented soon after the 1894 session began suggested that there was no

office on more than one occasion perhaps indicates that his interests lay elsewhere. His father had been Premier but there was no sign that Dick sought to emulate him. He was, however, surrounded by old family friends and relations who had earned great respect as presiding officers over lengthy terms in office. These included Sir John Morphett, Sir James Hurtle Fisher (Morphett's father-in-law) and his own brother-in-law, Sir Robert Dalrymple Ross, who died in office as Speaker in December 1887. As President of the Council, Baker had a chance to secure his status and reputation as a leading man in South Australia, particularly after he won a long-running battle to secure an appropriate place for the presiding officers in the South Australian order of precedence.[29] It is unlikely that he foresaw the long term in government of his enemy Kingston and the consequent lack of opportunity for any partisan political ambitions of his own. It may also be that he enjoyed the work and it gave him time to devote to contemplating more abstract intellectual and political questions that interested him greatly. Undoubtedly, after a slightly rocky start, he developed a facility for chairing that allowed him to put partisan considerations aside and ensure fair play in proceedings.[30]

Baker's reputation as an impartial and fair chair was confirmed and brought to national attention at the 1897–98 convention where Quick and Garran report that he took the chair in committee at the Adelaide session 'amidst cheers'.[31] It was clear soon after the convention that he resolved to seek the Senate presidency, but the situation was not without some irony, given the shenanigans over where the first meeting of the convention would be held and who would chair it, all well described by Alfred Deakin.[32] Adelaide won the prize and Kingston won the presidency but, in the event,

need for a Chairman of Committees and the President could do 'double duty' in the chair, a proposal that the Council adopted (and still holds to). In practical terms, this removed the vexed question of the President voting in committee because, as Chairman, the standing orders limited his right to vote in committee to a casting vote when the ayes and noes were equal. See *Minutes of the Proceedings of the Legislative Council*, South Australia, Parliament, 11 July 1894: 33; 18 July 1894: 42; 31 July 1894: 51.

29 In a letter dated 4 March 1900 to her mother, Audrey Tennyson referred to her husband's settlement of two great disputes—one concerning Adelaide Hospital and the other the order of precedence for the presiding officers—'Hallam has always said if he could only settle that question & one of precedence for the Speaker & Sir Richard Baker, which he has also arranged—he would not consider his governorship had been useless, & he has now settled them both' (Hasluck, *Letters of Audrey Tennyson*, 91).

30 Baker's capacity for non-partisanship was often later hotly disputed in the less mainstream press, in publications such as *The Bulletin* and *Quiz*, but even Baker's detractors acknowledged a certain principled distancing of himself from factional politics when circumstances required. When he became President of the Council, for example, he famously distanced himself from the National Defence League, a political party he had founded in 1891 in response to the election of Labor Party members of parliament to counter the perceived threat of the labour movement to conservative interests.

31 Sir John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Sydney: Angus & Robertson, 1901), 172.

32 Alfred Deakin, *The Federal Story: The Inner History of the Federal Cause* 1880–1900, ed. J. A. La Nauze (Parkville: Melbourne University Press, 1963), 75.

both Kingston and Baker were largely sidelined by their respective roles as President and Chairman of Committees. Baker's scheme to keep Kingston off the drafting committee was as dastardly as his mustachios. Thus, ego, mutual hatred and bloody-mindedness denied the convention the unrestricted contribution of two of its most expert members and foremost proponents of federation.[33]

As we have seen, Baker's preferred federal model failed to gain support and the Senate he strove to create to protect the interests of the smaller states was not as strong as he had hoped. The majority did not agree with Baker's views on responsible government and, true to the prediction in his opening speech to the Adelaide session,[34] responsible government and its conventions would come to exercise disproportionate influence in the careful federal balance. For all this, Baker's enthusiasm for federation did not wane and, despite health problems associated with the kidney disease that would eventually kill him, Baker remained keen to become the Senate's first President.

Baker's journey towards the Senate was echoed by that of another South Australian, Edwin Gordon Blackmore, who was appointed as the first Clerk of the Senate. In a comprehensive account of the opening of the first Parliament and associated revelries, Audrey Tennyson captured the excitement of having so many South Australians in influential positions in the new Parliament—Kingston in cabinet, Holder and Baker as presiding officers and Blackmore as Clerk of the Senate.[35]

Blackmore, also of Somerset origin like the Bakers, had arrived in South Australia via New Zealand where his medical father had taken the family to join a brother who was secretary to Governor Grey. Blackmore saw combat in the Maori Wars in 1863 and 1864 before leaving to join another brother in South Australia in parliamentary service. He was appointed parliamentary librarian in 1864 where he befriended the poet Adam Lindsay Gordon, an amateur jockey and one-time member of the House of Assembly, who later sold him a jumps horse.[36]

In 1869 Blackmore became Clerk-Assistant (or second in charge) in the House of Assembly and Clerk in 1886. The following year he was promoted to the more senior

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33 Margaret Glass, *Charles Cameron Kingston: Federation Father* (Carlton: Miegunyah Press at Melbourne University Press, 1997), 175–178.

34 'I am afraid that if we adopt this Cabinet system of Executive it will either kill Federation or Federation will kill it; because we cannot conceal from ourselves that the very fundamental essence of the Cabinet system of Executive is the predominating power of one Chamber'. *Debates of the Australasian Federal Convention of 1897/8*, First session (Adelaide, 23 March 1897): 28.

35 Hasluck, *Letters of Audrey Tennyson*, 159.

36 E.G. Blackmore, 'Adam Lindsay Gordon. Reminiscences by an Old Friend', *The Age*, 3 June 1899, 13.

post of Clerk of the Legislative Council and Clerk of the Parliaments. In this post, he also clerked the 1897–98 constitutional convention, which set him up as one of the frontrunners for the post of Clerk of the Senate in 1901. His papers from the convention are now in the National Archives of Australia. They are meticulously well-organised, demonstrating many good clerkly habits that are still discernible in Senate practices.

While Dick Baker was serving in the House of Assembly from 1868 to 1871, Blackmore was in the parliamentary library, then Clerk-Assistant in the Assembly. When Baker served in the Legislative Council from 1877 to 1900, Blackmore was a senior parliamentary officer, becoming Clerk of the Council in 1887 and working directly with Baker as President from 1893.

There was also another familiar face on the Council staff at this time. Blackmore's second in charge from 1888 was John Cummins Morphett, Dick's cabin mate from the voyage of the *Victoria* to Great Britain in 1856, that eleven-year-old boy depicted as Jack Melfort in *All Aboard for England!*[37] When Blackmore was granted furlough by the Legislative Council in 1900 so that he could recover from the rigours of the convention and travel 'Home' to hobnob with all his House of Commons and academic connections, John Cummins Morphett acted as Clerk during Dick Baker's last year as Council President. One wonders whether they recalled their earlier adventures and Dick's famous map during no doubt earnest discussions over the application of standing orders and the coming federation.

Blackmore did not quite share the social status of the Bakers, but he was nonetheless a significant man about town with many important connections. He was a member of the Adelaide Hunt Club, including as its master and secretary, a member of the Church of England synod, a member of the church's Aboriginal mission at Poonindie, a governor of St Peter's College, and a coach and official of the Adelaide Rowing Club. He married the daughter of Archdeacon G.H. Farr, headmaster of St Peter's. He also lectured in history at the University of Adelaide. In 1900, he wrote a book about the establishment of the South Australian Bushmen's Corps, the organising committee of which he had been a member.[38]

His history as a parliamentary officer was enhanced by his decision to embark on a series of parliamentary texts, crowned by his production of a manual of practice for the House of Assembly, and one for the Legislative Council. He was the only person

[37] John Cummins Morphett became Clerk of the House of Assembly after his Council service concluded in 1900 but returned to the Council as Clerk of the Parliaments in 1918 till he retired two years later.

[38] E.G. Blackmore, *The Story of the South Australian Bushmen's Corps (*Adelaide: Hussey & Gillingham, Adelaide, 1900).

in Australia doing this for the time being, and his string of titles, which included a series of several books of the rulings of the Speakers of the House of Commons in London, set him apart from the usual run of parliamentary officers from the other colonies.[39]

It seems, however, that Blackmore's ambitions to become the foremost parliamentary officer of the new nation were not widely shared. In Melbourne, in particular, where the Clerk of the Parliaments, G.H. Jenkins, saw Blackmore's ambitions as beyond the scope of his duties as the Clerk of Parliaments of a minor colony, Blackmore's claims to be the first of his cohort went beyond what was appropriate. For Jenkins, Blackmore was head of a service with 'the same importance as a parish council,

[39] Titles included:

- *The Decisions of the Right Hon. Evelyn Denison, Speaker of the House of Commons (April 30, 1857–February 8, 1872) on Points of Order, Rules of Debate, and the General Practice of the House* (Adelaide: Government Printer, 1881)
- *The Decisions of the Right Hon. Evelyn Denison, Speaker of the House of Commons (April 30, 1857–February 8, 1872) and of the Right Hon. Henry Bouverie William Brand, Speaker of the House of Commons (February 9, 1872–February 25, 1884) on Points of Order, Rules of Debate, and the General Practice of the House* (Adelaide: Government Printer, 1892)
- *The decisions of H.B.W. Brand, Speaker of the House of Commons (February 9, 1872–September 7, 1880), on Points of Order, Rules of Debate, and the General Practice of the House* (Adelaide: E. Spiller, Government Printer, 1882)
- *The Decisions of the Right Hon. Sir H.B.W. Brand, G.S.B., Speaker of the House of Commons (1881), on Points of Order, Rules of Debate, and the General Practice of the House* (Adelaide: E. Spiller, Government Printer, 1883)
- *The Decisions of the Right Hon. Sir H.B.W. Brand, G.S.B., Speaker of the House of Commons (1882), on Points of Order, Rules of Debate, and the General Practice of the House* (Adelaide: E. Spiller, Government Printer, 1884)
- *Manual of the Practice, Procedure and Usage of the House of Assembly of the Province of South Australia: As Governed by the Standing Rules and Orders for Regulating the Public Business of the House and Proceedings on Private Bills, and by the Rules, Forms and Practice of the House of Commons* (Adelaide: Government Printer, 1885)
- *The Decisions of the Right Hon. Arthur Wellesley Peel (1884–1886) on Points of Order, Rules of Debate, and the General Practice of the House* (Adelaide: Government Printer, 1887)
- *The decisions of the Right Hon. Arthur Wellesley Peel (1884–1895) on Points of Order, Rules of Debate, and the General Practice of the House* (Adelaide: Government Printer, 1900)
- *The Decisions of the Right Hon. Sir H.B.W. Brand, G.C.B., (Viscount Hampden), Speaker of the House of Commons, (given from the Chair of the House in Session Feb. 15, 1883–Aug, 1883, and in the Session Commencing Feb. 5, 1884, to his Retirement on Feb. 25, 1884) on Points of Order, Rules of Debate and the General Practice of the House (being a Continuation of Brand's Decisions, 1872–1880, 1881, 1882)* (Adelaide: Government Printer, 1887)
- *Manual of the Practice, Procedure, and Usage of the Legislative Council of the Province of South Australia: as Governed by the Standing Rules and Orders of the Legislative Council Relating to Public Business, and by the Rules, Forms and Practice of the House of Commons where Applicable* (Adelaide: Government Printer, 1889)
- *The Law of the Constitution of South Australia: A Collection of Imperial Statutes, Local Acts, and Instruments Relating to the Constitution and Government of the Province, with Notes Historical and Constitutional* (Adelaide: Government Printer, 1894).

no more than the Board of Works'. He was someone who 'wrote a few useless compilations of Imperial Speaker's decisions for the sake of notoriety!' 'Those paltry collections of precedents are only a low advertising dodge!'[40] Yet it was Blackmore's clerkship of the 1897–98 convention that brought him to a national audience.

I have yet to find any correspondence between Blackmore and Baker about Blackmore's quest to be Clerk of the Senate. It is almost as if Blackmore had no idea that Baker would become his President, despite the latter's well-known ambitions.[41] But Blackmore lobbied others. A.J. Peacock of Victoria, who showed his letters to the Victorian Clerk, Jenkins, was quite outraged that Blackmore appeared to be asking him for a testimonial. Blackmore then wrote further letters to Peacock to withdraw any such suggestion that he may have made.[42] Once it appeared that Barton would be the new Prime Minister, Blackmore was on the front foot. He was working out of Sydney well before he was appointed as Clerk of the Senate on 1 April 1901. Barton used him to write the first standing orders for the Senate and the House of Representatives while Jenkins, first acting Clerk of the House, arranged the opening ceremonies.[43] Meanwhile, Baker was gentlemanly enough to hold on to his letter of resignation until Blackmore's appointment as the first Clerk of the Senate came through officially.[44]

When it came to the election of the first President of the Senate, the Senate's first debate was about how it should be done. Senators eventually settled on a system whereby the first person to gain a majority of votes would be elected President. It took only one ballot to elect Baker as first President. He was the third candidate nominated after Senators Zeal (Protectionist) and Sargood (Free Trade), both Victorians, but he stole the show with 21 votes on the first ballot, with Sargood getting 12 and Zeal getting three.[45] In fact, Baker was a rare President, not being of the governing party (although he had publicly committed to support Barton's protectionist ministry). He was a free trader through and through, but his ability to step back from his partisan political beliefs had been shown before and his reputation as an excellent chair was still in people's minds. He clearly had the confidence of his colleagues despite the Victorian rivals.

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40 Edward T. Hubert, Diary, NLA MS 506, entries from 30 June 1899 and 20 June 1899.

41 *Critic*, 5 August 1899, 4.

42 These references are in the notes of Edward T. Hubert, a Victorian parliamentary employee, NLA MS 506.

43 Jenkins had never given up his day job in Victoria because it commanded a higher salary than the Commonwealth job, and he soon returned to it.

44 Letter from E.G. Blackmore to Atlee Hunt, dated 22 January 1901, NAA CRS A6, item 01-1073.

45 *Journals of the Senate*, 9 May 1901: 3–4.

On the other hand, Blackmore's clerkly efforts were not overwhelmingly appreciated. The Senate rejected a motion to adopt his draft standing orders and instead opted to use those of the South Australian House of Assembly that had been used at the 1897–98 convention. A Standing Orders Committee then worked up its own set.[46]

Draft standing orders sat on the table for a couple of years till they were debated in June and August 1903. Between these two periods of debate, another Standing Orders Committee report was tabled that revived the old idea of a standing order that referred to the House of Commons in Westminster as the source of all other parliamentary lore. It was not a standing order that the President favoured and was, in fact, inimical to his object.[47] There is more digging to do but it seems to me that this report was perhaps the work of a Senate Clerk about to lose one of his last important battles with his President.

All of Blackmore's old publications in South Australia, his several volumes of House of Commons Speaker's rulings and his manuals for the operation of both Houses had been predicated on a very close resemblance to the way that things operated in the House of Commons. On the other hand, Baker had a completely different view of the role of the Senate in the future operation of the Australian Parliament. It was not a copy of the House of Commons that Baker was pursuing. It was a new federal structure that brought together the representatives of the states in a new kind of parliament whose sole difference from the powers of the House of Representatives was to be specified only in section 53 of the Constitution as it now was.[48] This was the

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46 For a summation of the events, see Rosemary Laing, *Annotated Standing Orders of the Australian Senate* (Canberra: Department of the Senate, 2009), 4–7.

47 Dissenting reports were not a feature of South Australian practice and so the President, outvoted in the committee, had no option but to present a report he did not agree with. The new standing orders allowed dissent.

48 Section 53 provides as follows:

> 53. Powers of the Houses in respect of legislation
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> Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate. But a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services under the proposed law.
>
> The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government.
>
> The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people.
>
> The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.

only sense in which the powers of the two houses differed. So when Baker embarked on the arguments about the standing orders, it was not about yet another different type of colonial upper house—it was about a kind of second chamber that would be quite different to any kind of chamber that had been established before.

Baker during his time as President of the Senate

There are many examples of the kinds of standing orders where Baker attempted to excise layers of meaning that had accrued over centuries in Great Britain. Although undoubtedly a conservative, Baker had no love for meaningless ritual. An example of his minimalism is the kind of statement a newly elected President might make to a Governor-General when presented to that officer after his election. The usual kind of thing that was claimed from a head of state, be it a governor in the colonial parliaments or the Queen in Great Britain, was a summation of what the House of Commons had been claiming since the mid-sixteenth century. It was a claim to 'their undoubted rights and privileges', and praying 'that the most favourable constructions may be put upon all their proceedings'. This was what Blackmore's draft had had, and if senators took any notice of the minutes for the first day of the new Parliament in 1901, this is apparently what President Baker had claimed from the Governor-General. Whether that happened or not was a moot point. When the relevant standing order was debated in 1903, the new terms were: '[h]e shall, in the name and on behalf of the Senate, claim the right of free and direct access and communication with His Excellency'. Senator Best wanted to amend it to restore the old 'rights and privileges' approach but the President was blunt in his assessment:

> The old words were departed from because they are a survival of the procedure which has come down to us from the time of the Tudors and Stuarts, when the Speaker of the House of Commons claimed from the Crown certain rights and privileges.

Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws.

And Baker knew about Tudor Speakers. He was descended from Henry VIII's last Speaker, Sir John Baker, of Sissinghurst, Kent, where the Baker coat of arms can still be seen carved into the gatehouse. Interestingly, it shares various devices, including three swans, with Dick Baker's crest.

Baker continued:

> The use of the words has been continued by all Parliaments down to the present time, though they now involve the ridiculous absurdity of the President or the Speaker claiming from the Crown rights which the Crown cannot grant, and the Crown solemnly granting those rights. Is it not time we stopped that? What right has the Crown to abrogate the common law? Under section 49 of the Constitution we have all the powers, immunities and privileges of the British House of Commons, and it is under that section of our Constitution that we are exempt from the law of libel and from arrest while attending Parliament. It seems to me that we should adapt our procedure to existing circumstances, and we should not ask His Excellency to grant us that which he cannot grant, and leave him to pretend to do that which we know he cannot do.[49]

Senator Best then asked, well, why do we have anything at all? And so the current form was arrived at which makes no mention at all of what the President says to the Governor-General on presentation. There is no need because all of the rights and privileges are provided in the Constitution. This is one of a number of examples where the old colonial standing orders were similarly updated.

So, what was the relationship between Baker and Blackmore? My view is that it probably worked best for Blackmore when he was Clerk of the Legislative Council, happily conferring with his friends in Westminster about precedents while Baker learned the ropes as a presiding officer.[50] Baker, however, came to a much deeper understanding of the role of the Senate than Blackmore could ever emulate.

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49 Senate debates, 10 June 1903: 672–673.

50 Blackmore appeared less confident without the Westminster frame of reference, although he tried to engage his English friends on all sorts of constitutional questions, including when an ordinary election for President should take place and in regard to whether special majorities required in standing orders were contrary to section 23 of the Constitution (which is about Senate voting). See Appendix 13, Laing, *Annotated Standing Orders of the Australian Senate*, 666–670. There is no evidence that their replies were ever noted by Baker or by the Senate. Despite Blackmore's South Australian experience, the first tracts about the Senate's new financial role were written by the second Clerk, C.B. Boydell, who had not served as the clerk of a colonial house before he came to work for the federal Parliament.

One other point is worth making and it is a personal one. When parliamentary officers moved to Melbourne to take up their posts, none of Blackmore's previous man about town activities in Adelaide translated to Melbourne. Maybe it was the death of his wife in 1901. Maybe his health was beginning to decline. In any case, his years in the Senate, particularly after he lost so comprehensively on the standing orders, were without any of the major publications that had made his name hitherto. Though having led the cohort of Australian clerks in the years leading up to federation, Blackmore's post federation career was relatively unspectacular.

For Dick Baker, however, his last years in the Senate were potentially his best, notwithstanding ill health that may have dogged them. In 1904 he wrote a memorandum on how the Senate might establish its procedural independence, entitled 'Remarks and Suggestions on the Standing Orders', which was tabled on 9 March 1904 and referred to the Standing Orders Committee.[51] The paper was a response to the absence of an 'umbilical' standing order tying the practices of the Senate to those of the House of Commons. Baker held that 'in cases not specifically provided for we should gradually build up "rules, forms and practices" of our own, suited to our own conditions'. He suggested that the President should make rulings on the best procedure to adopt and, as later agreed by the Senate,[52] that rulings should stand unless the Senate altered them. Each session, the President should report on previous rulings and identify anywhere the result was inconvenient, allowing the Senate to decide the matter.[53]

The President's first such report was tabled on 17 August 1905.[54] All Presidents since then have added to the corpus of knowledge about interpreting the Senate's rules. It is a practice that is absolutely fundamental to the Senate's independence.

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51 *Journals of the Senate*, 9 March 1904: 11

52 Standing Orders Committee, 'First Report: Procedure under the New Standing Orders' PP No. S.2/1904, tabled 21 April 1904: 33; adopted 18 May 1904: 39.

53 The suggestions were as follows:

> (1) That in any case which may arise which has not been provided for by the rules, or in which the rules appear insufficient or manifestly inconvenient, the President should state to the Senate (after mature consideration, if possible) what, in his opinion, is the best procedure to adopt, and that the Senate should decide.
>
> (2) That at the commencement of each session the President should lay a paper on the Table formulating and tabulating all the decisions arrived at during the last session, giving reasons (if it should be necessary to do so) why, in his opinion, any of his own decisions were incorrect, or any of the decisions of the Senate would lead to inconvenient results. The Senate could then take the decisions objected to into consideration and decide the matter.

54 *Journals of the Senate*, 17 August 1905: 37. See Appendix 7 of Laing, *Annotated Standing Orders of the Australian Senate* for further issues in the series.

When Dick Baker died in 1911, he was thoroughly lauded as a ‘great constitutionalist’. He did more than most to design an institution to represent the people of the states and to ensure that its early operation went as far as it possibly could in achieving its goal of equality amongst states, regardless of their population size. But there are many reasons why Baker has been forgotten. To summarise:

- he was a conservative member of parliament, not at all fashionable amongst the rediscovered radicals of the centenary of the federation era
- he did not hold much truck with pursuing a ministerial career and was not therefore seen as a leading light by those same historians
- he championed the Senate as a states house to represent the interests of the smaller states, never a popular cause
- as he foresaw, his vision of federation was soon overtaken by the dominance of responsible government in the political mix, a dominance that was exacerbated by global events starting in 1914
- as a parliamentarian rather than a politician, Baker’s abiding interest in the structures of governance were nonetheless focussed on advancing the interests of businessmen such as himself, interests which for him were consonant with the national interest but which for many others became consonant with individualistic self-interest over national concerns. In short, he was a capitalist. Other political movements prospered to promote the kind of communal and socialist focus he would have abhorred.

Finally, without direct heirs, it is easy for his legacy to be lost. The challenge is now to revive it.

Question — Rosemary, thank you very much for a fascinating lecture. You did not really say much about what Baker's contemporaries, particularly other senators, said about him. Is that a completely separate area of inquiry?

Rosemary Laing — Yes, I suppose it is. I did not use material from his final debate or his obituary. I did mention, of course, George Pearce, who was a member of the first Senate and who wrote a book about his recollections of the era. Baker did have enemies and one of them was another South Australian senator, Josiah Symon, who seemed to fall out with everybody. He was another lawyer and a very pernickety person—I think he was actually Baker's mother's lawyer—and it got to the point where Symon would not communicate with Baker at all. So there must have been things about Baker that did get up people's noses, but for the most part he seemed to be highly regarded by his peers and very highly regarded as a chair. That is what they were interested in—getting a fair go from the chair—and he was highly, highly lauded.

Question — I would like to ask if I formed the wrong impression that Baker was not of a democratic sentiment, being relatively undemocratic and perhaps even 'un-republican'. How did this translate into his attitude towards the party system which was forming at that time?

Rosemary Laing — Baker had a very strong sense of the party system. To go to the point about democracy, I do not think he was undemocratic but I think he had a 'born to rule' attitude to life and felt people should keep their places. He hated socialism and he hated the idea of socialism, and in response to the first Labor members being elected to the South Australian Parliament he formed a new political party, the National Defence League. However, when he became President of the South Australian Legislative Council in 1893, he made a big point of stepping back from the activities of the party so that he could be seen to be impartial in the chair. So he is that balance between that man of principle in the chair but also a pretty down and dirty politician when he needed to be.

Question — In a sense, doesn't that explain why Baker has been erased from public recollection?

Rosemary Laing — Quite!

Question — As President he was neutral in his preoccupations, but after assuming the role did Baker make public speeches commenting on the issues of the day, for example on protection or free trade? Were these speeches reported in the press when he was running for re-election or are they totally lost?

Rosemary Laing — Well, Baker only served one term as a senator, but certainly the campaign material from earlier elections to the South Australian Legislative Council drew on all his experience in many forms. He continued to write pieces for the press, but I suppose his later contributions were more about federation and the idea of federation. He is interesting in that he was a free trader and the first government was not a free trade government. So he is one of the very few Senate Presidents who was not from the governing party and he seemed to have been elected on his merits as a chair rather than anything else. He had competition from Victorians for the chair but he was able to overcome them.

I think you are probably quite right that he stepped back from the politics. As President, he tried to take on more stately roles. For example, he was very proud to represent Australia at the Imperial Durbar in India in 1903 where Edward VII was proclaimed emperor of everywhere. Audrey Tennyson has a lovely bit about how many blouses young Addie Baker, who accompanied Baker in place of his wife, took for the occasion. But Baker was sort of a partisan nonpartisan if you get what I mean. He had it both ways.

Democracy before Dollars—the Problems with Money in Australian Politics and How to Fix Them*

Joo-Cheong Tham

There is a deep paradox at the heart of representative democracy—it is a form of rule by the people that distances itself from the people. The central justification for representative government is popular sovereignty. As the Universal Declaration of Human Rights proclaims, '[t]he will of the people shall be the basis of the authority of government'.[1] Yet as a representative, not direct, democracy,[2] there is structured distance between 'the people' and those who exercise governmental power.

The aspiration of representative democracy is that this distance is bridged by strong mechanisms of accountability and responsiveness, as well as an ethos based on the public interest, all of which seek to ensure that government officials rule 'for the people'. The obvious risk is that this distance becomes a gulf and that public officials govern for a few rather than 'for the people'—that an oligarchy operates rather than a democracy.

It is a startling fact that many Australians believe—and increasingly so—that government functions as an oligarchy. Survey evidence shows that perceptions that '[p]eople in government look after themselves' and '[g]overnment is run for a few big interests' have increased significantly since the 2000s, so much so that in 2017, more than 70 per cent of respondents agreed with the first statement and more than half with the second.[3] And since 2016, there has been a nine per cent increase in perceptions that federal members of parliament are corrupt (85 per cent saying 'some' are corrupt, 18 per cent responding that 'most/all' are corrupt).[4]

Capitalism vs democracy

These perceptions of oligarchy would have surprised Plato who had Socrates say that 'democracy comes into being after the poor have conquered their opponents, slaughtering some and banishing some, while to the remainder they give an equal

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* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra, on 12 April 2019.

1 The United Nations, Universal Declaration of Human Rights, art 21(3).

2 John Stuart Mill, *Considerations on Representative Government* (1861).

3 Danielle Wood and Kate Griffiths, *Who's in the Room? Access and Influence in Australian Politics*, (Grattan Institute, 2018), 14, Figure 1.2.

4 'Griffith Research Shows Trust in Government Slides', *Griffith News*, 20 August 2018, www.app.secure.griffith.edu.au/news/2018/08/20/griffith-research-shows-trust-in-government-slides/.

share of freedom and power'.[5] Surviving the passage of time is, however, the insight that democracies carry the risk of class domination. But it is the wealthy, rather than poor, who are controlling the levers of power. The most potent danger of oligarchy in contemporary times is plutocracy.

A risk is not, however, an inevitability. Whether democracies warp into plutocracies turns fundamentally on how society is organised. And here, democracy fights with one hand tied behind its back in economies organised according to capitalist principles—where the means of production, distribution and consumption are privately owned and driven essentially by the profit motive.

This occurs, firstly, because democratic principles are not seen to apply to the private sector—a significant part of society—even though power is routinely exercised by private entities. Notably, in most workplaces, there is a system of 'private government'[6] where the power of employers over their workers can often be dictatorial and where, as John Stuart Mill puts it, the great majority are 'chained…to conformity with the will of an employer',[7] and yet we are socialised to consider this as a realm where democracy should not travel.

And in the 'public' sphere where democratic principles (popular control, political equality, the public interest) are supposed to apply, these principles are in constant threat of being subverted. Under capitalism—what Albert Einstein considered 'the predatory phase of human development'[8]—'the members of the legislative bodies are selected by political parties, largely financed or otherwise influenced by private capitalists who, for all practical purpose, separate the electorate from the legislature'.[9] Indeed, businesses have power through direct contributions to parties, and through ownership of the means of production, distribution and exchange. It is power through ownership (private property rights) that gives rise to what Lindblom in the classic study, *Politics and Markets*, described as the 'privileged position of business'.[10] This implies tremendous power in the market *and* in the political sphere.

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5 Quoted in Raymond Williams, *Keywords* (Britain: Croom Helm, 1976), 83.

6 Elizabeth Anderson, *Private Government: How Employers Rule Our Lives (And Why We Don't Talk About it)* (Princeton: Princeton University Press, 2017). See also Julian A. Sempill, 'The Lions and the Greatest Part: The Rule of Law and the Constitution of Employer Power', *Hague Journal on the Rule of Law* 9, no. 2 (2017): 283, 284–291 and 309–312.

7 John Stuart Mill, 'Chapters on Socialism' in John Stuart Mill (Stefan Collini, ed.), *On Liberty: With the Subjection of Women and Chapters on Socialism* (Cambridge: Cambridge University Press, 1989), 227.

8 Albert Einstein, 'Why Socialism', *Monthly Review* 50, no. 1 (1998) (1949): 1–7.

9 Ibid.

10 Charles E. Lindblom, *Politics and Markets: The World's Political-Economic Systems* (New York: Basic Books, 1977), chapter 13. See also Julian Sempill, 'What Rendered Ancient Tyrants Detestable: The Rule of Law and the Constitution of Corporate Power', *Hague Journal on the Rule of Law* 10, no. 2 (2018): 219–253.

Businesses have power in the political sphere because political representatives rely heavily on the decisions of businesses for their electoral success. As Lindblom has observed, '[b]usinessmen cannot be left knocking at the doors of the political systems, they must be invited in'.[11]

These dynamics profoundly shape understandings of the 'public interest'. For Einstein, they meant that 'the representatives of the people do not sufficiently protect the interests of the underprivileged sections of the population'.[12] Their effects can, in fact, be deeper—when the 'public interest' is equated with the demands of the most powerful businesses, the corruption of representative systems by capitalism is well underway, if not complete.

Transparent failures in the funding of political parties

Even barring fundamental reorganising of society, democracies have a range of tools to insulate the political process from plutocratic control. Choices can be made whether to vigilantly guard against the threats capitalism poses to democracy, to neglect them and allow them to fester, or worse, to be complicit in the disenfranchisement of the public. The actions of the political elite at the national level have tended to fall towards the latter end of the spectrum with laissez-faire regulation of political party funding the favoured position.

As a consequence, Australia's democracy has been seriously undermined in three major ways. The first is through secrecy in political funding. Under funding and disclosure laws, federal political parties are required to annually disclose their income, expenditure and debts, but rather than achieving transparency this is a non-disclosure scheme. It is notorious for its lack of timeliness with contributions disclosed up to 18 months after they were made. For instance, the $1.75 million donation made by the former Prime Minister, Malcolm Turnbull, to aid the Liberal Party's 2016 federal election campaign was disclosed more than 13 months after it was made.[13] In recent years, the major parties have avoided itemising over half their income because the high disclosure threshold (the level at which contributions need to be itemised with the name of the donor) makes it possible to split donations into smaller amounts, which are paid to different party branches and which do not need to be itemised.[14]

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11 Ibid., 175.

12 Einstein, 'Why Socialism'.

13 Jackson Gothe-Snape, 'Foreign Money and Turnbull Millions: Discover the Donors that Helped the Liberals Win the Election, *ABC News*, 1 February 2018, www.abc.net.au/news/2018-02-01/donations-political-turnbull-election-millions-foreign-donations/9380014.

14 Dr Belinda M. Edwards, 'Dark Money: The Hidden Millions in Australia's Political Finance System', GetUp!, cdn.getup.org.au/1969-Dark_Money.pdf. The indexed threshold currently stands at $13, 800 per annum.

Such secrecy should not surprise us. Senator Eric Abetz, when sponsoring 2006 amendments that weakened the federal disclosure scheme, said he hoped for 'a return to the good old days when people used to donate to the Liberal Party via lawyers' trust accounts'.[15]

The second way in which Australia's democracy has been undermined by political contributions stems from the fact that at the federal level there are virtually no limits on political contributions—contributors to political parties can give as much as they wish and there is no cap on how much parties can receive. The result has been a corruption of the political process. Although it is not quid pro quo corruption (where money is directly exchanged for a favourable decision), which is the principal danger, the shroud of secrecy around political contributions means we cannot rule this out. The predominant danger is corruption through undue influence.[16] Such corruption occurs when influence over the political process is secured by virtue of the payment of money. In these situations, the essential ingredient of corruption is present—the exercise of power on improper grounds (the payment of money) resulting from the receipt of a benefit.

Such corruption is present with the sale of access and influence by the major parties—what former Prime Minister, Tony Abbott characterised as a 'time-honoured' practice.[17] Less obvious, but of more significance, is what the High Court has described as 'clientelism'. As the High Court describes it, clientelism 'arises from an office holder's dependence on the financial support of a wealthy patron to a degree that is apt to compromise the expectation, fundamental to representative democracy, that public power will be exercised in the public interest'.[18]

Risk of clientelism clearly arises with the dependence of major parties on corporate contributors and, in the case of the Australian Labor Party, its reliance on trade union funds. And it is most emphatically present in the way in which the major parties have actively cultivated business donors with strong links with the Chinese Communist Party Government. The three most notable donors—Huang Xiang Mo, Chau Chak Wing and Zhu Minshen—secured access to the highest levels of political office, including meetings with Prime Ministers Rudd, Gillard, Abbott and Turnbull, after donating millions of dollars to their parties.[19] As Clive Hamilton rightly notes,

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15 Richard Baker, 'Are Our Politicians for Sale?', *The Age*, 24 May 2006, 15, www.theage.com.au/technology/are-our-politicians-for-sale-20060524-ge2dgv.html.

16 Joo-Cheong Tham, *Money and Politics: The Democracy We Can't Afford* (Sydney: University of New South Wales Press, 2010), 4–6.

17 'Lobbying is a Legitimate Part of Our Democracy', *The Australian*, 6 May 2014, 15.

18 *McCloy v New South Wales* (2015) 257 CLR 178 [36].

19 Clive Hamilton, *Silent Invasion: China's Influence in Australia* (Richmond, Victoria: Hardie Grant Books, 2018), chapter 4.

'[d]onations to political parties are the most obvious channel of influence for the CCP [Chinese Communist Party] in Australian politics'.[20]

The third way in which laissez-faire regulation of political party funding has undermined Australia's democracy is through unfairness, or departures from the ideal of political equality. Corruption through undue influence is bound up with unfairness. Jeff Kennett, former Liberal Premier of Victoria, captured this well in relation to the sale of access and influence:

> The professionalism of selling time has risen to such a level that it has corrupted the democratic process; it corrupts the principle [that] all people are equal before the law.[21]

There is unfairness when power follows the giving of money, as well as when the giving of money follows power. Corporate contributions almost universally flow to the major parties—the parties likely to be in government. And even with the major parties, incumbency can give rise to a significant fundraising advantage. For instance, in the 2019 New South Wales state elections, the New South Wales Liberal Party raised more than three times the amount received by the New South Wales Labor Party, most probably because of its incumbent status.[22]

With no limits on election campaign spending, such unfairness in fundraising easily translates into unfairness in electoral contests, with the political parties favoured by corporate sponsors enjoying a significant spending advantage. The very same absence of spending limits enabled Clive Palmer to pour more than $55 million into the 2019 federal election, potentially outspending the Liberal Party and also the Australian Labor Party. With an estimated wealth of $1.8 billion, Palmer's spending shows how big money in elections is small change for the mega-rich.[23]

The (almost) lawless world of political lobbying

Money influences politics not only through political contributions but also through political lobbying—attempts to influence the political process through communication

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20 Ibid., 86.

21 Royce Millar, 'Brumby in Rethink on Fundraising', *The Age*, 8 December 2009, 1.

22 Nigel Gladstone, 'Liberal Donations from Events Triple Labor Ahead of NSW Election', *The Sydney Morning Herald*, 31 December 2018, www.smh.com.au/national/nsw/liberal-donations-from-events-triple-labor-ahead-of-nsw-election-20181227-p50odm.html.

23 Max Koslowski, 'Palmer Set to Top Labor, Libs with $50m Poll Spend', *The Age*, 18 January 2019, 4–5. For those doubtful about any unfairness stemming from Palmer's spending given the unlikelihood of his United Australia Party securing a single parliamentary seat, just imagine if those opposing Palmer's policies had the same budget—imagine if the hundreds of workers made redundant by Palmer's company, Queensland Nickel, who are still fighting to receive their full entitlements, had $50 million to highlight their plight.

with public officials. After all, political lobbying invariably is funded political activity, and both political lobbying and political contributions are often deployed as different strategies directed at the same goal of influencing the political process.

Laissez-faire regulation of political lobbying shares the trinity of vices resulting from laissez-faire regulation of political party funding—secrecy, corruption and unfairness.[24] The Australian Government Lobbyists Register makes a tepid gesture towards transparency.[25] While it reveals some information about commercial lobbyists (lobbyists who act on behalf of third parties), it fails to fully disclose who is engaging in lobbying, particularly through its exclusion of in-house lobbyists (companies, trade unions and other non-government organisations).[26] There are other signal defects—the register fails to disclose who is being lobbied, the subject matter and timing of that lobbying. All this is exacerbated by lax enforcement by the Department of the Prime Minister and Cabinet. Not a single lobbyist has been suspended or had their registration removed since 2013, despite the department identifying at least 11 possible breaches.[27] Such lax enforcement does not appear to be problematic for the department. According to its Secretary, the Lobbyists Register and its code 'is an administrative initiative, not a regulatory regime'.[28]

In the wake of secrecy comes the risk of corruption and misconduct. This is hardly a remote risk, as the various findings of misconduct made by the Western Australian Corruption and Crime Commission in relation to the lobbying activities of former Western Australian Premier, Brian Burke, make clear.[29] On the contrary, there is a sense this risk is growing in proportion to the number of former ministers and senior public servants who are employed in the private sector after leaving public sector employment (which is known by the technical term 'post-separation employment'). This is now a well-established pathway with more than a quarter of former ministers and assistant ministers taking up roles in peak organisations, large corporations, lobbying and consulting firms since 1990.[30]

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24 'Lobbying activities' and 'Lobbyist' are defined in clause 3 of the Australian Government's Lobbying Code of Conduct (2013), lobbyists.ag.gov.au/about/code.

25 *Australian Government Register of Lobbyists*, lobbyists.ag.gov.au/home.

26 Lobbying Code of Conduct, clause 3.5.

27 Australian National Audit Office, *Management of the Australian Government's Register of Lobbyist*, Report No 27, 14 February 2018, www.anao.gov.au/work/performance-audit/management-australian-government-register-lobbyists.

28 Stephen Easton, 'PM&C Shrugs Off Audit of Toothless Federal Lobbying Rules', *The Mandarin*, 15 February 2018, www.themandarin.com.au/88434-pmc-shrugs-off-audit-of-toothless-federal-lobbying-rules/.

29 Western Australian Corruption and Crime Commission, *Report on the Investigation of Alleged Misconduct Concerning Dr Neale Fong, Director General of the Department of Health* (2008), 5; Western Australian Corruption and Crime Commission, *Report on the Investigation of Alleged Public Sector Misconduct Linked to the Smiths Beach Development at Yallingup* (2007), 6–7.

30 See Wood and Griffiths, *Who's in the Room?,* 20–22.

As the New South Wales Independent Commission Against Corruption (NSW ICAC) has observed, '[c]onflicts of interest are at the centre of many of the post-separation employment problems'.[31] Firstly, the prospect of future employment can give rise to these conflicts. In order to improve their post-separation employment prospects, public officials, including ministers, may modify their conduct by going 'soft' on their responsibilities or more generally by making decisions favourable to prospective private sector employers.[32] Conflicts might also arise when public officials are lobbied by former colleagues or superiors as their prior (and possibly ongoing) association can compromise impartial decision-making.

The federal Lobbying Code of Conduct (the Code) does acknowledge the risks of post-separation employment. For instance, clause 7.1 states that former federal ministers and parliamentary secretaries 'shall not, for a period of 18 months after they cease to hold office, engage in lobbying activities relating to any matter that they had official dealings with in their last 18 months in office'.

The inadequacy of this measure is, however, vividly illustrated by the case of former Trade Minister, Andrew Robb, who took up an $880,000 consultancy with Chinese firm, Landbridge, immediately after he departed Parliament.[33] There is at the very least a reasonable perception of a conflict of interest between Robb's duties when Trade Minister, which included the negotiation of the China-Australia Free Trade Agreement, and the prospect of employment by a firm that would benefit from this agreement, a possibility that would have been clearly discussed prior to Robb's retirement from Parliament, given the timing of his retention by Landbridge. Yet, neither the post-separation ban in the Lobbying Code of Conduct or its twin in the Statement of Ministerial Standards[34] effectively deals with this conflict. They apply only to 'lobbying activities' but not to lobbying-related activities, such as providing political intelligence, and are restricted to matters in which the former ministers have had 'official dealings'. This restriction excludes many matters that fell within Robb's ministerial portfolio but about which he may not have had 'official dealings'.

And then there is unfair access and influence stemming from the failure to properly regulate lobbying. Secret lobbying, by its nature, involves such access and influence. When lobbying, or the details of the lobbying, are unknown at the time when the law

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31 NSW ICAC, *Managing Post Separation Employment* (1997), 7.

32 Ibid., 9–11.

33 Nick McKenzie, Richard Baker and Chris Uhlmann, 'Liberal Andrew Robb took $880k China Job as Soon as He Left Parliament, *The Sydney Morning Herald*, 6 June 2017, www.smh.com.au/national/liberal-andrew-robb-took-880k-china-job-as-soon-as-he-left-parliament-20170602-gwje3e.html.

34 Australian Government, Statement of Ministerial Standards, Clause 2.25, August 2018, www.pmc.gov.au/sites/default/files/publications/statement-ministerial-standards_1.pdf.

or policy is being made, those engaged in that lobbying are able to put arguments to decision-makers that other interested parties are not in a position to counter simply because they are not aware that those arguments have been made.

Secrecy, for one, seems integral to the power wielded by what has been labelled the 'most powerful lobby group'—the Pharmacy Guild of Australia.[35] The influence wielded by the Pharmacy Guild, particularly through lobbying,[36] prompted Stephen Duckett, former secretary of what is now the Commonwealth Department of Health, to characterise the pharmacy industry as 'a classic example of what economists call "regulatory capture": the regulator acts in the interest of the regulated, rather than the public interest'.[37]

Even without secrecy, unfair access and influence can result from lobbying through the creation of 'insiders' and 'outsiders' to the political process. The former consists of a tightly circumscribed group that includes commercial lobbyists and in-house lobbyists of companies, trade unions and non-government organisations. The latter is the rest of us. Of course, not all are equal within the group of 'insiders' and here the 'privileged position of business' speaks with a loud voice. Witness, for instance, the almost ritualistic trips made by prime ministers to the New York residence of Rupert Murdoch.[38] Consider too that where ministerial diaries are published (Queensland and New South Wales) most disclosed meetings held by senior ministers are with businesses or industry peak bodies.[39]

And here unfairness is bound up with corruption when privileged access to the political system is bought, for example, through securing the services of former ministers. As the NSW ICAC has observed:

> The problem arises when the lobbyist is someone who claims to have privileged access to decision-makers, or to be able to bring political influence to bear. The use of such privilege or influence is destructive of the principle of equality of opportunity upon which our democratic system

[35] Matthew Knott, 'The Pharmacy Guild: the Most Powerful Lobby Group You've Never Heard of', *The Sydney Morning Herald*, 2 April 2015, www.smh.com.au/politics/federal/the-pharmacy-guild-the-most-powerful-lobby-group-youve-never-heard-of-20150401-1mckxl.html.

[36] Stephen Duckett and Peter Breadon, 'Premium Policy? Getting Better Value from the PBS', Grattan Institute, June 2015, grattan.edu.au/wp-content/uploads/2015/06/823-Premium-Policy4.pdf.

[37] Stephen Duckett, 'Turnbull Backs Pharmacies over Consumers, yet Again', 8 May 2018, Grattan Institute, grattan.edu.au/news/turnbull-government-backs-pharmacies-over-consumers-yet-again/.

[38] Tony Wright, 'The Worker's Mate has a Day on the Piste with Kerry', *The Age*, 18 February 2010, 6; Mark Kenny, 'Gillard to Lunch with Murdoch', *The Advertiser*, 5 March 2011, 4; James Glenday, 'Prime Minister Tony Abbott pushes for Enhanced Business Ties on New York Visit', *ABC News*, 10 June 2014.

[39] Wood and Griffiths, *Who's in the Room?,* 18.

> is based. The purchase or sale of such privilege or influence falls well within any reasonable concept of bribery or official corruption.[40]

A toxic environment

When it comes to money in politics, there is what George Monbiot has identified as the 'Pollution Paradox':

> The dirtiest companies must spend the most on politics if they are not to be regulated out of existence, so politics comes to be dominated by the dirtiest companies.[41]

Perhaps nothing more vividly illustrates this paradox in Australia than the vice-like grip fossil fuel companies have on politics in this country. The power of the 'fossil fuel order'[42] or 'fossil fuel power network'[43] has clearly been facilitated by the use of money in politics. For example:

- These companies are amongst the largest contributors to the major parties.[44]
- The success of the $22 million advertising campaign by mining companies against the Rudd government's resource super profits tax is part of political folklore—so much so that '[i]t's now become routine for industry groups to threaten a "mining tax style campaign" every time they don't get their way with government'.[45]
- Its employees and lobbyists have included former ALP ministers Nick Bolkus, Greg Combet, Craig Emerson, Martin Ferguson, former National party leaders, John Anderson and Mark Vaile, and former Liberal Party ministers, Helen Coonan[46] and Ian Macfarlane.[47]

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40 NSW ICAC, *Report on Investigation into North Coast Land Development* (1990), 29.

41 George Monbiot, *Out of the Wreckage: A New Politics for an Age of Crisis* (London: Verso Books, 2018), 134.

42 David Ritter, 'Beautiful Weather: The Social Politics of Global Warming', *Australian Quarterly* 89, no. 4 (2018): 3 and 8.

43 Quentin Beresford, *Adani and the War Over Coal* (Sydney: New South Wales Books, 2018), 5.

44 Hannah Aulby and Mark Ogge, *Greasing the Wheels: The Systemic Weaknesses that Allow Undue Influence by Mining Companies on Government: A Queensland Case Study* (Australian Institute, 2016), 7–8. See also 'Friends in High Places: Fossil Fuel Political Donations', Market Forces, February 2019, www.marketforces.org.au/politicaldonations2019/.

45 Matthew Knott, 'The Man Who Killed Rudd's Mining Tax', *The Australian*, 15 July 2019, www.theaustralian.com.au/business/business-spectator/the-man-who-killed-rudds-mining-tax/news-story/851da8b4dc89dc8f1d34b236eba50737; Mark Davis, 'A Snip at $22m to Get Rid of PM', *The Sydney Morning Herald*, 2 February 2011, www.smh.com.au/business/a-snip-at-22m-to-get-rid-of-pm-20110201-1acgj.html.

46 Anne Davies, 'CSG Industry Hires Well-Connected Staffers', *The Sydney Morning Herald*, 25 May 2015, www.smh.com.au/national/nsw/csg-industry-hires-wellconnected-staffers-20150515-gh2rg3.html.

- Published ministerial diaries indicate that these companies enjoy disproportionate access to ministers in Queensland and New South Wales.[48]

With such power comes profound impact. Under the Howard government, climate change policy was determined by fossil fuel lobbyists (many of whom were former senior public servants) who likened themselves to organised crime through a self-styled label—the 'greenhouse mafia'.[49] Mining company Adani secured significant policy concessions for its proposed Carmichael mine (including deferment of mining royalties and compulsory acquisition of land) after making political contributions to the Liberal National Party of Queensland and the Liberal Party of Australia, and engaging commercial lobbyists, including Damien Power, a former treasurer of the Queensland Labor Party, and former National Party Queensland Premier Rob Borbidge.[50] Perhaps the most singular fact is that fossil fuel companies have played an instrumental role in ousting two out of the five prime ministers Australia has had since 2007—Kevin Rudd[51] and Malcolm Turnbull.[52]

The health of our living world very much turns on the health of our democracy.

Ten-point plan for democratic regulation of funding of federal election campaigns

1. Effective transparency of political funding

- *comprehensive*:
  i. low disclosure threshold with amounts under threshold aggregated
  ii. covers key political actors (including third parties)
- *timeliness*:
  e.g. UK system of quarterly report with weekly reports during election campaign
- *accessibility*
  requires analysis of trends etc. (e.g. through reports by electoral commissions)

2. Caps on election spending

- *comprehensive*:
  i. covers all 'electoral expenditure'

47 Anna Henderson and Elly Bradfield, 'Former Resources Minister Ian Macfarlane says New Mining Job Complies with Code of Conduct', 26 September 2016, www.abc.net.au/news/2016-09-26/ian-macfarlane-appointed-to-run-queensland-mining-lobby/7876942.

48 Wood and Griffiths, *Who's in the Room?*, 18–19.

49 Clive Hamilton, *Scorcher: The Dirty Politics of Climate Change* (Melbourne: Black Inc. Agenda, 2007), chapter 1.

50 Aulby and Ogge, *Greasing the Wheels*, 24–29; Wood and Griffiths, *Who's in the Room?*, 23.

51 Mark Davis, 'A Snip at $22m'.

52 Emma Alberici, 'Alex Turnbull: Coal Miners Exerting "Undue Influence" on Liberal Party, Says Son of Former PM Malcolm Turnbull', *ABC News*, 28 August 2018, www.abc.net.au/news/2018-08-28/alex-turnbull-says-coal-miners-have-undue-influence-on-liberals/10170908.

ii. covers key political actors (including third parties)

- applies 2 years after previous election—allow limits to apply around 6 months
- *two types of limits:*
  i. national
  ii. electorate
- level set through review and harmonised with levels of caps and public funding

3. Caps on political donations

- *comprehensive:*
  i. covers all political donations
  ii. covers key political actors (including third parties)
- gradually phase in to set cap at $2000 per annum and private funding at around 50 per cent of total party funding
- exemption for party membership (including organisational membership fees) with level at $200 per member (similar to section 26 of *Election Funding Act 2018* (NSW))

4. A fair system of public funding of political parties and candidates

- election funding payments with two per cent threshold and calculated according to tapered scheme
- annual allowance calculated according to number of votes and party members
- party development funds for political parties starting up
- level set through review and harmonised with levels of caps and public funding—with public funding around 50 per cent of total funding
- increases in public funding to be assessed through a report by Australian Electoral Commission
- replace tax deductions for political donations with system of matching credits with credits going to political parties and candidates

5. Ban on donations sourced from overseas or from foreign governments

- no case for banning donations for those who are foreign-born
- ban overseas-sourced donations
- ban donations from foreign governments

6. Stricter limits on government advertising in period leading up to election

- needed to deal with spike in 'soft' advertising in election period
- caps on amount spent on government advertising two years after previous election

7. Stricter regulation of parliamentary entitlements

- needed to deal with incumbency benefits through entitlements that can be used for electioneering
- ban use of printing and communication allowance two years after previous election

8. Measures to harmonise federal, state and territory political finance laws

- *minimalist*:
  anti-circumvention offence (like section 144 of *Election Funding Act 2018* (NSW))
- *maximalist*:
  harmonising political finance regulation in terms of concepts, provisions etc.

9. An effective compliance and enforcement regime

- *measures to build a culture of compliance*:
  a) governance requirements for registered political parties
  b) party and candidate compliance policies (tied to public funding)
- *key*:
  an adequately resourced Australian Electoral Commission which adopts a regulatory approach toward political finance laws
- anti-corruption commission able to investigate breaches of these laws that fall within meaning of 'corrupt conduct' or on referral of the Australian Electoral Commission (as currently provided in NSW ICAC Act)

10. A vigilant civil society

- a network of media and non-government organisations committed to 'following the money'
- public subsidies for such scrutiny
- strategic collaborations between scrutiny organisations and statutory agencies.

Ten-point plan for democratic regulation of political lobbying

1. Register of lobbyists

- cover those regularly engaging in political lobbying (repeat players) including commercial lobbyists and in-house lobbyists
- require disclosure of identities of lobbyists, clients, topics of lobbying and expenditure on lobbying

2. Disclosure of lobbying activity

- quarterly publication of diaries of ministers and shadow ministers and their chiefs of staff, including the identities of who they meet and meaningful detail as to subject matter of meetings
- lobbyists on lobbyist register to make quarterly disclosure of contact with public officials, including the identities of public officials and subject matter of meetings

3. Improved accessibility and effectiveness of disclosure

- register of lobbyists and disclosure of lobbying activity to be integrated with disclosure of political contributions and spending
- annual analysis of trends in such data by an independent statutory agency (e.g. Australian Electoral Commission or federal anti-corruption commission)

4. Code of conduct for lobbyists

- code of conduct to apply to those on register of lobbyists
- under the code, lobbyists will have a duty of legal compliance and truthfulness, and to avoid conflicts of interest, unfair access and influence

5. Stricter regulation of post-separation employment

- ban on post-separation employment to extend to lobbying-related activities (including providing advice on how to lobby)
- requirement for former ministers, parliamentary secretaries and senior public servants to disclose income from lobbying-related activities if they exceed a specified threshold

6. Statement of reasons and processes

- requirement for government to provide a statement of reasons and processes for significant executive decisions
- this statement should include:
    - a list of meetings required to be disclosed under the register of lobbyists and through publication of ministerial diaries
    - a summary of key arguments made by lobbyists
    - a summary of the recommendations made by the public service and, if these recommendations were not followed, a summary of the reasons for this action

7. Fair consultation processes

- a commitment from government to fair consultation processes (based on inclusion, meaningful participation and adequate responsiveness)
- guidelines to be developed to give effect to this commitment (similar to UK Cabinet Office's Consultation Principles)
- statement of reasons and processes (above) should include extent to which these guidelines have been met

8. Resourcing disadvantaged groups

- government support for advocacy on the part of disadvantaged groups including ongoing funding and dedicated services
- support should be provided in a way that promotes advocacy independent of government and ensures fair access to the political process

9. An effective compliance and enforcement regime

- education and training for lobbyists and public officials
- independent statutory agency (e.g. Australian Electoral Commission or federal anti-corruption commission) to be responsible for compliance and enforcement

10. A vigilant civil society

- a network of media and non-government organisations committed to 'following the money' spent on political contributions and political lobbying
- public subsidies for such scrutiny
- strategic collaborations between scrutiny organisations and statutory agencies.

Towards democratic regulation of money in politics

Borrowing the words of former Prime Minister, Malcolm Turnbull, we need 'root and branch reform' of the regulation of money in Australian politics.[53] In my book, *Money and Politics: The Democracy We Can't Afford*, I identified four democratic principles to govern such regulation:

1. protecting the integrity of representative government (including preventing corruption)
2. promoting fairness in politics
3. supporting political parties in performing their democratic functions
4. respecting political freedoms.[54]

These principles are the anchor points for the two ten-point plans in this paper, one on the funding of election campaigns and the other on political lobbying. The ten-point plan on political lobbying is based on a discussion paper I wrote with Yee-Fui Ng for the New South Wales Independent Commission Against Corruption, 'Enhancing the Democratic Role of Direct Lobbying in New South Wales'.[55]

These reforms can be developed in a way consistent with constitutional requirements, including freedom of political communication implied under the Constitution. While the High Court of Australia has struck down several measures for breaching this freedom,[56] it has equally made clear that preventing corruption and promoting fairness are legitimate objectives and that measures will not be in breach of this freedom if they are justified by these objectives.[57] There is no fatal constitutional obstacle to rebalancing the contest between democracy and oligarchy—particularly plutocracy—by implementing these plans.

Coda: A democratic ethos of community, care and compassion

Regulation alone will not solve the ills of money in Australian politics. What is absolutely essential is a democratic ethos—a deep orientation towards democratic principles. This implies an orientation towards the four principles identified above.

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53 'Turnbull Calls for Donation Prohibition', *SBS News*, 24 February 2015, www.sbs.com.au/news/turnbull-calls-for-donation-prohibition.

54 Tham, *Money and Politics*, chapter 1.

55 Yee-Fui Ng and Joo-Cheong Tham, 'Enhancing the Democratic Role of Direct Lobbying in New South Wales: A Discussion Paper Prepared for the New South Wales Independent Commission Against Corruption' (Sydney: New South Wales Independent Commission Against Corruption, 2019).

56 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Unions NSW v NSW* (2013) 304 ALR 266*; Unions NSW v NSW* [2019] HCA 1.

57 *McCloy v NSW* (2015) 257 CLR 173; *Unions NSW v NSW* [2019] HCA 1.

Of cardinal importance to what Tocqueville characterised as the 'spirit of democracy' is the commitment to equality.[58]

Other principles underlying the democratic ethos are less explicit and warrant spelling out. They stem from a fundamental truth that democracies are, by nature, communities. They are not random collections of individuals, but a 'we' that considers itself 'a people'. Democracy is the process of *collective* self-determination. That is why we easily interchange reference to the public interest with the interest of the *community*.

And that is why, what Hugh Mackay, one of Australia's sages, correctly recognised as our moral obligation to nurture and sustain supportive communities is at the same time a *democratic* obligation.[59] This is fundamentally an obligation founded upon an ethic of care. As philosopher G.A. Cohen noted, central to the principle of community is that 'people care about, and, where necessary and possible, care for one another, and also care that they care about one another'.[60]

Going beyond caring for our personal relationships, the democratic ethic of care extends to the health of our political institutions. In democracies, we are *all* bound by a public trust to maintain and sustain these institutions. It is not just public officials who have this responsibility.[61] As John Stuart Mill recognised more than a century and a half ago, for any system of government to survive and thrive, the people under such government must be willing and able to do what is required to maintain the system and for the system to fulfil its purposes.[62] Under a system of government committed to democratic principles, we all have an obligation to participate in and sustain what Ralph Miliband has characterised as 'the practice and habit of democracy'.[63] As Mackay has warned us, 'to disengage is to abdicate your role as a citizen'.[64]

In a way, the democratic ethic of care gives fuller meaning to the third (neglected) principle of the French Revolution—fraternity. And through fraternity, we can also

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58 Alexis de Tocqueville, *Democracy in America*, 7th edn (translated by Henry Reeve, 1874), 347.

59 Hugh Mackay, *Australia Day Address 2019*, www.australiaday.com.au/events/australia-day-address/2019-speaker-hugh-mackay/.

60 G.A. Cohen, *Why Not Socialism?* (Princeton, New Jersey: Princeton University Press, 2009), 34–35.

61 For the High Court's recognition of public office as public trust, see *R v Boston* (1923) 33 CLR 386.

62 John Stuart Mill, 'Considerations of Representative Government' in John Gray, ed., *On Liberty and Other Essays* (Oxford: Oxford University Press, 1991), 207–208.

63 Ralph Miliband, *Socialism for a Sceptical Age* (London: Verso, 1994), 90.

64 Hugh MacKay, *Australia Reimagined: Towards a More Compassionate, Less Anxious Society* (Sydney: Pan Macmillan Australia, 2018), 246.

more clearly see the connection between democracy and compassion. As the Dalai Lama correctly understood, fraternity means 'love and compassion for others'.[65] Urging a Revolution of Compassion, His Holiness, a self-proclaimed disciple of Karl Marx,[66] specifically argued that such a revolution 'will breathe new life into democracy by extending solidarity'.[67] Of one with the Dalai Lama is Hugh Mackay, who in his important book, *Australia Reimagined*, urges more compassion in our discourse and institutions.[68] For Mackay, this 'radical culture-shift in the direction of more compassion'[69] includes 'institutions winning back our trust by restraining their lust for wealth or power in favour of a more sensitive engagement with the society that gives them their social license to operate'.[70]

All this might sound strange to many (as it would have to me a few years back). There may be a sense that I have travelled too far from the topic of money in Australian politics. If so, perhaps a thought experiment might help:

> Imagine if fossil fuel companies (and their lobbyists) had in the past two decades used (for that matter, not used) the immense privileges their wealth conferred upon them in accordance with an ethic of care for Australia's democracy—imagine an Australia where these companies exercised their power with a strong sense of compassion.

65 The Dalai Lama and Sofia Stril-Rever, *A Call for Revolution: An Appeal to the Young People of the World* (New York: Harper Collins, 2017), 28.

66 Ibid., 31.

67 Ibid., 244.

68 Hugh Mackay, *Australia Reimagined*.

69 Mackay, *Australia Day Address*.

70 Ibid.

The Senate—the Struggle Continues*

Andrew Murray

Former Clerk Harry Evans was a wonderful man and I admired him enormously. We hit it off because we were both parliamentarians. Harry emphasised the vital importance of the Senate to the health and integrity of our democracy. He fearlessly and sometimes fiercely promoted the Senate as an institution. The clarity of Harry's thought gave considerable thrust to his arguments. He knew that there is a continuing need to defend, explain, promote and advance the cause of the Senate not just because of its vital national, constitutional and democratic role, but because of the forces opposing it.

The Senate is an integrity institution. I first thought of the Senate in those terms some years ago when I read a paper by the Hon. James Spigelman AC QC, the former Chief Justice of New South Wales, on a distinct and institutionally separate fourth branch of government he called 'the integrity branch of government'.[1] To attract legitimacy and trust, an integrity institution must itself have integrity, but it is more than just an institution that has integrity.

An integrity institution has as its prime purpose an obligation to ensure that institutions, organisations or individuals over which it has oversight or power, themselves operate with integrity. Paraphrasing Spigelman, it must act to ensure that governmental institutions exercise the powers conferred on them in the manner in which they are expected and/or required to do so, and for the purposes for which those powers were conferred.[2]

Spigelman's paper identified the ways in which existing integrity institutions ensure institutional integrity elsewhere. He identified the committees of Parliament, audit offices, independent corruption commissions, royal commissions, and ombudsmen as fulfilling an integrity function. Of those institutions Spigelman identifies, only the

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* This paper was presented at the annual Harry Evans Lecture at Parliament House, Canberra, on 20 September 2019. Author's note: 'My thanks to the Clerk of the Senate for asking me to deliver the annual Harry Evans lecture. I consider it an honour'.

1 James Spigelman, 'The Integrity Branch of Government', *Australian Law Journal* 78, no. 11 (2004): 724.

2 The abstract of Spigelman's paper reads in part: 'The recognition of a functionally distinct and institutionally separate fourth branch of government is occasionally proposed in the constitutional law literature. The paper proposes the recognition of such a branch, termed the integrity branch. At a high level of generality, the purpose of the integrity branch is to ensure that each governmental institution exercises the powers conferred on it in the manner in which it is expected and/or required to do so and for the purposes for which those powers were conferred, and for no other purpose'. Spigelman, 'The Integrity Branch', 726–729.

committees of Parliament are by election and not by appointment. I never heard Harry use the term 'integrity institution' but he certainly believed in that notion. He knew that the Senate's integrity role was hard won, and that the Senate would have to continue to struggle to assert that role.

The struggle is twofold. Firstly, for the Senate to retain the character of an integrity institution, complete with the support, legitimacy, trust and culture that such standing demands. Secondly, to counter the forces that continue to seek to delegitimise, deny, reduce or resist the powers and authority necessary to the functioning of the Senate as an effective integrity institution. Hence the title of this paper, 'The Senate—the struggle continues'. The title was prompted by my memory of the rallying cry used during the Mozambican War of Liberation, *A luta continua*—the struggle continues.[3]

It is natural for observers of the Senate to see it in the 'now' and to judge it accordingly. It is also human nature to focus on its faults, not its strengths. The present matters, but it is the Senate's past that points the way to its future. The birth of the Senate was a struggle, but once given life and meaning by the Australian Constitution, its struggle thereafter has been to grow stronger and to stay strong. The Senate's strength has been and will always be tested. That is because the Senate is in a competition for money and power. Its role is not to acquire it, but to guard and monitor it.

The Senate's constitutional duty is to check or restrain others, and often to encourage others, in order to ensure the proper use of money and power. The struggles of the past and present have been for the Senate's independence, for the principles of accountability, transparency and responsibility, and for the further advances needed in integrity.

The constitutional framers intended the Australian Senate to be a necessary and powerful foil to the executive, the House of Representatives and the bureaucracy. The Senate's status as a powerful bicameral house with its own representational federal franchise stands on firm constitutional foundations, with the central institutional check of ensuring that all legislation should have a double majority.[4]

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3 The full Portuguese saying is '*A luta continua, vitória é certa*' meaning '*The struggle continues, victory is certain*'. Mozambique was a colony of Portugal for over four centuries. The Mozambican war of independence between Portugal and the Mozambique Liberation Front (FRELIMO or Frente de Libertação de Moçambique) started in 1964 and ended with a ceasefire in 1974, followed by negotiated independence in 1975.

4 For an exposition on the merits of a double majority see Glenn Ryall and Jessica Stout, 'Scrutiny Committees: A Vehicle for Safeguarding Federalism and the Constitutional Rights of Parliament', *Papers on Parliament* 67 (May 2017): 131.

Stanley Bach was right to say that ultimate legislative authority lies with the House,[5] but the executive must be ever mindful that while it may have the numbers in the House it needs to work to get the numbers in the Senate. This is not a one-way street. The Senate, in turn, has to work to get the numbers in the House.

Some believe the constitutional founders intended the Senate to be a house of review but the Constitution itself is silent on that point. However, the Senate was given the powers to become one and review is now an absolutely vital part of its work.[6] While the legislative and policy struggle between the houses is perennial, other Senate struggles since 1901 have been periodic. They are struggles because getting the executive to agree, accept, reform or change does not come easily and resistance continues. Nevertheless there have been tremendous strengthening advances for the Senate since 1901. These advances interlock but can be summarised as:

- asserting and advancing independence from the executive, including through Senate reform. The 1949 introduction of proportional representation for Senate elections meant that governments thereafter found it hard to attain their own Senate majority

- increasing the Senate's power and resources to make that independence meaningful, for instance it now controls its own budget, and has access to the research expertise of the parliamentary library and parliamentary budget office

- effectively exercising power in restraining government from abuses or fault, principally through the committee system and the estimates hearings process

- insisting on scrutiny and review of legislation, delegated legislation, and expenditure—this became more effective and enduring after standing committees were established[7]

- introducing the use of discovery, particularly orders for the production of documents, and the Murray Motion,[8] albeit limited by the invoking of executive privilege, restrictions on freedom of information requests and by secrecy orders. The accompanying power to call witnesses is powerful, but is constrained by an inability to call ministers from the House or ministerial advisers

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5 'If and when push finally comes to shove, the Constitution favours the ultimate legislative supremacy of the House of Representatives'. Stanley Bach, *The Platypus and the Parliament: The Australian Senate in Theory and Practise* (Canberra: The Department of the Senate, 2003), 29.

6 See Stanley Bach's discussion on 'why the concept of the Senate as a House of Review has remained so unclear', ibid., 153–156.

7 Chief Justice Robert French referred to this function as 'parliamentary quality control' in his speech, 'Adding Value to Law Making', delivered at the Australia–New Zealand Scrutiny of Legislation Conference: Scrutiny and Accountability in the 21st Century (Canberra, 6 July 2009), 1.

8 The 2001 Senate Order on Entity Contracts is also known as the '*Murray Motion*'. It requires the government to place essential details of its contracts on the internet.

- enhancing the power of veto over delegated legislation[9] through the restricted ten-year life of legislative instruments[10]—delegated legislation constitutes over half of all federal law by volume in Australia[11]

- thoroughly investigating environmental, social, economic and other national issues[12]

- defending rights and freedoms—as the Senate puts it, avoiding laws that unduly trespass on personal rights and liberties[13]

- insisting on transparency, so making government and parliamentary processes and information open and accessible

- insisting that the executive, the bureaucracy and the Parliament itself are accountable, and enforcing that accountability. Accountability accelerated following the 1970 introduction of a range of Senate standing committees and estimates public hearings

- making efforts to attend to integrity in office and function so that the Parliament and its members stay true to purpose and exhibit honesty, trustworthiness, fairness and ethics in conduct and performance. Integrity is the subject of more recent attention.

These often fierce struggles continue. Harry knew there would always be unfinished business. Of his twenty reform proposals submitted to the 2020 Summit in 2008, there has only been movement on five.[14]

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9 Under the *Acts Interpretation Act 1904*, the Senate has the legal authority to disallow delegated legislation.

10 The *Legislation Act 2003* formerly the *Legislative Instruments Act 2003*.

11 *The Table,* Journal of the Society of Clerks-at-the-Table in Commonwealth Parliaments, 78 (2010): 30.

12 See, for example, previous inquiries by the Senate Standing Committees on Community Affairs, Environment and Communications, www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Completed_inquiries/2016-19; the Senate Standing Committees on Community Affairs, www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Completed_inquiries/2016-19; and the Senate Standing Committees on Economics, www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Completed_inquiries/2016-19.

13 It is interesting to note that rights but not freedoms are in the titles of the 1976 International Covenants on Civil and Political Rights, and on Economic Social and Cultural Rights, and the 1986 Australian Human Rights Commission, although they are in the text.

14 Harry Evans, *Parliamentary Reform Proposals for the 2020 Summit*, tabled at Budget estimates 2008–2009, Senate Standing Committee on Finance and Public Administration (Canberra: Department of the Senate, 26 May 2008), www.aph.gov.au/Parliamentary_Business/Senate_Estimates/fapactte/estimates/bud0809/parliament/index. See also, Harry Evans, 'Time, Chance and Parliament: Lessons from Forty years', *Papers on Parliament 53* (June 2010), www.aph.gov.au/sitecore/content/Home/About_Parliament/Senate/Powers_practice_n_procedures/pops/~/link.aspx?_id=4EEB6147E0874E338DEB3EC4D4740A0F&_z=z; 'Harry Evans: Selected Writings', *Papers on Parliament* 52 (December 2009); *Papers by former Clerk of the Senate Harry Evans*, www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/The_Biographical_Dictionary_of_the_Australian_Senate/Papers_by_former_Clerk_of_the_Senate_Harry_Evans.

Let us put our Senate into a larger context. Ideology is a system of ideas and ideals governing political theory and practice. That definition makes democracy itself an ideology. As a form of government and politics, democracy competes with other systems and ideologies. To survive competition, to survive attack, you have to defend and thrive.

Competition can be deadly. Wars are the worst of it. In the first five decades following federation in Australia there were two world wars and the Great Depression to contend with, surges in authoritarian sentiment, attractions to the extremes of various 'isms', including racism, communism and fascism, and internally a serious campaign for secession in Western Australia. The next five decades were calmer, but still with war, periodic bouts of turmoil and challenges to our peace, security and prosperity.

There have always been anarchists, terrorists, radicals, reactionaries and revolutionaries living within democracies—including ours—whose societal effect is greater than their numbers and is occasionally catastrophic. There have always been those who hanker after a winner takes all approach—the tyranny of the majority—assailing the very foundations of successful democracy, which accommodates opposing opinions and interests.[15]

Such winner takes all attitudes can be devastatingly counterproductive.[16] Defence is needed against these various assaults. Thriving socially and economically counters democracy's critics. Institutional integrity considerably helps that thriving. People struggling with life will sometimes remark that it is better than the alternative. Churchill is credited with making a similar remark about democracy and its alternatives.[17]

Australia is invariably and correctly described as a liberal democracy, albeit not a perfect one.[18] Liberal democracy's ideological strength and health has been bolstered firstly by its successful absorption of the theories and practices of other appealing

[15] This theme is well developed by Lord Sumption in the Reith lectures. See Jonathan Sumption, 'Rights and the Ideal Constitution' (*The Reith Lectures*, no. 4, BBC Radio 4, 15 June 2019), www.bbc.co.uk/programmes/m0005t85.

[16] Senator Andrew Murray speaking on the Workplace Relations Amendment (Work Choices) Bill, Senate debates, 2 December 2005: 212–213, parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansards%2F2005-1202%2F0121;query=Id%3A%22chamber%2Fhansards%2F2005-12-02%2F0008%22.

[17] Sir Winston Churchill MP, *House of Commons Debates*, 11 November 1947, vol. 444, columns 203–321, api.parliament.uk/historic-hansard/commons/1947/nov/11/parliament-bill.

[18] A common description of a liberal democracy is one of a representative system of government in which individual rights and freedoms are recognised and protected, and the exercise of political power is limited by the rule of law.

ideologies (for instance conservatism, socialism and liberalism),[19] and secondly by what it provides its adherents—freedoms and rights, prospects and prosperity, welfare and wellbeing. Many more people in the world live under alternative systems of rule than under a liberal democracy—illiberal democracies, theocracies, dictatorships, monarchies and systems born of oppressive ideologies like communism. [20]

A threat to democracy comes from those who actively seek other systems of rule or government, or from those who want to 'change society'. It also comes from those who are disengaged, an increasing trend.[21] One survey has it that an amazing one in three Australians surveyed thought that 'in some circumstances a non-democratic government can be preferable' or 'it doesn't matter what kind of government we have'.[22]

Defence of democracy requires a forthright assertion of its values. In a 1966 speech in decidedly illiberal and only partially democratic South Africa, Robert Kennedy gave an impassioned defence of the freedom of speech, of protest and the press:

> The enlargement of liberty for individual human beings must be the supreme goal and the abiding practice of any Western society… The essential humanity of men can be protected and preserved only where government must answer not just to the wealthy, not just to those of a particular religion, or a particular race, but to all its people.[23]

With less passion but equal force, The Right Honourable Lord Sumption, former Justice of the Supreme Court of the United Kingdom, said in his 2019 BBC lectures that there are two essential and fundamental human rights—the right to a basic measure of security to life, liberty and property, and the right to freedom of expression, assembly and association.[24] We are surely all aware of how strong the

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19 In the European Parliament, which is home to 751 members and 28 member states, they have organised themselves into eight political groups or political families, broadly relating to particular ideological streams—the biggest three are conservatism, socialism and liberalism.

20 Freedom House, *Freedom in the World 2018: Democracy in Crisis*, freedomhouse.org/report/freedom-world/freedom-world-2018.

21 See, for example, Mark Evans, Gerry Stoker and Max Halupka, *Trust and Democracy in Australia: Democratic Decline and Renewal*, Democracy 2025, Report no. 1 (2018), www.democracy2025.gov.au/documents/Democracy2025-report1.pdf.

22 Table 23 of the Lowry Institute survey shows that in the period from 2012 to 2018 between 18 per cent and 26 per cent of people surveyed thought that 'in some circumstances a non-democratic government can be preferable' and between 12 per cent and 16 per cent responded that 'it doesn't matter what kind of government we have'. Alex Oliver, *2018 Lowy Institute Polling* (Sydney: Lowy Institute, 20 June 2018), www.lowyinstitute.org/publications/2018-lowy-institute-poll#sec35296.

23 Robert F. Kennedy, 'Day of Affirmation Address' (Speech, University of Cape Town, South Africa, 6 June 1966).

24 Sumption, 'Rights and the Ideal Constitution'.

attacks on these essential rights are in Australia and elsewhere in the democratic world.

By its design and purpose the Senate can deal with legislation and significant issues with integrity, meaning that is does so on a well-informed independent basis, honestly and with consistency. The committee system encourages cross-party participation and cooperation, a great virtue in any democratic system. There are pressures that affect our Parliament and how it conducts itself—which in turn challenge the Senate's ability to steer the steady institutional course required of it.

Countering terrorists or radicals or malicious foreign powers is not just costly but results in unfortunately necessary restrictions on our freedoms and rights. Governments and bureaucrats sometimes push the limits on these restrictions and they are permanent in effect. There are seldom sunset clauses on such restrictions. It is the Senate that is needed to ensure these restrictions do not go too far. More broadly, others less violent or dangerous seek to erode our freedoms and rights when they assail academic freedom and free speech to assert other values. The Senate must not be passive on these fronts. Strong criticism and distaste for democratic parliaments and governments can be generated by fear and frustration. The Senate has an essential role in using reasoned argument to deal with these.

In my twenties there was widespread and justified concern about the danger of nuclear war, the threat of communism, and the Club of Rome's predictions.[25] For a minority these concerns morphed into apocalyptic fears—we see the same happening today on climate. A source of strong criticism arises from the frustration felt by particular groups who believe their problems and issues are not being adequately addressed. Then there is the criticism that has many supporters—those authoritarians who want the political party in power to prevail without a Senate check—the 'get out of our way and let us govern' mob.

John Rawls saw one of the roles of political philosophy as to 'discover grounds for reasoned agreement in a society where sharp divisions threaten to lead to conflict'.[26] In my view that is best done when democracy flourishes, freedom of speech and thought prevails, where integrity in conduct is a given, where respect is shown for persons and arguments, and where the minority is represented and is not oppressed or

[25] Founded in 1968 at Accademia dei Lincei in Rome in Italy, the Club of Rome consists of current and former heads of state, high-level politicians, government officials and bureaucrats, diplomats, scientists, economists, and business leaders from around the globe.

[26] Stanford Encyclopaedia of Philosophy, *John Rawls* (9 January 2017), plato.stanford.edu/entries/rawls/#FouRolPol. John Bordley Rawls (1921–2002) was an American moral and political philosopher in the liberal tradition.

disadvantaged. It is also best done when issues of concern to the populace are seriously and competently addressed by parliaments and governments.

Rawls said another role of political philosophy is 'probing the limits of practicable political possibility',[27] achieving enduring and 'workable political arrangements',[28] and allowing for 'reconciliation…to calm our frustration and rage against our society'.[29] One of the great virtues of democratic systems is that it internalises its critics—they are represented within its political class. The integrity of the Senate is displayed when those competing tensions are successfully accommodated.

My use of 'political class' rather than 'members of parliament' is deliberate. The political class here means those who engage in political activity to further their ideological, policy or special interest ends, and includes many in the media.[30] Maintaining a healthy strong democracy can be likened to maintaining the integrity of a complex structure. Structural integrity or institutional integrity means holding together and preserving its function without it breaking or deforming. It is self-evident that helping ensure our democratic structure does not break or deform requires the Senate itself to retain and indeed enhance its institutional integrity.

Professor Charles Sampford writes that 'a national integrity system encapsulates the interconnecting institutions, laws, procedures, practices and attitudes that promote integrity and reduce the likelihood of corruption in public life'.[31] He also argues that integrity systems are 'a form of risk management'.[32] The structural or institutional integrity of the Senate rests on the Australian Constitution and constitutional law, supported by such instruments as the *Parliamentary Privileges Act 1987* and Senate rules, precedents, practice, conduct and culture.

The maintenance of Senate institutional integrity is not solely a matter for senators—it depends on the culture, conduct, behaviour and values of senators, the Clerk and Senate departmental staff and the other members of the political class working in

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27 John Rawls (Samuel Freeman ed.), *Lectures on the History of Political Philosophy* (Cambridge and London: The Belknap Press of Harvard University Press, 2007), 10–11.

28 Stanford Encyclopaedia of Philosophy, *John Rawls*.

29 Rawls, *Lectures on the History of Political Philosophy*, 10.

30 Wikipedia tells us that 'political class' is a concept in comparative political science originally developed by Italian political theorist Gaetano Mosca (1858–1941) to refer to the relatively small group of activists that is highly aware and active in politics, and from whom the national leadership is largely drawn. Mosca examined the mechanisms of renewal of the ruling class, the characteristics of politicians, and the different forms of organisation developed in their wielding of power. The political class could include subject-matter policy specialists, aided by permanent staff.

31 Charles Sampford, 'Parliament, Political Ethics and National Integrity Systems', *Papers on Parliament* 55 (February 2011): 9.

32 Ibid., 16.

Parliament. Individual integrity must be present to preserve institutional integrity. Individual integrity requires individuals to be honest and truthful in their dealings and true to their values.

It does not require people to be perfect, but being imperfect does not excuse bad conduct, or unnecessary and shrill censoriousness and absolutism, or those who insist on conformity of their choosing. Such conduct offends the essence of the 'fair go' and 'live and let live' doctrine that allows for democratic tolerance and compromise. Having said that, the passion, humanity, imperfection and variety our democratic representational system throws up is to be celebrated. Totalitarian or conformist systems do not allow that.

The integrity of an institution does not require everyone who is a part of it to have integrity, but it does require most to have integrity. It particularly requires leaders to have integrity. It requires those who respect and understand the integrity expected of that institution to defend and advance that integrity. Institutional and individual integrity affects faith and trust in our political system. Faith and trust is essential to ongoing support for our liberal democracy and to avoid criticism moving to disaffection. Trust in our democratic institutions is often thought to be at a low ebb, largely apparently because of the way in which members and senators conduct themselves.[33]

There are current reports of less respect within modern democracies for democracy itself and its institutions.[34] Yet there is recent research on attitudes that indicates that 'Australians have a huge appetite to reboot and to renew their democracy'.[35] Australians as a whole want to be assured that their political class and political institutions will keep them safe and secure, uphold the rule of law, preserve their rights and their freedoms, address issues of concern and competently advance their prospects and wellbeing. And will behave in a manner that befits their office.

How do Australians regard institutional and individual integrity in politics? In balance sheets there are valuable assets known as intangibles—assets like the reputation of brands or goodwill. In accounting an intangible is known and understood, even though it cannot be touched, is difficult to describe and difficult to value. In politics

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33 Jenny Wilkinson, *Fiscal Transparency and the Parliamentary Budget Office* (address at the launch of the Open Budget Survey for Australia, Canberra, Australian National University, 20 March 2018).

34 Table 23, Oliver, *2018 Lowy Institute Poll*; Andrew Markus, *The Scanlon Foundation Surveys 2018*, 31–39, scanlonfoundation.org.au/wp-content/uploads/2018/12/Social-Cohesion-2018-report-26-Nov.pdf; Sarah M. Cameron and Ian McAllister, *Trends in Australian Political Opinion: Results from the Australian Election Study 1987–2016*, 74, australianelectionstudy.org/.

35 Dr Travers McLeod, 'Trust and Current Challenges' (transcript of proceedings, Australasian Study of Parliament Group 2018 Annual National Conference, Brisbane, 19 July 2018), 19.

there are intangibles that are known and understood too, such as the reputation, standing and sense of worth a nation and its institutions enjoy.

The intangibles are of great importance to the Australian people looking at the Parliament and making judgements on its integrity and culture. It may be very unfair but a relatively common view on the streets and in the media seems to be that the political class are self-interested, untrustworthy liars, with the exception, people will say, of the ones they know personally, who are surprisingly nice people. I believe Australians once distinguished the conduct of individuals from the reputation of institutions, so the Parliament was more respected than the politician and likewise the media more than the journalist. Institutions in general seem more on the nose—how can that be otherwise when banks debit the dead and churches protect paedophiles.[36]

We live completely different lives to our ancestors, but—and history bears me out—human nature has not changed. Human nature can, however, be corralled within power and societal structures, and be guided by society's customs, culture and what is regarded as acceptable behaviour. Right from the start rules and laws have sought to curb the worst in us. The simple list of Ten Commandments has expanded every century until we get to today's Criminal Code, buttressed by myriad laws, codes of conduct and rules about multiple facets of our lives. The best in us has never needed much rule and law, and freely exhibits itself daily in individuals and in institutions that act with integrity.

Non-democratic systems give power and control to an elite, and rule and law is oppressive. Democracy is intended to give power and control to the people. Our democratic system is based on the rule of law delivered through legitimate and widely accepted decision-making processes, and on power controlled by institutional checks and balances.[37] Bicameralism is one of those controls and is designed to provide a powerful check on government.

Why is it, when we are all drawn from the same human pot, that surveys show that those in the health and teaching professions are highly regarded by Australians, and

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[36] The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry; the Royal Commission into Institutional Responses to Child Sexual Abuse.

[37] According to Geoffrey de Q. Walker 'most of the content of the rule of law doctrine can be subsumed in two propositions:

(1) that people [including, one should add, the government] should be ruled by the law and obey it, and

(2) that the law should be such that people will be able [and, one should add, willing] to be guided by it'.

See Walker, *The Rule of Law: Foundation of Constitutional Democracy* (Carlton: Melbourne University Press, 1988), 21.

those in the media, unions and politics are not? The *Roy Morgan Image of Professions Survey 2017* is instructive. Nurses were rated as 'high' or 'very high' at 94 out of 100, ministers of religion and bank officials at a terrible 34 and 33, and newspaper journalists, union leaders and federal MPs at an awful 20, 17, and 16 out of 100 respectively.

I have read no better synopsis of the causes of the low opinion people have of the political class than Professor Lewis' paper to the Australasian Study of Parliament Group 2018 Annual National Conference.[38] It is unlikely that better human beings than the rest of us populate nursing and teaching professions, or that individuals in those professions have intrinsically greater integrity and higher standards than individuals in other professions.

The answer to the wide gulf between high and low regard must lie partly in the very different nature of the work being done in each profession, partly in the different laws, rules and standards that apply to each, and particularly in the different ethics and culture in each. Such entrenched attitudes as shown in that survey are unlikely to change and have a long history. Any historian can find instances of such disregard and full-blown abuse going back centuries. Nevertheless we should heed current concerns. Public distaste for the standards of conduct in democratic politics makes it harder for defenders of the virtues of democracy.

Outgoing British Prime Minister Theresa May is reported to have said that vile abuse and perpetual strife was corroding democratic values in British politics and around the world.[39] Her remarks reflect distress at a decline in the value placed on professional standards, courtesy and civility in parliamentary and public discourse. Lord Sumption remarks that there is a 'mounting tide of hostility to representational politics'.[40] There are those who are profoundly pessimistic. Paul Kelly reports that Professor Jonathon Haidt believes that 'the liberal, multicultural, secular model of Western politics is not a natural phenomenon for human beings' and says that 'there is a very good chance that American democracy will fail'.[41]

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38 Colleen Lewis, 'Trust and Current Challenges' (*Proceedings of Australasian Study of Parliament Group 2018 Annual National Conference*, Brisbane, 19 July 2018), 20–23.

39 Nick Miller wrote in *The Sydney Morning Herald* that 'Theresa May…used her last major speech as Prime Minister to warn the "politics of winners and losers, of absolutes and of perpetual strife" has taken hold, "and that threatens us all". The descent of political debate into "tribal bitterness" and vile abuse was corroding democratic values in British politics and around the world, May said'. See 'The World is Heading to a "Darker Place" of Hatred, May Says in Last Major Speech', *The Sydney Morning Herald*, 18 July 2019, www.smh.com. au/world/europe/the-world-is-heading-to-a-darker-place-of-hatred-may-says-in-last-major-speech-20190718-p5288y.html.

40 Sumption, 'Rights and the Ideal Constitution'.

41 Paul Kelly 'America's Uncivil War on Democracy', *Weekend Australian*, 20–21 July, 2019, 15. Jonathon Haidt is a social psychologist and author and the Professor of Ethical Leadership at New York's Stern School of Business.

Does it matter that journalists and members of parliament are so poorly regarded? Worldwide haven't they always been? The answer to both questions is yes. Perceptions and the judgement of the political class and of political institutions are derived from experience and observation. Those who lie or exaggerate greatly to further their cause (a common fault), or who do not act in the public interest, or who hide, conceal or deceive, or who are incompetent make Australians fearful, nervous, insecure and untrusting, and damn the reputation of other politicians and the parliamentary institution as a whole. It is particularly an issue when leaders of the political class behave in this way.

These are not new issues. In its 1992 report, the Royal Commission into Commercial Activities of Government and Other Matters in Western Australia said:

> Ministers have elevated personal or party advantage over their constitutional obligation to act in the community's interests. Public funds have been manipulated to partial ends. Personal associations and the manner in which electoral contributions were obtained could only create the public impression that favour could be bought, that favour would be done.[42]

Nevertheless, our system is mostly producing the goods. Without diminishing justified concerns with significant national shortcomings and failures, overall Australia is a well-off, peaceful, enlightened, progressive liberal democracy operating under a fair rule of law. It is protected by a universal suffrage, strong political institutions and high standards of governance. That being said, Australia's political culture and political integrity needs improving and the principles and freedoms of a liberal democracy need defending.[43]

There have been a growing number of integrity initiatives. In 2017, a Senate select committee usefully reviewed both them and integrity institutions.[44] With regard to the Parliament, these initiatives seem to have had little effect yet on culture, and not enough on conduct, to change press and public opinion of senators and members.

In recommendation 5 the committee recommended the Parliament 'appoints a Parliamentary Integrity Commissioner to provide advice on matters of ethics to

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[42] *Report of the Royal Commission into Commercial Activities of Government and Other Matters*, vol. 6, no. 1 (1990), 27 – 3 [27.2.3].

[43] Transparency International produces a Corruption Perceptions Index measuring public sector corruption. The 2018 CPI scores 180 countries and territories from 0 (highly corrupt) to 100 (very clean). The highest score (Denmark) was 91—Australia ranked 13th with a score of 79.

[44] Senate Select Committee on a National Integrity Commission, *Report* (Canberra: Department of the Senate, 13 September 2017), www.aph.gov.au/Parliamentary_Business/Committees/Senate/National_Integrity_Commission/IntegrityCommissionSen/Report.

senators and members'.[45] Such a person has long been called for—there has always been a need to address a parliamentary and party culture that will tolerate slippery standards and conduct.[46] Many resist efforts to improve their conduct. I remember what a struggle it was for me to get the first ever audit done on parliamentary entitlements in 100 years.[47]

Of course no integrity measure works if it is not reported and enforced and if the punishment is inadequate. As an example, the Senate has criteria for establishing contempt. Integrity requires a senator to be true to their conscience. The Senate rules recognise that senators may not be improperly influenced:

> A person shall not, by fraud, intimidation, force or threat of any kind, or by other improper means, influence a senator in the senator's conduct as a senator…[48]

If anyone thinks the threat of losing preselection has not been used to pull senators into line, they are living on another planet. The Senate is alert to the problem in both houses. In 2017, the Select Committee on a National Integrity Commission recommended more diligence in privileges committees,[49] and on breaches of ministerial standards.[50] As far as I can see, things have not improved on either front.

I wish to suggest a few matters selected from a number that would contribute to the integrity of the Senate as a vital national integrity institution. Incremental improvement taken together should make a difference—I use 'should' not 'will' advisedly.

Concerning government and governance as a whole

Ending decades of calls for such a body, in December 2018 the government announced that it will establish an independent statutory Commonwealth Integrity Commission to strengthen integrity arrangements across the public sector and to detect, deter and investigate corrupt conduct. That is a good thing. In my independent

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45 Ibid., 221.

46 The government announced in December 2018 that it would establish a Commonwealth integrity commission as an independent statutory agency led by a commissioner. A public consultation process closed in February 2019. Attorney-General's Department, *Commonwealth Integrity Commission*, www.ag.gov.au/Consultations/Pages/commonwealth-integrity-commission.aspx.

47 Australian National Audit Office (ANAO), *Parliamentarians Entitlements: 1999–2000*, Audit Report no. 5, 2001–02.

48 Rosemary Laing, ed., *Odgers' Australian Senate Practice*, 14th edn (Canberra: Department of the Senate, 2016), 791.

49 Senate Select Committee on a National Integrity Commission, *Report*, 222.

50 Ibid., 223.

2008 report undertaken at the request of the Finance Minister, I recommended that the government establish a public sector regulator.[51] There is no public sector regulator equivalent to the Australian Securities and Investments Commission (ASIC).[52] I doubt whether that function can be incorporated into the proposed National Integrity Commission or into the Public Service Commission as presently constituted.

A primary tenet of good governance is that of a professional public service in which its leadership exercises its powers and responsibilities effectively and ethically and is held to account when transgressions occur. The accountability gap in the existing enforcement mechanisms detailed in my 2008 report demonstrated the need for a public sector regulator focussed on financial administration and management matters.

This regulator would need sufficient flexibility to carry out an enforcement function by way of a range of enforcement options in order that the seriousness of the offence and best way to address a contravention is taken into account. It would be a mistake to assume that such a regulator need be as costly or large as ASIC. Despite further improvements in public sector governance, such as the introduction of independent audit committees,[53] I remain of the view that a public sector regulator is worth considering.

My report, *Review of Operation Sunlight: Overhauling Budgetary Transparency*, recommended:

> That the Government establish a Public Sector Regulator focussed on financial administration and management matters, with strong and comprehensive enforcement powers that promote an efficient regulatory system for the public sector. Persuasion, education and encouraging compliance through negotiation, settlement and adverse publicity should be the primary enforcement mechanisms. Prosecution resulting in civil or criminal penalties should be a last resort.[54]

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51 Andrew Murray, *Review of Operation Sunlight: Overhauling Budgetary Transparency* (June 2008), 81–83 (recommendation 37).

52 Australian Securities and Investments Commission founded in 1998.

53 For instance, rules issued under the *Public Governance, Performance and Accountability Act 2013* include requiring departments and agencies to have an audit committee where independent members are in the majority and the CEO and CFO are excluded from membership (see Rule 17 of the Public Governance, Performance and Accountability Rule 2014). That is a step in the right direction.

54 Murray, *Review of Operation Sunlight*, 83 (recommendation 37).

Concerning the political class

Democracy is itself a safeguard on character—if elected politicians are later found to lack integrity and to have weak principles they will be subject to scrutiny by our free press and to the judgement of voters. That is after the event. At the outset, can we improve the functioning and integrity of political parties that select candidates and can we improve the ability of the voters to make informed choices?

It is the members of the Senate who guard its integrity, that determine Senate activity and decide contested legislation. That makes who becomes a senator vital. The most fundamental democratic principle of all is that the members elected to the Parliament should genuinely reflect the voting intention of the electorate. A very important reform was to ensure Australians did not get senators they did not vote for.[55] The 2016 double dissolution election ended the practice of preference harvesting and backroom negotiations delivering senators by a dodgy lottery.

It is obviously preferable that a vote is an informed one. That becomes harder in a multi-party, multi-candidate system. Below-the-line voters select Senate candidates and not political parties. Senate elections produce very large numbers of contesting candidates, registered political parties and registered groups. Try looking up Senate candidates to assess their attributes. It is impossible, even on the websites of the established parties. Having an open field is a fundamental democratic principle. There are already restraints in place that limit the field somewhat. I do not propose more. What I do propose is that in the nomination process the Australian Electoral Commission (AEC) should be provided with a minimum profile of each candidate that it publishes on its website.

More important is reform of the money flow in politics, both direct and indirect. Politics is the contest of interests, ideas and commitments, inevitably realised through money and power. The possession or desire for money and/or power can corrupt morals and affect personal integrity. There are also those so impassioned by their cause that they conclude the end justifies any means. That is why those who possess and use money and/or power in our political system need restraint, to be watched and held to account. As do the unscrupulous.

I have campaigned at length on political donations and refer you to that work.[56] I was delighted to see one of my long campaigns on outlawing foreign donations

55 *Commonwealth Electoral Amendment Act 2016*.

56 Andrew Murray and Marilyn Rock, 'The Dangerous Art of Giving', *Australian Quarterly* 29, (2000): 29–33; submission to the Joint Standing Committee on Electoral Matters, *Inquiry into the 2007 Federal Election* (Canberra: Parliament of Australia, April 2008); Andrew Murray, submission in response to the Australian Government Electoral Reform Green Paper, *Strengthening*

finally realised.[57] I continue to be alarmed by the system and nature of political donations. The law as it stands permits some political parties to seek to rise to power or influence outcomes on the strength of political advertising and 'fake news' that is fraudulent. A lax attitude to truthfulness fosters a culture within political circles that regards deception as simply part of the political game, rather than the serious attack on the integrity of the political system that it is.

The private sector is already required by law not to engage in misleading or deceptive conduct under section 18 of the Australian Consumer Law.[58] The *Commonwealth Electoral Act 1918* should be amended to prohibit inaccurate or misleading statements of fact in political advertising which is likely to deceive or mislead.[59] There is no plausible justification for permitting political advertising to make statements of fact that are demonstrably false. Such advertising has long been outlawed in South Australia. The Commonwealth should follow suit.

Political governance is weak. In a 2009 paper I asked the question 'Can better political governance give Australia an improved political class?'[60] Improving the internal governance arrangements of political parties is part of the answer to strengthening the institutional integrity of the Parliament. Over time perhaps it could even improve parliamentary culture. Political governance includes how a political party operates, how it is managed, its corporate and other structures, the provisions of its constitution, how it resolves disputes and conflicts of interest, its ethical culture and its level of transparency and accountability.

The Commonwealth Electoral Act should be amended to require standard items to be set out in a political party's constitution for the party to gain registration, similar to the requirements under corporations law for the constitution of companies. Party constitutions should be required to specify:

- the conditions and rules of party membership
- how office bearers are preselected and selected

Australia's Democracy (November 2009); Andrew Murray, submission no. 5 to the Australian Government Electoral Reform Green Paper, *Donations Funding and Expenditure* (2009); Andrew Murray, submission no. 3 to the Joint Standing Committee on Electoral Matters, *Inquiry into the 2010 Federal Election and Matters Related Thereto* (Canberra: Parliament of Australia, January 2011).

57 The Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2018 became law on 30 November 2018, requiring 'wholly political actors to verify that donations over $250 come from an organisation incorporated in Australia'.

58 The Australian Consumer Law is set out in schedule 2 of the *Competition and Consumer Act 2010*.

59 Senator Andrew Murray, Second reading of the Electoral Amendment (Political Honesty) Bill 2003, Senate debates, 27 March 2013: 10323.

60 Andrew Murray, 'Can Better Political Governance Give Australia an Improved Political Class?', *Agenda: A Journal of Policy Analysis and Reform* 16, no. 3 (2009): 63–67.

- how preselection of candidates is conducted
- the processes for the resolution of disputes and conflicts of interest
- the processes for changing the constitution
- processes for administration and management.

Party constitutions should also provide for the rights of members in specified classes of membership to take part in the conduct of party affairs—either directly or through freely chosen representatives—to freely express choices about party matters, including the choice of candidates for elections, and to exercise a vote of equal value with the vote of any other members in the same class of membership.[61] Party constitutions should be open to public scrutiny on the internet. The AEC should be empowered to investigate any allegations of a serious breach of a party constitution and be able to apply an administrative penalty.

Then there is section 44 of the Constitution. Section 44 has been a major problem for decades, but the costly and distracting mayhem during the last Parliament was unprecedented and annoyed Australians no end. The two most contentious paragraphs of section 44 state that 'a person who holds or is eligible for dual citizenship cannot nominate as a candidate and serve in Parliament' and 'an employee in the public sector must resign their employment to nominate for election'.[62] Section 44 has been the subject of multiple inquiries and recommendations,[63] but reform was unlikely until the issue of dual citizenship was clarified for all Australians. In 2002, the law changed to allow Australians to actively acquire foreign citizenship without losing their Australian citizenship.[64]

The resolution of section 44 problems was again addressed in 2018 by the Joint Standing Committee on Electoral Matters (JSCEM).[65] The committee reported that section 44 'is no longer operating to effectively ensure its principal intent of parliamentary integrity and national sovereignty' and that it 'acts as a deterrent for many Australians who are considering actively participating in politics'.[66] Shockingly, the committee estimated that over half of all Australians would have barriers to nomination[67] under section 44 paragraph (i), because 46 per cent of the

61 Senator Andrew Murray, amendments to Electoral and Referendum Amendment (Prisoner Voting and other measures) Bill 2004, Senate debates, 12 August 2004: 26576, parlinfo.aph.gov.au/parlInfo/search/display/displayw3p;query=Id%3A%22chamber%2Fhansards%2F2004-08-12%2F0448%22.

62 Joint Standing Committee on Electoral Matters (JSCEM), *Excluded: The impact of section 44 on Australian democracy* (Canberra: Parliament of Australia, May 2018): xxi.

63 Ibid., 8 [1.44] and 20 [2.29].

64 Ibid., 38 [3.21].

65 Ibid., xix.

66 Ibid., 104 [5.41–5.42].

67 Ibid., 49 [3.62], [3.64] and 50 [3.67].

population were born overseas,[68] and eight per cent would have barriers to nomination under paragraph (iv) because they work in the public sector.[69] That is an unpalatable breach of the principle of universal suffrage and cries out for reform.

The minimalist position would be to just delete paragraphs (i) and (iv) and leave the other three paragraphs and section 45 alone. However the committee 'believes that sections 44 and 45 should be repealed in their entirety, or amended to mirror section 34 and include 'until the Parliament otherwise provides'.[70] It wants a referendum to be held 'to once and for all fix the problems with section 44'.[71] The implication of the report is that a referendum should be held in this term of Parliament.

I was a member of JSCEM for twelve years and am on the record as supporting reform of section 44. Only one in five referendums succeeds. I am not a pessimist about either of the 2018 committee propositions quoted above passing, but given public distrust of the political class it would be wise for a draft bill to be drawn up beforehand, on at least a bipartisan and hopefully multi-party basis, so that Australians can see exactly what replacement legislation would propose as the barriers and qualifications for sitting as a member or senator, particularly with respect to the issue of conflicts of interest.

Concerning the Parliament, and in particular the Senate

The most significant and meaningful advance in recent years in enhancing the Senate's role has been the establishment of the independent Parliamentary Budget Office (PBO) in 2011. As with all major reforms, many years of campaigning preceded it. The PBO has brought more rigour, depth and accuracy into parliamentary and political discourse on budgets and costings. The Australian National Audit Office (ANAO) reported in 2014 that the PBO had 'made a significant contribution to levelling the playing field for all parliamentarians, as for the first time all have access to independent policy costing and budget expertise during all periods of the Parliamentary cycle'.[72] The ANAO found that the PBO had 'contributed to greater transparency about the fiscal and budgetary framework'.[73]

68 Ibid., 50 [3.67].

69 Ibid., 49 [3.64].

70 JSCEM, *Excluded*, 98 [5.6]. Section 45 is dependent on section 44 for its operation.

71 JSCEM, *Excluded*, x.

72 Australian National Audit Office (ANAO), *The Administration of the Parliamentary Budget Office*, Audit Report No. 36 (2013–14), 101.

73 Ibid., 117.

Our laws have four components:

- primary legislation
- delegated or subordinate legislation that flows from the primary legislation
- the bureaucratic rules, standards, practices and institutions that accompany its administration
- any jurisprudence that is provoked by the primary or delegated law.

The vital Senate Scrutiny of Bills and Regulations and Ordinances committees do an often effective job of scrutinising the first two components, and Senate references committees sometimes address the latter two at a later date.

It is not just the law that requires examination, but the cost it carries with it. The Senate's legislation committees, in considering estimates of proposed annual expenditure, perform an essential job in examining new appropriations and programs,[74] and at my initiative, the annual tax expenditures statement.[75]

Recently there has been a determination to address expenditure via delegated legislation, which is long overdue.[76] For significant long-standing legislation that has no termination date, and/or large annual expenditures, formal periodic review is needed. In my independent 2008 report undertaken at the request of the Finance Minister I recommended that the government include sunset clauses in all future standing appropriations.[77] This has not happened. There is a precedent for sunsetting. All legislative instruments, i.e. delegated legislation, are automatically repealed ten years after registration.[78] There are exemptions.[79]

Special (or standing) appropriations are monies that are appropriated by Acts of Parliament other than the annual appropriation Acts and which appropriations continue for longer than a financial year, sometimes in theory forever. Their accumulated aggregate quantum is very considerable. Approximately 70 to

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74 Stand-alone estimates committees operated between 1970 and 1994. Department of the Senate, *Senate Brief No. 5 – Consideration of Estimates by the Senate's Legislation Committees*, (July 2019), www.senate.gov. au/About_Parliament/Senate/Powers_practice_n_procedures/Senate_ Briefs/Brief05.

75 Senator Andrew Murray, Senate debates, 2 December 2003: 18692, parlinfo.aph.gov.au/ParlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansards%2F2003-1202%2F0125;query=Id%3A%22chamber%2Fhansards%2F2003-12-02%2F0208%22; Laing, ed., *Odgers*, 478.

76 Senate Standing Committee on Regulations and Ordinances, *Parliamentary scrutiny of delegated legislation* (Canberra: Department of the Senate, 3 June 2019): 111.

77 Murray, *Review of Operation Sunlight* (June 2008), 29–32 (recommendation 11).

78 *Legislation Act 2003*, s. 50.

79 Senate Standing Committee on Regulations and Ordinances, *Parliamentary scrutiny of delegated legislation*, 143 (recommendation 19).

80 per cent of all government expenditure is of this nature.[80] Insufficient scrutiny is given by the Parliament to the constant procession of bills containing standing appropriations and virtually none to those already in operation. Little consideration is given as to whether standing appropriations in particular bills are appropriate in the longer term. Such a practice may be administratively convenient, but for many reasons it is unwise not to revisit such laws.

Where the legislation itself does not have an appropriate independent review process, a manageable and workable selective review of significant ongoing legislation and its standing appropriation needs to be devised by the Senate or be delegated by it. It is doubtful that sunsetting all primary legislation appropriations at ten years would be prudent, but no appropriation should be forever either. Sunsetting to twenty five years might be the appropriate standard.

Bringing past legislation into the sunsetting regime would need to be staggered and attended to each year, starting with any standing appropriations still applying for the first twenty years of federation. It would take ten years to clean up most standing appropriations from the period between 1901 and 2001 if it were done on a 20, 20, 10, 10, 10, 10, 5, 5, 5, 5 year basis.

In theory the presence of political parties and members of the government in the Senate should fatally undermine the prospects of it acting effectively as an integrity institution. That is because the possibility of political parties gaining advantage or benefit, or of senators gaining personal advancement or benefit or higher office, or of using their position to advance partisan or personal interests, produce a conflict of interest.

At times political parties have been able to use their place in the Senate to advantage, but to assert that a demonstrated conflict of interest for individuals is common is wrong. In practice the record shows that over the decades, senators as a whole have done their duty and fulfilled their constitutional obligation and role. Resolving or managing actual and potential conflicts of interest is undoubtedly greatly assisted by regular elections, public and media scrutiny, transparency and accountability, the combativeness of opposing parties and the values and integrity of individual senators.

One area where conflict of interest has triumphed over integrity is in appropriations for the ordinary annual services of government. The Senate Appropriation and Staffing Committee has long railed against impropriety here. The Senate Scrutiny of

[80] Department of Finance, *Appropriations: Constitutional Background* (31 July 2019), www.finance.gov.au/resource-management/appropriations/rmg-100-guide-to-appropriations/appropriations-constitutional-background/.

Bills Committee has reported on appropriations bills since 2014, commenting that inappropriate classification continues to undermine the Senate's constitutional functions. Parties large enough to form government have united to ensure that new expenditure on new programs can still masquerade as 'the ordinary annual services of government'. In 2018, responding to unsuccessful amendments to the appropriations bills to reclassify policy items as new expenditure, the Coalition and Labor both restated their support for an executive compact that supports the current flawed classification.[81]

I am one among a number over the decades that have tried to deal with this matter but, apart from achieving some significant remedial housekeeping of redundant appropriations, I too failed.[82] In a 2017 paper, Anne Twomey took up the vexed question of an eternally slippery executive using authorised appropriations and expending them contrary to the purpose of the original proposal.[83] In my 2008 report to the Finance Minister,[84] I wrote:

> The constitutional imperative is governed by two Constitutional provisions: section 83 – appropriation must be made by law; and section 53 – restricting the powers of the Senate to amend bills imposing taxation or providing for the *ordinary annual services of the Government*. A corollary of these provisions is that an appropriation bill *not* for the ordinary annual services of the government may be directly amended by the Senate.
>
> In addition, section 54 provides that an appropriation bill for the ordinary annual services of the government must contain only those appropriations.[85]

I also wrote that the executive's abuse of these sections 'is a direct challenge by the executive to the unambiguous intention of the Australian Constitution'.[86]

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81 Senator Mathias Cormann, Senate debates, 19 March 2018: 1489, parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansards%2F1f259955-aacf-4c95-81a8-eff720fa60a3%2F0183;query=Id%3A%22chamber%2Fhansards%2F1f259955-aacf-4c95-81a8-eff720fa60a3%2F0184%22; Senator Don Farrell, Senate debates, 19 March 2018: 1489, parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2F1f259955-aacf-4c95-81a8-eff720fa60a3%2F0184%22.

82 Murray, *Review of Operation Sunlight*, 11–16 (recommendations 4 and 5).

83 Anne Twomey, 'Wilkie v Commonwealth: A Retreat to Combet over the Bones of Pape, Williams and Responsible Government', *AUSPUBLAW*, 27 November 2017, auspublaw.org/2017/11/wilkie-v-commonwealth/.

84 Murray, *Review of Operation Sunlight*, recommendation 37 and supporting text, 11–16.

85 Ibid., 11.

86 Ibid., 13, referring to section 53 of the Australian Constitution.

Having failed to achieve a satisfactory outcome to this impasse for decades, perhaps it is time for the Senate to resolve as a first step (using Spigelman's concepts) that appropriations are approved for the purposes and in the manner envisaged at the time of parliamentary authorisation and for no other purpose. However, the High Court decisions in *Wilkie v Commonwealth* and *Australian Marriage Equality Ltd v Cormann* in 2017 and in *Combet v Commonwealth of Australia* in 2005 mean that the only way to enforce compliance with the constitutional intent has to be through prescriptive legislation.[87] A Senate resolution will not suffice, but perhaps as a first step it will stiffen the Senate's back somewhat. On past form neither major party is likely to have sufficient integrity to contemplate a legislative solution.

The government response to part of my recommendations to the Minister of Finance noted that 'the Government will consider including formal review clauses in special appropriation legislation, requiring governments to review and report to Parliament on a periodic basis on the continuing need for the legislation and whether the existing focus of the legislation remains valid'.[88] A decade later it seems that no such review clauses have been included in new standing appropriation provisions.

In this paper I have tried to put the Senate in context as an institution, to give a broad perspective on the issues, and to propose a non-exhaustive list of advances that need to be made in the interests of integrity and democracy. The Senate's ongoing struggle to effectively serve Australia will and must continue.

[87] *Wilkie v Commonwealth and Australian Marriage Equality Ltd v Cormann* [2017] HCA 40*; Combet v Commonwealth of Australia* [2005] HCA 61.

[88] Australian Government, *Commonwealth Government response to Review of Budget Transparency*, (June 2008), 7, www.finance.gov.au/sites/default/files/official-government-response-to-murray-report_0.pdf.

Question — The Charter of Budget Honesty, which was introduced in 1998, used to include the structural Budget figures which give a true estimate of the state of the Budget. Prior to the 2007 election, the Parliamentary Budget Office put out a paper detailing the structural Budget figures which showed that the finances were not nearly as strong as the government claimed. Should the structural Budget figures be reinstated?

Andrew Murray — As I said human nature has not changed and does not change. Essentially those with money and power always want to hang onto it and do not want to give it up and do not like controls over what they can do with their money and power. That is the essential problem underlying all these debates. In my 2008 report [*Review of Operation Sunlight: Overhauling Budgetary Transparency*] I made a recommendation to the Joint Standing Committee on Public Accounts and Audit that they review the Charter of Budget Honesty because it continually needs to be updated to address the ways in which people will try and get round it, which is what you are referring to. Tackling that does not require a speech in the Parliament or a set of questions at Estimates because that will not solve the problem. You actually need to enforce it through principles or rules which are established through the Charter of Budget Honesty. If people are serious about that they have to take it to a committee which has standing, which can review it properly and can produce an outcome which will change matters permanently.

Question — I would like your views on the unrealised potential of the Senate to be not just a house of review but a house where debates can be highlighted and can help resolve longstanding and difficult issues like climate change. Both the Senate and the House of Representatives declined to pass resolutions stating that there is climate change emergency. Can the Senate help lift public debate on such difficult issues?

Andrew Murray — The short answer is yes. I refer you to the great American Liberal philosopher John Rawls who I quoted as outlining the importance of reasoned argument in resolving issues of great conflict and controversy. The difficulty we have with great debates, such as the matter to which you refer, is that there are those at either ends who are so impassioned by their cause that they exaggerate the issues and therefore lose the confidence of the people in what they say. So the case for reasoned argument and for debate which informs is one in which the Senate can help.

It may be an odd transference but I refer you to the reports the Senate did on children in institutions. Long before that, there were attempts to push those issues under the carpet, to suppress those matters. The Senate inquiries brought forward reasoned arguments, if you like, about what had happened and identified the issues associated with and consequences of institutionalisation. This eventually led to the Royal Commission into Institutional Responses to Child Abuse on which I sat.

The Senate can take matters of great importance to the Australian people or of great importance to Australia and can indeed make a huge difference. It depends on the nature of the people in the Senate and on their capacity to persuade, but I think if we can improve the variety and range of senators we might see an advance such as you want.

Question — You spoke of the enormous difficulty you had in conducting an audit of travel entitlements for parliamentarians. Why has it been so difficult to achieve a system of rules and regulations which governs and prevents the abuse of travel by federal politicians? Many years ago a Western Australian senator came to Queensland to give an address to a party that was not his own but on a topic which meant a lot to him. He told the audience he was not really entitled to have his trip paid for by the taxpayer but because the rules were so loose he did it because everyone else did.

Andrew Murray — I come back to a central theme—human nature does not change. So where people have a set of rules and arrangements that benefit them or benefit the institutions they serve, they do not want that interference. It interferes with their freedom of operation—and by the way there is a very interesting thesis by a political scientist called Joo-Cheong Tham who says that Australia does not suffer much individual corruption in public life but there is institutional corruption. We all know that self-regulation is dangerous and wherever that applies you have difficulties. That is why legislation has been introduced to remove self-regulation.

It is no accident that of all the mighty forces that exist in Australia—and I use the word mighty deliberately because politics of course governs our lives, our laws, our policy, the funds we raise and the funds we spend—politics is the least constrained by regulation, law and control. It is why I attend to the issue of political governance. It just requires long-term campaigning by those who want integrity, which by the way includes many people within the political parties themselves. There are plenty of people who would argue exactly as you argue—for more integrity on these matters—but the few always affect the many. This is another point I make about human nature, it does not matter if you are a judge or a gravedigger there is always a percentage of humanity who will do the wrong thing. Three or five politicians who do the wrong thing affect the other two hundred and twenty-two who do not.

Question — I have three questions. Firstly, if the United Kingdom ignores the outcome of the Brexit referendum what will this mean for Australia? Secondly, at the end of the day who is the ABC answerable to when they can influence an election quite dramatically? Thirdly, I would like to hear your comments on free speech.

Andrew Murray — Your first question is one I cannot answer. Just briefly, I do not think democracy should only express itself in one way, namely through elections.

The Swiss very effectively use referenda in defined circumstances, and plebiscites are an expression of the people's voice without being attached to a legislative intention. So I do support plebiscites and referenda on a popular basis. By the way, Australia is well-served by having compulsory attendance at the polls—if Britain had had compulsory attendance at their polls I wonder if the result of their plebiscite would have been different.

On the ABC, I simply say a national broadcaster has only two reasons to exist—either for propaganda purposes or because there is market failure. So you must come to your own view surrounding that. There is market failure in certain respects in the communications market, and there is a need for propaganda, namely with respect to our voice in the broader Pacific, but those are the only two reasons you should ever have a national broadcaster.

The third matter, freedom of speech, well here we are! I am all for it. I cannot abide the attacks on academic freedom and free speech. One of the very best decisions that Australians made way back in the forties and fifties was not to ban the Communist Party because those idiots could only be exposed if they were given more and more licence to speak freely. Do not supress voices you disagree with. Let them speak because the populace at large will just see them for the fools they are.

Enriching Democracy—Achievements of the Senate Crossbench and Backbench in the 45th Parliament*

Maureen Weeks

Introduction

The 45th Parliament was like no other—which is true of all parliaments in western democracies. Each carves its own place in the parliamentary history of its country.

For many the distinguishing feature of the Senate during the 45th Parliament is the number of senators who did not serve their full term. Of the 76 senators elected at the 2016 double dissolution election, at least nineteen did not.[1] Not all left on their own volition, as ten were held by the High Court to be ineligible to serve as senators under section 44 of the Constitution.[2] Not all disqualifications related to citizenship—other provisions of that section were adduced in relation to former Senator Culleton (bankruptcy, and convicted and under sentence) and former Senator Day (office for profit under the crown). At least nine senators chose to leave, creating casual vacancies.[3] Despite such disruption, the remaining senators continued to pursue their agendas, through legislative and other means.

Background

The Senate's legislative powers, which are set out in the Constitution, are the same as those of the House of Representatives, with the exception of legislative proposals relating to appropriation and taxation. Section 53 (Powers of the Houses in respect of legislation) provides:

> Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate. But a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services under the proposed law.

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* A version of this paper was presented at the Australian Study of Parliament Group Conference, Parliament House, Canberra, 2–4 October 2019.

1 If the two senators who were appointed by the High Court and resigned are included, then 21 senators did not serve their term.

2 Sitting as the Court of Disputed Returns and acting on referrals from the Senate.

3 If the two senators who were appointed by the High Court and subsequently resigned are included, then 11 senators resigned.

> The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government.
>
> The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people.
>
> The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.
>
> Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws.

Section 51 lists those matters which fall under the Commonwealth Parliament's jurisdiction. Neither section 51 nor section 53 makes any recommendation as to the status of senators exercising these legislative powers. The Senate itself has placed no prohibitions on any senators pursuing a legislative outcome to achieve their policy positions. Indeed, since the beginning of 2011 the Senate's standing orders specifically provide for the consideration of private senators' bills.[4] Although the 2011 amendment provided for the specific consideration of bills, there have always been opportunities for non-executive senators to introduce and have bills considered.[5] The 2011 amendment increased these opportunities by virtually doubling the available time each sitting week and quarantining time for debate on private senators' legislation. In practice the standing order has operated so that the available time each year is divided proportionately between non-government parties and independent senators. However, there seems to be an unofficial agreement that one of the periods each year will be allocated to the consideration of a government senator's private bill.

While time for the consideration of private senators' bills is incorporated in the Senate's routine of business, the amount of time available and how that time is apportioned imposes limitations on any backbench senator in the prosecution of their legislative agenda. Arguably if you are a member of a large party in the Senate the time available is proportionally greater than that of a single independent senator.

[4] Private senators' bills are those that are introduced by senators who are not acting as ministers, including backbench government senators.

[5] In June 1901 the Senate adopted a sessional order that provided for the consideration of both government and general business. General business is that business initiated by non-executive members, excluding business of the Senate matters.

However, your agenda is notionally in competition with those of other senators in your party. It is therefore rare for any private senators' bills to enter the statute book.

This paper looks at the fate of three legislative proposals from non-executive senators, all of which achieved some success, and examines how that success was achieved and whether these successes should be regarded as disruptions.

The first of the bills to be considered is the sixteenth private senators' bill to receive Royal Assent since federation. Introduced by a backbench government senator, the bill passed both the Senate and House of Representatives and was assented to on 8 December 2017.

Marriage Amendment (Definition and Religious Freedoms) Bill 2017

The Marriage Amendment (Definition and Religious Freedoms) Bill 2017 was initiated in the Senate, introduced on a motion sponsored by Senator Dean Smith and eight other non-executive senators on the day the results of the government's postal vote were announced (see below for further discussion of the postal vote).[6] The motion not only provided for the introduction of the bill but also sequestrated periods in the routine of business to ensure that debate was not truncated—all senators who wanted to speak would have the opportunity to do so. The vote on the bill was to be a conscience vote and the two hours and twenty minutes allocated to the consideration of private senators' bills under standing orders was not going to be long enough to give every senator an opportunity to speak. In asking that the motion be considered as a formal motion,[7] the then Attorney-General, Senator George Brandis, indicated that allocating the government's legislative time to debate 'delivers on the Prime Minister's promise to facilitate such debate in the event of a yes vote'.[8]

The yes vote the Attorney-General was referring to was the result of the government postal vote. It had been put in place when the Senate had refused to reconsider the Plebiscite (Same-Sex Marriage) Bill 2016. The bill was to establish a legislative framework for a compulsory vote in a national plebiscite that would ask Australians 'Should the law be changed to allow same-sex couples to marry?'. It had been considered and passed by the House of Representatives in October 2016, but had failed to pass the Senate in November of that year. The government's attempt to resurrect the bill by proposing to restore it to the Senate's agenda (the *Notice Paper*) was defeated on 9 August 2017.

6 Marriage Amendment (Definition and Religious Freedoms) Bill 2017, www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s1099.

7 That is considered without amendment or debate and finalised immediately.

8 Senator George Brandis, Senate debates, 15 November 2017: 8557.

The postal vote utilised an existing legislative base—the *Census and Statistics Act 1905*. On 9 August 2017 the Treasurer issued a Direction to the Australian Statistician requiring the Bureau of Statistics to collect statistical information from all Australians on the electoral roll (on a voluntary basis) as to their views on whether or not the law in relation to marriage should be changed to allow same-sex couples to marry.[9] It provided for the results to be published on or before Wednesday, 15 November 2017. On the Wednesday morning the results were announced and that afternoon the bill was introduced, with the debate adjourned to the next sitting day.

The seamless transition from the announcement of the result, confirming that 61.6 per cent of voting Australians supported the legislative change, to the introduction of the bill belies the carefully choreographed lead-up to that day.

Since 2006 the Notice Papers of both houses had contained iterations of bills which would give recognition to same-sex marriage. On the day Senator Smith's bill was introduced, the Senate's *Notice Paper* already listed three private senator's bills dealing with the matter. Two legislative outcomes were sought in the existing bills—altering the definition of marriage to be the union between two people and the recognition of same-sex marriages that had been celebrated overseas. While these were broadly the objectives of the Smith bill, it took a more mature legislative approach resulting in more sharply defined outcomes.

Such an approach was made possible, not just by the legislative drafting that had preceded it, but through the committee inquiries that took place on previous bills. Perhaps the most important inquiry in terms of shaping the Smith bill was the work of the Senate Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill which reported in February 2017.

The committee was established in November 2016 to examine the exposure draft of a bill that had been released by the government to inform its proposed plebiscite. Following the failure of the plebiscite bill to pass the Senate earlier in the month, the select committee was to consider, amongst other matters, 'potential amendments to improve the effect of the bill and the likelihood of achieving the support of the Senate'.[10] Another focus of the inquiry was 'the nature and effect of proposed exemptions for ministers of religion, marriage celebrants and religious bodies and organisations'.[11]

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[9] Census and Statistics (Statistical Information) Direction 2017, dated 9 August 2017 [F2017L01006], www.legislation.gov.au/Details/F2017C00661.

[10] *Journals of the Senate*, 30 November 2016: 712.

[11] Ibid.

The committee had eight senators as members, half drawn from the government's backbench and the other half divided equally between the opposition benches and the crossbench. It also provided for other senators to participate in the inquiry without being full committee members. Committees are often defined by the members and the approach taken by the Chair. This was the case in this inquiry where the Chair, Senator David Fawcett, indicated in the Chair's forward to the report:

> The committee considers that this inquiry into the Exposure Draft…provides an opportunity to consider much of this evidence in a more collegiate and coordinated manner and to identify where there may be areas of agreement, and to better understand and narrow those areas where there are differences of approach.[12]

The report was carefully calibrated to advance debate. The committee made no recommendations but identified areas of consensus and areas for future discussion. In doing so, it expressed its intention that:

> this body of evidence will prove a valuable and instructive foundation, identifying the scope of issues to be addressed by a parliament considering legislative changes to the definition of marriage in this area.[13]

Senator Smith, a member of the committee, used the committee's work to instruct his bill, which departs from the exposure draft in line with the committee's conclusions. Participating in the committee's inquiry also gave him the opportunity to tease out issues and test his ideas with witnesses and refine his views on how to frame an acceptable bill. This work was reflected in the drafting and the negotiations undertaken which resulted in eight co-sponsors to his motion for the introduction of the bill. These sponsors were from across the political spectrum, including the leaders of the opposition and the Australian Greens, other government backbenchers as well as crossbench senators.

The statement made by the Leader of the Australian Greens, Senator Richard Di Natale, just prior to the bill's introduction gives an indication of the compromises that had been negotiated to achieve a draft of a bill primed for success:

> Let me make it very clear: the Greens made significant concessions in ensuring that a cross-party bill that got widespread support would be able to be presented to this chamber. We engaged in that committee process in

[12] Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill, *Report* (Canberra: Department of the Senate, February 2017): ix.

[13] Ibid.

> good faith, knowing that we would have to give some ground if this parliament was to support it. This bill is not the bill the Greens would have introduced if we were proposing legislation ourselves.[14]

Despite this negotiation and perhaps because of the resulting compromises, the Senate considered a range of amendments to the bill proposed by a number of senators, including a Greens senator. Some of the amendments were an attempt to refocus the terms of the bill, particularly in how religious beliefs were accommodated. The only successful amendments were those posed by the then Attorney-General, which can generally be described as technical and consequential amendments—tidying up the statute book.

Senator Smith's motion to amend the Senate's usual routine of business included extended hours and a provision that the end of the sitting week would be determined by the conclusion of the Senate's proceedings on the bill. However, this did not eventuate as the bill completed all stages and passed the Senate with a day of the sitting fortnight remaining, during which the Senate returned to its normal routine of business.

Not all private senators' bills that pass the Senate are granted the extended consideration of the Smith bill, although this is more likely when the main parties allow conscience votes. Usually debate is limited to the time provided in the routine of business. It is rare in this period of business for any question to be resolved by the Senate. Debate fills the allocated time and the final speaker is interrupted by the Senate reaching the time nominated for the next item of business. However, the next case study proved to be one of the exceptions to that rule.

Treasury Laws Amendment (Axe the Tampon Tax) Bill 2018

The tampon tax bill, introduced by Senator Janet Rice in May 2018, sought to remove the GST from sanitary products by amending the *A New Tax System (Goods and Services) Tax Act 1999*.

This Act is one of the Acts that established a goods and services tax, a broad based tax initially envisaged as applying to all goods and services in Australia. However, the price of the passage of the bills was a narrowing of the base with exemptions provided on a range of goods and services. The revenue raised by the Commonwealth levying the tax is distributed between the states and territories in accordance with the *Intergovernmental Agreement on Federal Financial Relations*.

[14] Senator Richard Di Natale, Senate debates, 15 November 2017: 8559.

Under the Agreement, provision was made for further amendments to either the base or the rate of the tax (generally 10 per cent) to be made with the unanimous agreement of the states and the endorsement of the Commonwealth Government of the day.[15]

The tampon tax bill sought to achieve GST free sanitary products by inserting a new definition (sanitary products) in the Act and providing that the supply of these products was GST free.[16] Senator Rice, in speaking to the bill, acknowledged the requirements placed on the government by the Intergovernmental Agreement and argued the Commonwealth should lead the way:

> The only states that currently do not support axing the tax all have Liberal governments. The Prime Minister needs to show leadership, bring the remaining states into line, and support this Greens bill to axe the tampon tax.[17]

During her brief speech, Senator Rice also indicated that she had written to the 'state and territory treasurers to urge their support for removing this unfair tax'.[18] She also indicated that the work to remove GST on sanitary items had been going on since the 'introduction of the tax in 2000 when a petition with 10,355 signatures was lodged. She reported the shift in support for the removal of the GST, indicating the most recent petition on the matter had over 127,000 signatures.[19]

A government backbench senator responded, arguing the importance of maintaining a broad revenue base to states and territories as it is determinative of how much money they get to undertake their responsibilities. Senator Amanda Stoker argued that it was not only the Commonwealth that wanted to maintain the broad revenue base, but also the states and territories, reporting that at the recent meeting of state and territory treasurers 'not a single state or territory raised this as an issue with the Treasurer and not one of them indicated that they as a jurisdiction had changed their point of view'.[20] In 2015 the government wrote to the state and territory treasurers proposing the removal of the GST on sanitary products, but did not receive unanimous agreement.[21]

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15 Intergovernmental Agreement on Federal Financial Relations, section A14 of Schedule A, www.federalfinancialrelations.gov.au/content/intergovernmental_agreements.aspx.

16 Treasury Laws Amendment (Axe the Tampon Tax) Bill 2018, www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s1128.

17 Senator Janet Rice, Senate debates, 18 June 2018: 2993.

18 Ibid.

19 Ibid.

20 Senator Amanda Stoker, Senate debates, 18 June 2018: 2995.

21 Lauren Cook, 'Removing GST on Feminine Hygiene Products', *Flagpost*, (Parliamentary Library, 29 November 2018), www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2018/November/Removing_GST_on_feminine_hygiene_products.

Debate on the bill lasted half an hour before an opposition senator stood and moved to close the debate, asking that the question be put. A successful response to that question was rapidly followed by the succession of questions required to complete the Senate's proceedings on the bill and it was passed. Accordingly, it was sent to the House of Representatives for its consideration.

The bill was duly introduced into the House on the reporting of the message, but it was not debated and finally lapsed from the House's *Notice Paper* at the end of the 45th Parliament. However, at the October meeting of state and territory treasurers there was unanimous agreement to remove the GST from 'feminine hygiene products' and, following a consultation period, the Minister for Health issued the 'A New Tax System (Goods and Services Tax) (GST-free Health Goods) Determination 2018' which made the necessary amendment.[22]

The use of a determination to make various health goods GST free under section 38(47) of the A New Tax System (Goods and Services) Tax Act was not unprecedented. In fact, the then Senator Leyonhjelm asked a series of questions at the Additional Estimates hearing in February of 2018 about extending existing determinations to cover sanitary products. The Treasury officers present were unsure of the reasons why the minister could not simply add other items to the existing determinations and agreed to take the question on notice.[23]

Senator Leyonhjelm's suggestions as to how to remove the GST from sanitary products was not the first attempt to do so. In June 2017 another Greens senator moved an unsuccessful amendment to the Treasury Laws Amendment (GST Low Value Goods) Bill 2017.[24] Senator Larissa Waters' amendment was very similar to the terms of her colleague's bill but was proposed as an additional amendment to a government bill amending the A New Tax System (Goods and Services) Tax Act. Proposing amendments to a government bill is a tried and tested means to further the legislative proposals of opposition or crossbench senators and can sometimes result in success, as was the case for the next proposition—amendments to the Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2018.

22 Ibid.

23 Senator David Leyonhjelm, *Committee Hansard*, Senate Economics Legislation Committee, 28 February 2018: 139.

24 Treasury Laws Amendment (GST Low Value Goods) Bill 2017, www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5819.

Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2018

The Home Affairs Bill was a government bill introduced into the House of Representatives in March 2018. The bill addressed a number of migration and customs issues including the return of a non-citizen to Australia.[25]

The Selection of Bills Committee considered the bill in Report No. 5 of 2018, and recommended that no committee inquiry was required, suggesting the bill was unremarkable.

Following its introduction into the Senate on 20 August 2018 the bill was not considered again until the last sitting week of the parliamentary year. On 4 December 2018, when debate on the second reading resumed, the opposition announced that an apparently routine bill was about to become 'a little bit more complicated':

> as I understand it, there is going to be a proposal in the committee stage of this bill, by a Greens senator, to link measures from members of the House of Representatives crossbench to this bill. As a consequence, there may well be further amendments moved by the Labor Party, given the change in circumstances.[26]

The measures Senator Kim Carr was referring to were those in a bill before the House of Representatives which were introduced by five independent and crossbench members. That bill, which became known as the Medevac bill, provides for the temporary transfer to Australia of transitory persons and their families held on Manus Island or Nauru if they are assessed by two or more treating doctors as requiring medical treatment. Rather than begin the legislative journey in the House of Representatives as a bill, these measures were repackaged as amendments to be moved in the Senate to the government's bill.

Later that day, a notice of motion was lodged in the names of a Greens senator and an independent senator proposing to order the government's business by granting precedence to the government's Home Affairs bill over all other business and imposing a limitation on the debate, effectively setting in place a guillotine. When the notice was moved the next day it was amended to alter the time at which the bill would be given precedence and the time that the questions on the remaining stages of the bill were to be put to the Senate. In his comments the previous day, Senator Carr had indicated that the opposition would need time to have their proposed amendments drafted and this may explain the revised times and date. The amendment which

[25] Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2018, www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6069.

[26] Senator Kim Carr, Senate debates, 4 December 2018: 9269.

revised the restricted time for the debate on the bill was agreed and the motion was also successful—both questions were resolved without division.

Any amendment to the bill would need to go to the House of Representatives for its consideration and the revised timetable for the bill left a very narrow margin for that to occur in what remained of the 2018 sittings. The resolution required the Home Affairs bill to be called on at 12.45 pm on Thursday and the remaining questions of the bill to be put at 1.50 pm. Thursday was the last scheduled day of the 2018 sittings.

At the appointed time the bill was called on and debate resumed. In the intervening time a raft of amendments had been circulated, both to the motion for the second reading of the bill and to the bill itself. As the Senate proceeded to systematically consider the amendments, which included amendments to the Medevac amendments and government amendments, Question time and other business vanished. Among other matters, the government's amendments sought to insert additional schedules to the Home Affairs bill, which were other government bills recast as amendments. The proceedings were protracted as various senators requested that the questions on the amendments be divided and moved that standing orders be suspended. Finally, after the House of Representatives had adjourned for the day, the bill was passed with only the amendments relating to the medical evacuations being agreed to.

The amended Home Affairs bill spent the summer break languishing between the two houses. When the message was reported to the House at the beginning of the 2019 sittings the government challenged the constitutionality of certain amendments, citing limitations upon the financial powers of the Senate. The Speaker left the matter to the House, which agreed to the Senate's amendments with further amendments, including one intended to address the constitutional point. The various votes on the bill in the House were carried with opposition members and most non-aligned members in the majority, 75 votes to 74.

The Senate agreed to these amendments in a process put in place on the motion of the opposition that allowed for a single question to be resolved—'That the amendments made by the House be agreed to'. It was carried 36 votes to 34 and the normal processes for assent were followed, with the bill receiving assent on 1 March 2019. However, after the 18 May election the government sought to remove the Medevac amendments from the *Migration Act 1953*, introducing the Migration Amendment (Repairing Medical Transfers) Bill 2019 into the House in July. The bill has passed the House and is under inquiry by the Senate's Legal and Constitutional

Affairs Committee. Therefore, the ultimate fate of the Medevac amendments is currently unknown.[27]

The Senate's role

In his last lecture in the Occasional Lecture series, Harry Evans reminisced on his years as Clerk and reflected on the culture of independence of the Senate. He maintained that the culture had been carefully 'nurtured by long periods of non-government majorities and lack of government control of the chamber' since federation. Concern was expressed that that 'independence is now entirely dependent upon a non-government party majority' and that the Australian Parliament 'is under a degree of domination that would not be tolerated elsewhere'.[28] It is that culture of independence that prevents the Senate becoming a rubber stamp under executive dominance.

In a representative democracy scrutiny of the executive, its policies and legislation is a function of the Parliament. Such scrutiny leads to greater accountability and transparency, resulting in better outcomes for those the Parliament serves—the Australian people. It is a critical function and one that is generally exercised in the Australian federal sphere by the Senate as a house of review. However, reacting to the executive's policies and administration, while significant, is also a limited contribution to the democratic process. The Senate is an elected body with legislative functions—it is difficult to argue that exercising those functions should be viewed as disruption, yet they read as such because of expectations as to how our government-dominated parliaments typically function. None of the case studies was innovative in its approach, all relied on precedent.

All three case studies, each a very different story, enjoyed success because the Parliament supported the proposals. The passage of the Smith bill included the votes of many on the government's frontbench in both houses. It was considered during time routinely spent debating the government's agenda and with the acknowledgment of the Attorney-General that this was to facilitate its consideration. The removal of the GST on sanitary products required the executive to make the amending determination, after undertaking the requirements of the Intergovernmental Agreement. The Senate's Medevac amendments were successful in the House, despite the government's opposition, because of the support of the majority. Without this support none of the proposals would be law.

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[27] Since this paper was written, the Senate has passed the Migration Amendment (Repairing Medical Transfers) Bill 2019, with the government securing crossbench support for the legislation. The bill received Royal Assent on 4 December 2019.

[28] Harry Evans, 'Time, Chance and Parliament: Lessons From Forty Years', *Papers on Parliament* 53 (June 2010): 5 and 7.

The journey to achieve that success highlights how the Senate and the work of senators contribute to the democratic process. Senator Smith used his participation in the select committee process to engage with the community, to test ideas, to tease out solutions so that the bill he developed found acceptance with the majority, despite the reservations expressed both in debate and in the amendments proposed to the bill.

The solution of an amending determination to remove the GST on sanitary products was voiced in an estimates hearing, as Senator Leyonhjelm queried why it could not be adopted. The departmental officers were unable to name the problem but undertook to take the question on notice and therefore explore the issue. That exploration was also aided by Senator Rice's bill offering a way forward and both influenced the outcome.

With the Home Affairs bill the crossbench succeed in importing amendments initially introduced in a private members' bill and worked with the opposition to have the proposal become law. The constitutional argument mounted by the government was met in the House by the opposition proposing amendments that would dispose of the issue. The opposition also worked with the crossbench to facilitate the bill's final consideration in the Senate.

The Senate may test the government's patience, but its diverse benches can enrich rather that disrupt democracy.

Wilkie v Commonwealth and Parliamentary Control of Appropriations

Glenn Ryall

In September 2017 the High Court rejected two challenges to the legality of the Australian Marriage Law Postal Survey in *Wilkie v Commonwealth*. From the Parliament's perspective this case was significant as it canvassed important issues relating to the Parliament's role in appropriating money, particularly for urgent expenditure. This paper will briefly outline Parliament's role in making appropriations and then consider the significance of the case to the extent that it emphasised that it is largely the role of the Parliament (and not the courts) to exercise control over appropriations. The paper concludes with a discussion of some options to increase parliamentary oversight of the appropriation mechanism known as the Advance to the Finance Minister (the Advance).

Background

The proceedings challenged the lawfulness of measures taken by the Commonwealth Government 'to direct and to fund the conduct of a [voluntary] survey of the views of Australian electors on the question of whether the law should be changed to allow same-sex couples to marry'.[1] These measures followed the defeat in the Senate[2] of a government bill—the Plebiscite (Same-Sex Marriage) Bill 2016—which would have authorised the holding of a compulsory plebiscite and appropriated the funds to pay for it.[3]

The plaintiffs' arguments

While the challenges also raised issues such as standing and the scope of the functions of the Australian Bureau of Statistics (ABS), of particular relevance to the Parliament was the plaintiffs' challenge to the mechanism used to fund the survey—a determination made under section 10 of *Appropriation Act (No. 1) 2017–2018*. This determination (known as an Advance to the Finance Minister determination) provided funding of $122 million to the ABS to enable it to conduct the survey.[4]

1 *Wilkie v Commonwealth* (2017) 263 CLR 487, 508 [1].

2 *Journals of the Senate*, 7 November 2016: 400–401; *Journals of the Senate*, 9 August 2017: 1620–1621.

3 Anne Twomey, 'A Tale of Two Cases: Wilkie v Commonwealth and Re Canavan', *Australian Law Journal* 92, no. 1 (2018): 17.

4 *Wilkie v Commonwealth* (2017) 263 CLR 487, 514–15 [28]. *Advance to the Finance Minister Determination (No. 1 of 2017–2018)*, www.legislation.gov.au/Details/F2017L01005.

The plaintiffs sought to challenge the validity of both section 10 itself and the Advance determination made under it.

The Advance to the Finance Minister

Section 10 of *Appropriation Act (No. 1) 2017–2018* is a standard Advance to the Finance Minister provision. An Advance provision is included in each annual Appropriation Act to enable the Finance Minister to allocate additional funds to entities for expenditure in the relevant year. Provisions of this nature have been included in appropriation bills since 1901.[5] The text of these provisions has remained unchanged since the enactment of *Appropriation Act (No. 1) 2008–2009*, as has the total amount that can be allocated under them ($675 million).[6]

A significant element of the case related to the interpretation of subsection 10(1) which makes it a precondition to the application of the remainder of section 10 that:

> the Finance Minister is satisfied that there is an urgent need for expenditure, in the current year, that is not provided for, or is insufficiently provided for, in Schedule 1…because the expenditure was unforeseen until after the last day on which it was practicable to provide for it in the Bill for this Act before that Bill was introduced into the House of Representatives.[7]

If this precondition is met then the Finance Minister may make a determination to allocate additional funds to an entity listed in Schedule 1. The effect of such a determination is that the budget figures for an entity are increased so that an additional amount is included in the appropriation for the relevant entity. Importantly, subsection 10(4) exempts Advance determinations from parliamentary disallowance.

Breadth of use of the Advance

While the Advance to the Finance Minister is a relatively obscure mechanism, its significance is emphasised by the breadth of its use. As outlined below, since 2008–09 the Advance has been used 37 times to allocate over $1.3 billion in additional funds.

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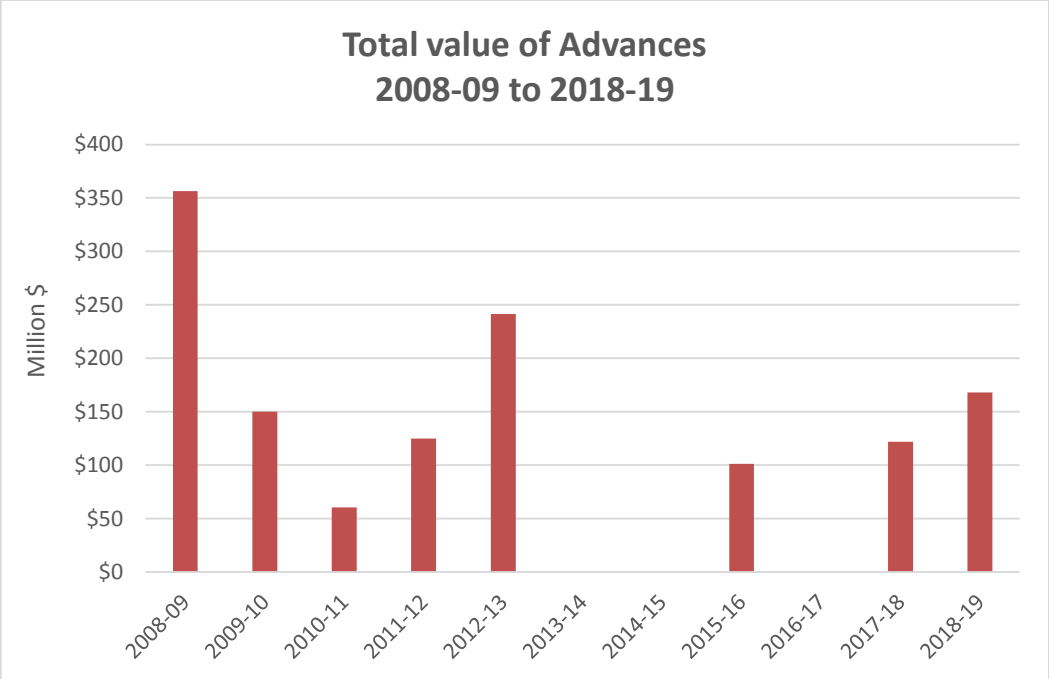
5 *Wilkie v Commonwealth* (2017) 263 CLR 487, 526 [73].

6 Comprising a cap of $295 million in the appropriation bill for the ordinary annual services of the government (Appropriation Bill No. 1) and $380 million in the appropriation bill for non-ordinary annual services appropriations (Appropriation Bill No. 2). However, it is standard practice for the amount available to be allocated under the Advance to the Finance Minister provisions in a financial year to be replenished by Appropriation Acts No. 3 and No. 4. See the Appendix for the text of the Advance provisions from Appropriation Bill (No. 1) 2019–2020 and Appropriation Bill (No. 2) 2019–2020.

7 *Wilkie v Commonwealth* (2017) 263 CLR 487, 533 [97].

Year	No. of Advances	Total value of Advances
2008–09	9	$356,354,739
2009–10	6	$150,240,462
2010–11	5	$60,590,000
2011–12	7	$124,822,580
2012–13	5	$241,466,895
2013–14	-	-
2014–15	-	-
2015–16	1	$101,237,000
2016–17	-	-
2017–18	1	$122,000,000
2018–19	3	$167,939,000
Total	***37***	***$1,324,650,676***



The Senate Standing Committee for the Scrutiny of Bills (the Scrutiny of Bills Committee) has regularly commented on the Advance provisions, noting that they

represent a significant delegation of legislative power to the executive.[8] To demonstrate the breadth of circumstances in which the Advance provisions have been used, in 2017 the committee published details of a selection of Advances issued since 2006–07:[9]

Year	Purpose	FRL No.	Amount
2006–07	To meet commitments in relation to payments to the Australian Broadcasting Corporation to provide Australian television in the Asia Pacific region	F2006L02669	$8,989,493
2007–08	To cover funding obligations for the Mersey Community Hospital, Tasmanian Health Initiatives, Year of the Blood Donor measure and ongoing blood and organ donation services	F2007L04155	$48,760,078
2008–09	To enable payments to local governments through the Regional and Local Community Infrastructure Program	F2009L00712	$206,500,247
2009–10	To enable the payment of an additional contribution to the International Monetary Fund Poverty Reduction and Growth Trust	F2010L00149	$29,675,000
2010–11	To cover payments for the 2011–12 budget measure 'Supporting football in the lead up to the 2015 Asian Cup'	F2011L01128	$7,500,000
2011–12	To enable the Department of Regional Australia, Local Government, Arts and Sport to meet a shortfall of funding for expenditure relating to grants to arts and culture bodies	F2012L01523	$6,000,000
2012–13	To enable the Department of Health and Ageing to make payments through the Local Hospital Networks Special Account to Victorian Local Hospital Networks	F2013L00558	$107,000,000
2015–16	To enable the AEC to implement the electoral reforms in the *Commonwealth Electoral Amendment Act 2016*, as well as to bring forward election preparations for the 2016 Federal Election	F2016L00673	$101,237,000
2017–18	To facilitate a voluntary postal plebiscite for all Australians enrolled on the Commonwealth electoral roll, conducted by the Australian Bureau of Statistics	F2017L01005	$122,000,000

[8] Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest*, no. 4 of 2019 (Canberra: Department of the Senate, 31 July 2019): 6–8.

[9] Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest*, no. 12 of 2017 (Canberra: Department of the Senate, 18 October 2017): 97–98.

Most recently, the committee noted that in 2018–19 the Advance provisions were used to allocate funding for:

- an expansion of the Drought Communities Program ($75,379,000)[10]
- the re-opening of the Christmas Island Detention Centre following the passage of the *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019* ($52,560,000)[11]
- a payment to South Australian Government to assist councils in South Australia to upgrade and maintain their local road network ($40,000,000).[12]

Comprehensive details about the use of the Advance provisions since 2000–01 are available on the Department of Finance website.[13]

Parliament's role in making appropriations

Before examining the significance of *Wilkie* for the parliamentary control of appropriations it is useful to briefly consider what is meant by an appropriation generally and to outline Parliament's role in making them.

What is an appropriation?

At common law

In the English constitutional tradition, an appropriation is an Act by which Parliament authorises the expenditure of moneys of the Crown.[14] This need for an appropriation to authorise expenditure of public moneys by the executive reflects a well-established common law rule that moneys of the Crown cannot be expended except under authority of an Act of Parliament. The rule 'arose out of the English Parliament's insistence that it rather than the sovereign should decide how revenue raised by taxation should be spent'[15] and was clearly set out by Viscount Haldane in *Auckland Harbour Board v The King*:

> it has been a principle of the British Constitution now for more than two centuries…that no money can be taken out of the consolidated Fund into

[10] Advance to the Finance Minister Determination (No. 1 of 2018–2019) [F2018L01816].

[11] Advance to the Finance Minister Determination (No. 2 of 2018-2019) [F2019L00577].

[12] Advance to the Finance Minister Determination (No. 3 of 2018-2019) [F2019L00852]; Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest*, no 4 of 2019 (Canberra: Department of the Senate, 31 July 2019): 6–8.

[13] www.finance.gov.au/publications/advance_to_the_finance_minister/.

[14] Enid Campbell, 'Parliamentary Appropriations', *Adelaide Law Review* 4, no. 1 (1971): 145 and 153.

[15] Ibid., 145.

> which the revenues of the State have been paid, excepting under a distinct authorization from Parliament itself. The days are long gone by in which the Crown, or its servants, apart from Parliament, could give such an authorization…Any payment out of the consolidated fund made without Parliamentary authority is simply illegal and ultra vires…[16]

In Australia

In the context of Australia's written constitution a clear distinction is drawn between an appropriation and the substantive power to spend public moneys.[17] Section 81 of the Constitution provides that:

> all revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution.

Section 83 stipulates that 'no money shall be drawn from the Treasury of the Commonwealth except under an appropriation made by law'.

These provisions mean that an appropriation of money in the Australian context is 'simply the earmarking or segregating of it from the Consolidated Revenue Fund'[18]—it does not provide the executive with a substantive power to spend the appropriated moneys. This is because the 'substantive power to spend the public moneys of the Commonwealth is not to be found in s 81 or s 83, but elsewhere in the Constitution or statutes made under it'.[19]

The role of Parliament generally

Despite the limited function of the appropriation process itself as an earmarking exercise, it is nonetheless very important as it ensures that the Parliament maintains oversight over the expenditure of public moneys.[20] Of particular importance in this regard is the language of sections 56 and 81 of the Constitution which mean that an appropriation can only be for a purpose which Parliament has determined.[21]

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16 *Auckland Harbour Board v The King* [1924] AC 318, 326–327.

17 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 55 [111] (French CJ); 73–74 [178]–[180] (Gummow, Crennan and Bell JJ); 113 [320] (Hayne and Kiefel JJ); 210–211 [601], 211–212 [603], 212 [606] (Heydon J).

18 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 210 [601] (Heydon J).

19 Ibid., 55 [111] (French CJ).

20 Ibid., 113 [320] (Hayne and Kiefel JJ); 210 [601] (Heydon J).

21 Section 56 of the Constitution provides that proposed laws for the appropriation of moneys cannot be passed unless the purpose of the expenditure has, in the same parliamentary session,

Together with the prohibition in section 83 of the Constitution, the requirement for an appropriation to be for a legislatively determined purpose results in an appropriation serving a dual function—'not only does it authorize the Crown to withdraw moneys from the Treasury, it restricts the expenditure to the particular purpose'.[22]

In *Pape v Federal Commissioner of Taxation*, Heydon J emphasised importance of the appropriation process:

> The appropriation regulates the relationship between the legislature and the Executive. It vindicates the legislature's long-established right, in Westminster systems, to prevent the Executive spending money without legislative sanction…It also operates so as to restrict any expenditure of the money appropriated to the particular purpose for which it was appropriated. That is, it creates a duty – a duty not to spend outside the purpose in question.[23]

This constitutional limitation that an appropriation must be for a legislatively determined purpose means that there cannot be 'appropriations in blank, appropriations for no designated purpose, merely authorizing expenditure with no reference to purpose',[24] nor can there be an 'appropriation in gross, authorizing the withdrawal of whatever sum the Executive Government may decide in the exercise of unfettered discretion'.[25] As stated by Latham CJ, 'an Act which merely provided that a minister or some other person could spend a sum of money, no purpose of the expenditure being stated, would not be a valid appropriation Act'.[26]

The role of the Senate

In *Wilkie* the Court highlighted the constitutional role of both houses of the Parliament in the appropriation process, noting that an appropriation must be by law and therefore passed by both houses:

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been recommended by a message of the Governor-General to the house in which it originated. *Wilkie v Commonwealth* (2017) 263 CLR 487, 525 [69]. See also *Brown v West* (1990) 169 CLR 195, 208; *New South Wales v Commonwealth* (1908) 7 CLR 179, 200; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 44 [79], 72 [176], 104 [292].

22 *Wilkie v Commonwealth* (2017) 263 CLR 487, 525–526 [70]. See also *Brown v West* (1990) 169 CLR 195, 208; *Victoria v Commonwealth* (1975) 134 CLR 338, 392.

23 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 210 [601] (Heydon J).

24 *Brown v West* (1990) 169 CLR 195, 208; *A-G (Vic) ex rel Dale v Commonwealth* (1945) 71 CLR 237, 253.

25 *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555, 582.

26 *A-G (Vic) ex rel Dale v Commonwealth* (1945) 71 CLR 237, 253.

> Sections 81 and 83 together give expression to the foundational principle of representative and responsible government "that no money can be taken out of the consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorization from Parliament itself". The sections also prescribe the form of the requisite parliamentary authorisation: it must be by "law". They thereby combine to exclude from the scheme of the Constitution "the once popular doctrine that money might become legally available for the service of Government upon the mere votes of supply by the Lower House".[27]

As noted in *Odgers' Australian Senate Practice*, while section 53 of the Constitution means that appropriation bills may not originate in the Senate, this does not mean that the Senate is not an equal partner with the House of Representatives in making appropriations. In fact, the first Senate insisted that words be removed from the preamble of the Supply Bills 1901 which implied that the granting of appropriations was the work of the House of Representatives.[28] Similarly, the Senate caused to be removed from the Governor-General's opening speech words implying that in the granting of appropriations the House of Representatives had some priority. The Senate has also exercised its right to decline to pass appropriation bills and items in such bills until relevant information is provided.[29]

The Court's decision

As noted above, the plaintiffs' challenge to the mechanism used to fund the postal survey was two pronged in that they sought to question the validity of section 10 itself, as well as the Advance determination made under it.

The validity of section 10

An impermissible delegation of legislative responsibility?

In relation to the validity of section 10, the plaintiffs suggested that Parliament had 'abdicated its legislative responsibility and impermissibly delegated its power of

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[27] *Wilkie v Commonwealth* (2017) 263 CLR 487, 523 [61]. See also *Brown v West* (1990) 169 CLR 195, 205, 208; *Auckland Harbour Board v The King* [1924] AC 318, 326; *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421, 449; *Commonwealth v Colonial Ammunition Co Ltd* (1924) 34 CLR 198, 224; W. Harrison Moore, *The Constitution of the Commonwealth of Australia*, 2nd edn (Melbourne: Charles F Maxwell, G. Partridge & Co, 1910), 522–523.

[28] Rosemary Laing, ed., *Odgers' Australian Senate Practice*, 14th edn (Canberra: Department of the Senate, 2016), 361.

[29] Ibid.

appropriation to the Finance Minister'.[30] In this regard, the plaintiffs argued that section 10 conferred power on the Finance Minister to alter the Appropriation Act 'so as to supplement "by executive fiat" the amount appropriated by Parliament in Sch 1'.[31]

The Court rejected this argument and in its reasons considered the history of similar provisions dating back to 1901.[32] The Court considered that the plaintiff's argument was based on a 'fundamental misconstruction', noting that 'the provision of *Appropriation Act No 1 2017–2018* which appropriates the Consolidated Revenue Fund is s 12', and that 'appropriations are not made or brought into existence just before they are paid, but when the Act commences'.[33] The Court held that:

> Section 12 operated on and from the commencement of *Appropriation Act No 1 2017–2018* as an immediate appropriation of money from the Consolidated Revenue Fund for the totality of the purposes of the Act. Section 12 so operated as an immediate appropriation of the amount of $295 million specified in s 10(3) in the same way as it operated as an immediate appropriation of the amount of $88,751,598,000 noted in s 6 to be the total of the items specified in Sch 1.[34]

Therefore the Court considered that the 'power of the Finance Minister to make [an Advance determination]…is not a power to supplement the total amount that has otherwise been appropriated by Parliament. The power is rather a power to allocate the whole or some part of the amount…that is already appropriated by s 12'.[35]

For a legislatively determined purpose?

In addition, the plaintiffs argued that section 10 was constitutionally invalid because, in enacting the provision, Parliament had transgressed the constitutional limitation that an appropriation must always be for a purpose identified by the Parliament. In rejecting this aspect of the plaintiffs' arguments the Court stated that the power of the Finance Minister to make an Advance determination is not 'at large if the precondition to the exercise of that power set out in s 10(1) is met'.[36] In addition, the Court noted that the structure of the Advance provision means that the Finance Minister is limited to allocating 'the whole or some part of the amount of $295 million

30 *Wilkie v Commonwealth* (2017) 263 CLR 487, 526 [71]–[72].
31 Ibid., 530 [86].
32 Ibid., 526–530 [73]–[84].
33 Ibid., 530 [87].
34 Ibid., 530–531 [88].
35 Ibid., 531 [89].
36 Ibid., 531 [90].

to a specified "item" in respect of a specified "entity"'.[37] It therefore could not be said that the Advance represented an 'appropriation in blank' or that it was an appropriation for no designated purpose.

Degree of specificity of the purpose of an appropriation is for Parliament to determine

The Court acknowledged that 'passing scepticism has from time to time been expressed academically, in the Senate and in this Court' as to how the Advance in the form in which it existed prior to 1999 'could be reconciled with the constitutional requirement for an appropriation to be for a legislatively determined purpose'.[38] The Court concluded that the 'reconciliation lies in recalling that the degree of specificity of the purpose of an appropriation is for *Parliament to determine*' [emphasis added].[39]

The validity of the Advance determination

As noted above, the Advance determination itself was challenged on the basis that the Finance Minister had not met the precondition set out in section 10 to the exercise of his power to make the determination.[40]

Advance determinations difficult to challenge

Challenging the determination was difficult because the precondition rested upon the minister being 'satisfied' of an urgent need for unforeseen expenditure and reliance on the subjective 'satisfaction' of a decision-maker makes it difficult to challenge the exercise of the power under most grounds of judicial review.[41] The Administrative Review Council has noted that the primary purpose of such provisions is to ensure that critical facts going to jurisdiction are to be determined by the administrative decision-maker (in this case the Finance Minister) rather than a court.[42] However, these provisions do not preclude judicial review altogether. For example, in the case

37 Ibid.

38 Prior to 1999 the Advance provisions were more general and did not, on their face, reference urgent need. See, for example, *Appropriation Act (No. 1) 1998–99* (Cth) s 13—'Any expenditure: (a) in excess of a specific appropriation; or (b) not specifically provided for by appropriation; may be charged to an item, subdivision or Division in the Schedule as the Minister directs but the total expenditure so charged in the year ending on 30 June 1999…must not at any time exceed the amount appropriated for that year under the head "Advance to the Minister for Finance and Administration"'.

39 *Wilkie v Commonwealth* (2017) 263 CLR 487, 531–532 [91].

40 Ibid., 532 [96].

41 Twomey, 'A Tale of Two Cases', 18. See Administrative Review Council, *The Scope of Judicial Review*, Report No 47 (2006), 22–24.

42 Administrative Review Council, *The Scope of Judicial Review*, 23.

of the Advance, the Finance Minister's satisfaction must be formed reasonably and on a correct understanding of the law.[43] In addition, the Finance Minister must not take into account a consideration which a court can determine in retrospect 'to be definitely extraneous to any objects the legislature could have had in view'.[44] However, the Finance Minister is not obliged to act apolitically or quasi-judicially.[45]

'Urgent need' for the expenditure

In determining what satisfaction the Finance Minister is required to form, in order to meet the precondition in subsection 10(1) that there be an 'urgent need' for the expenditure, the Court separated the words 'urgent' and 'need'.[46] The Court held that the 'notion of need does not require the expenditure to be critical or imperative'.[47] Instead, it must be 'expenditure which ought to occur, whether for legal or practical or other reasons'.[48] The Court rejected an argument that the need must arise from a source external to government.[49]

In relation to the term 'urgent' Twomey suggests that the term was 'stripped of substantive meaning'.[50] The Court stated that urgency 'is a relative concept' and that, in the case of the Advance, urgency must be read 'in the context of the ordinary sequence of annual Appropriation Acts'.[51] The Court therefore held that the 'question for the Finance Minister to weigh is why the expenditure that is needed in the current fiscal year…cannot await inclusion in Appropriation Act No 3' (i.e. the next scheduled Appropriation Act).[52] Thus it appears that something will be 'urgent' 'simply because the government decides it should be dealt with before the next scheduled Appropriation Act'.[53] In addition, while government guidelines in relation to the use of the Advance suggest that 'urgent need' should be interpreted quite strictly (e.g. a 'pressing or compelling' need to make a payment of money), the Court held that these do not amount to a legal constraint on the minister's powers.[54]

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43 *Wilkie v Commonwealth* (2017) 263 CLR 487, 537 [109]. See also *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 651–654; *Graham v Minister for Immigration and Border Protection* [2017] HCA 33 (6 September 2017) [57].

44 *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492, 505; *Wilkie v Commonwealth* (2017) 263 CLR 487, 537 [109].

45 *Wilkie v Commonwealth* (2017) 263 CLR 487, 537 [109].

46 Twomey, 'A Tale of Two Cases', 18.

47 *Wilkie v Commonwealth* (2017) 263 CLR 487, 537 [111].

48 Ibid.

49 Twomey, 'A Tale of Two Cases', 18; *Wilkie v Commonwealth* (2017) 263 CLR 487, 537 [112].

50 Twomey, ibid., 18.

51 *Wilkie v Commonwealth* (2017) 263 CLR 487, 537–538 [113].

52 Ibid.

53 Twomey, 'A Tale of Two Cases', 18–19.

54 Twomey, ibid., 19; *Wilkie v Commonwealth* (2017) 263 CLR 487, 538 [115].

Expenditure to be 'unforeseen'

In addition to the Finance Minister being satisfied that there is an 'urgent need' for the expenditure, the minister must also be satisfied that the expenditure was 'unforeseen'. In this regard, the Court held that the question to be asked is: was the expenditure for the *actual payments* that are to be made unforeseen by the executive government? It emphasised that 'the question is not whether some other expenditure directed to achieving the same or a similar result might have been foreseen'.[55] As a result, the Court concluded that the expenditure on the postal survey 'was unforeseen, even though the government had always intended to spend the relevant amount (or more) for the same purpose of being informed of the views of electors on same-sex marriage'.[56]

No need for government to consider introducing a special appropriation bill

In *Wilkie* the Court also emphasised that there is no need for the government to consider 'whether it is reasonable or practicable for the Government to introduce a Bill for a special appropriation' before using the Advance.[57] The Court stated that nothing in the text of the Advance provision or the history of its use supports such a requirement. As a result, where needed expenditure does not exceed the amount of the Advance (e.g. $295 million in Appropriation Bill (No. 1)), 'that amount is already immediately available to meet the expenditure provided only that the precondition in s 10(1) is met'.[58] In relation to the Court's reliance upon the history of the use of the Advance in this way, Twomey has suggested that it is hard to see how 'past abuse of the requirement for urgent necessity should justify present abuse of the requirement. Past practice cannot undo illegality or correct jurisdictional error'.[59]

Other matters relating to parliamentary control of appropriations

As well as specifically addressing issues relating to parliamentary oversight of the Advance, the Court reaffirmed that most aspects of the parliamentary appropriation process are not reviewable by the Court. The Court also alluded to the wide scope available to the executive to allocate appropriations against the very broadly framed 'outcomes' contained in modern appropriation bills.

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55 *Wilkie v Commonwealth* (2017) 263 CLR 487, 539 [120].

56 Anne Twomey, 'Wilkie v Commonwealth: A Retreat to Combet over the Bones of Pape, Williams, and Responsible Government, *AUSPUBLAW* (27 November 2017), auspublaw.org/2017/11/wilkie-v-commonwealth/.

57 *Wilkie v Commonwealth* (2017) 263 CLR 487, 538 [114].

58 Ibid.

59 Twomey, 'A Tale of Two Cases', 19.

Financial provisions of the Constitution not justiciable

Sections 53, 54 and 56 generally

Wilkie included commentary relating to the purposes of sections 53, 54 and 56 of the Constitution which, in part, regulate the process of enacting appropriation bills.[60] Most significantly, the Court restated that these sections are procedural provisions that govern the internal activities of the Parliament and the relationship between the Senate and the House of Representatives, so the Court will not entertain challenges to laws where it is argued that those sections have not been followed.[61] The interpretation and application of those sections of the Constitution are for both houses of the Parliament to determine between them.

Ordinary annual services of the government

The fact that the financial provisions of the Constitution in sections 53, 54 and 56 are non-justiciable was also affirmed by the Court's consideration of an argument advanced by the plaintiffs that section 10 of the Appropriation Act was in some way limited by the description in the long title of the Act, which states that it is an Act to appropriate money from the Consolidated Revenue Fund *for the ordinary annual services of the government* [emphasis added].[62] The Court noted that the language 'ordinary annual services of the government' is drawn from sections 53 and 54 and therefore this 'statutory language has no justiciable content'.[63]

However, drawing on *Brown v West*,[64] the Court did note that where there is settled, consistent and clear practice between the Senate and the House of Representatives in relation to what may be appropriately considered an appropriation for the 'ordinary annual services of the government' that practice may be relevant to the construction of the Advance provisions. The Court, however, noted that there is now considerable uncertainty in relation to parliamentary practice in this regard and, therefore in this case, there was 'an insufficient foundation for drawing a statutory implication which

60 Section 53 provides that proposed laws appropriating moneys shall not originate in the Senate. In addition, proposed laws appropriating moneys for the ordinary annual services of the government may not be amended in the Senate. They can however be returned to the House of Representatives at any stage with a request for an amendment. Section 54 prevents the executive from misusing section 53 by prohibiting the inclusion of additional matters that the Senate may not amend into proposed laws which appropriate moneys for the ordinary annual services of the government. Section 56 provides that proposed laws for the appropriation of moneys cannot be passed unless the purpose of the expenditure has, in the same parliamentary session, been recommended by a message of the Governor-General to the house in which it originated.

61 *Wilkie v Commonwealth* (2017) 263 CLR 487, 523–524 [63].

62 Ibid., 540 [123].

63 Ibid., 540–541 [124]–[125].

64 *Brown v West* (1990) 169 CLR 195.

would confine the operation of [the Advance provision] to expenditure which a court might characterise as expenditure other than on new policies'.[65]

Broadly stated outcomes in appropriation bills

In outlining the background to the Advance determination, the Court also alluded to the wide scope available to the executive to allocate appropriations against the very broadly framed 'outcomes' contained in modern appropriation bills. In this regard the Court noted that the increased appropriation to the ABS provided for in the Advance determination could be used for expenditure on activities directed to the following 'broadly stated outcome' for the ABS:

> Decisions on important matters made by governments, business and the broader community are informed by objective, relevant and trusted official statistics produced through the collection and integration of data, its analysis, and the provision of statistical information.[66]

The Court noted that the plaintiffs had not sought to argue 'that the activities to be carried out by the ABS [in running the postal survey] were incapable of answering the description of activities directed to this broadly stated outcome'.[67] The fact that no argument was advanced in this regard emphasises the wide scope available to the executive to allocate appropriations against these very broadly framed 'outcomes' without any oversight from the Parliament or the courts.

Implications of the decision for parliamentary control of appropriations

Noting the Court's approach to the construction of the Advance provision outlined above, it is clear that *Wilkie* has emphasised that it is largely the role of the Parliament (and not the courts) to exercise control over appropriations, particularly use of the Advance to the Finance Minister.[68] Twomey concluded that the High Court's decision in *Wilkie* means that the requirement for 'urgent need' is satisfied simply 'if the government decides that it wants to spend money in the period between appropriation bills'. In other words, there 'would appear to be no circumstances in

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65 *Wilkie v Commonwealth* (2017) 263 CLR 487, 541–542 [126]–[128]. The Court also questioned whether 'such inferences could be drawn by a court consistently with the privileges of the Senate and the House of Representatives secured by s 53 of the Constitution' (but found it unnecessary to reach any concluded view in relation to this). For further detail about parliamentary practice in relation to bills appropriating money for the ordinary annual services of the government see Laing ed., *Odgers*, 385–391.

66 *Wilkie v Commonwealth* (2017) 263 CLR 487, 515–516 [30].

67 Ibid.

68 Similar sentiments were expressed by the Court in relation to appropriations more generally in *Combet v Commonwealth* (2005) 224 CLR 494; see Laing ed., *Odgers*, 384–385.

which a government desire to spend could not satisfy the criteria of "urgent need" as interpreted by the High Court'.[69] Twomey suggests that this means the Court's interpretation of the legislative restrictions on the exercise of the Advance renders them of no substantive effect and that:

> This cannot be consistent with the intent of the provision. If Parliament had wanted to give the Minister power to authorise expenditure of the Advance on anything that the Government wanted, it would not have imposed the conditions in s 10. The fact that the Parliament did include this express limitation on the use of the Advance must indicate that it is intended to be a substantive limit on executive power.[70]

As a result, Twomey suggests that *Wilkie* has significant 'ramifications as a precedent which upholds the capacity of the Executive to allocate the appropriation of funds and to expend them, when there is existing standing authorisation in legislation to do so, without any parliamentary scrutiny and even against the will of Parliament', and that this 'undermines the foundational constitutional principle of responsible government'.[71] More directly, it has been argued that 'the Court effectively waived the constitutional significance of the repeated defeat of the [Plebiscite (Same-Sex Marriage) Bill 2016] in the Senate'.[72]

If it is Parliament's intention that there should be enforceable preconditions to the expenditure of money by the executive under the Advance provision, *Wilkie* means that it is necessary for the Parliament to change the standard text of the Advance provision that is agreed to each year. However, there are also other options for increasing parliamentary oversight of the Advance.

Options for increased parliamentary oversight of the Advance to the Finance Minister

The text of the Advance provisions has remained the same for many years.[73] The discussion above makes it clear that if the Parliament considered that the Advance provisions, as currently drafted, provide too much leeway to the executive government to expend money without sufficient parliamentary oversight, it is up to

69 Twomey, 'A Tale of Two Cases', 19.

70 Twomey, 'Wilkie v Commonwealth'.

71 Ibid.

72 Michael Kirby, 'Beyond Marriage Equality and Skin Curling' *Griffith Journal of Law and Human Dignity* 6, no. 2 (2018): 1 and 6. See also Gabrielle Appleby, Mark Aronson and Janina Boughey, Submission no. 2 to Senate Standing Committee on Regulations and Ordinances, *Inquiry into Parliamentary Scrutiny of Delegated Legislation* (Canberra: Department of the Senate, 24 January 2019): 8.

73 The Advance provisions for 2019–20 are extracted in the Appendix.

the Parliament to take action in this regard. Some potential options for increased parliamentary oversight include:

- more effectively utilising existing accountability mechanisms
- changing the preconditions that apply to the exercise of the Advance provisions
- changing the text of the Advance provisions to increase parliamentary oversight.

Utilising existing accountability mechanisms

Following recommendations made by former Senator Andrew Murray in his 2008 *Review of Operation Sunlight: Overhauling Budgetary Transparency*, a comprehensive annual report on the use of the Advance has been tabled in the Parliament.[74] The report is subject to review by the Australian National Audit Office and is referred to legislation committees considering estimates.[75] On occasion, senators have asked questions about the use of the Advance during estimates hearings and it is, of course, open to senators to continue to use this forum to scrutinise Advances in the future.[76]

The annual report on the use of the Advance is also considered in the Senate on a motion that the statements of expenditure be approved.[77] *Odgers' Australian Senate Practice* explains that rejection of the motion would signify dissatisfaction with the statement as an accountability document.[78] The Senate has never rejected such a motion—however it remains open to senators to utilise this existing mechanism to comment on the use of the Advance or to express the Senate's dissatisfaction.[79] As this process only occurs some time after the Advance has already been utilised, it provides a mechanism for ensuring accountability and transparency after the fact but does not have a direct effect on the use of the Advance.

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74 The reports are also published on the Department of Finance website: www.finance.gov.au/publications/advance_to_the_finance_minister/.

75 Laing ed., *Odgers*, 395. For the most recent referral of the report to legislation committees, see *Journals of the Senate*, 14 February 2019: 4692.

76 For the most recent consideration of Advances in estimates, see *Committee Hansard*, Senate Finance and Public Administration Legislation Committee, 9 April 2019: 124–125.

77 Laing ed., *Odgers*, 395–396. For the most recent consideration of the report in the Senate, see *Journals of the Senate*, 3 April 2019: 4845–4846.

78 Laing ed., *Odgers*, 396.

79 A further option to increase parliamentary oversight of the Advance provisions would be to expand the remit of the Senate Standing Committee on Regulations and Ordinances so that it may consider legislative instruments (like Advance determinations) that are not subject to disallowance.

Changing the preconditions that apply to the exercise of the advance provisions

If it is considered that the existing (after-the-fact) accountability mechanisms described above are no longer sufficient in light of the *Wilkie* decision it may be desirable to change the preconditions that apply to the exercise of the Advance provisions. In this regard, an inquiry by a parliamentary committee may be an appropriate mechanism to assess whether changes are required and, if so, what amendments to the text of the Advance provisions would be required to give the preconditions more substantive effect. The Advance has been considered by a number of parliamentary committees in the past,[80] and given the significance of the *Wilkie* decision it may now be appropriate for the Parliament to consider undertaking a further review.

Changing the Advance provisions to increase parliamentary oversight

Instead of changing the preconditions that apply to the exercise of the Advance provisions, a further option that could be considered (including by a parliamentary committee) would be the appropriateness of modifying the provisions to increase parliamentary oversight. Increasing parliamentary oversight could be achieved in a number of ways, including by:

- removing the current provision which makes Advance determinations exempt from the usual parliamentary disallowance process
- providing that Advance determinations are subject to a modified parliamentary disallowance process
- providing that Advance determinations do not come into effect until they have been approved by resolution of each house of the Parliament.

Removing the exemption from the usual parliamentary disallowance process

In relation to the first option of removing the current exemption from the usual parliamentary disallowance process, explanatory memoranda accompanying appropriation bills suggest that the Advance determinations should be exempt from disallowance on the basis that allowing the determinations to be disallowable 'would frustrate the purpose of the provision, which is to provide additional appropriation for urgent expenditure'.[81]

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[80] Senate Standing Committee on Finance and Government Operations, *Advance to the Finance Minister* (Canberra: Department of the Senate, 1979); Joint Committee of Public Accounts, *Advance to the Finance Minister* (Canberra: Parliament of Australia, 1988); Senate Standing Committee on Finance and Public Administration, *Transparency and Accountability of Commonwealth Public Funding and Expenditure* (Canberra: Department of the Senate, 2007).

[81] See, for example, Explanatory Memorandum, Appropriation Bill (No. 1) 2019–2020 (Cth) 9.

In relation to this explanation, it may be noted that subjecting Advance determinations to the usual disallowance process would not prevent the allocation of urgent additional funds. The additional moneys would become available to fund the urgent and unforeseen expenditure the day after the instrument was registered on the Federal Register of Legislation.[82] The only circumstance in which allowing the Advance provisions to be subject to disallowance may cause difficulties would be in a situation where the executive was concerned that the determination may be disallowed by a house of the Parliament. While, at first glance, the uncertainty created during the disallowance period may be seen as problematic, in reality this would simply mean that the executive would more closely consider whether its use of the Advance provisions was genuinely for urgent and unforeseen expenditure. Such an approach would simply be a reassertion of the centuries-old rule that it is for the Parliament (and not the executive) to authorise expenditure of public moneys.

However, if the view is taken that even a small level of uncertainty is unacceptable,[83] a modified parliamentary disallowance process and/or affirmative resolution process for Advance determinations may be considered appropriate.

Making advance determinations subject to a modified parliamentary disallowance process

As *Odgers' Australian Senate Practice* notes there are some forms of delegated legislation with different approval or disallowance procedures:

> Some instruments require affirmative resolutions of both Houses to bring them into effect, while others do not take effect until the period for disallowance has passed. Some involve a combination of both methods. The Senate has amended bills to insert such provisions where it was thought that particular instruments merited special control procedures.[84]

Providing that Advance determinations be subject to a modified parliamentary disallowance process would ensure effective parliamentary oversight of the determinations while at the same time removing any period of uncertainty. For example, within the Finance portfolio, section 79 of the *Public Governance, Performance and Accountability Act 2013* provides that certain determinations relating to special accounts do not commence until after a five sitting day

[82] *Legislation Act 2003* (Cth) s 12(1).

[83] In this respect it is noted that, assuming the relevant preconditions for the exercise of the Advance provisions had been met, funds expended under an Advance determination up until the moment immediately after the passing of a disallowance resolution would not be affected by the disallowance—they would have been validly spent. Disallowance would only prevent further funds being expended under the disallowed determination. See *Legislation Act 2003* (Cth) s 42(1).

[84] Laing ed., *Odgers*, 448.

disallowance period has passed.[85] The explanatory memorandum to the Public Governance, Performance and Accountability Bill 2013 noted that the modified disallowance process in section 79 allows Parliament to consider whether a special account should be established before the determination takes effect and that the process 'seeks to strike a balance between the opportunity for parliamentary scrutiny of the government's intentions and the need to not unduly delay the functional operations of financial administration'.[86] Such considerations may also be regarded as relevant to Advance determinations.

Making advance determinations subject to an affirmative resolution process

A further option to ensure effective parliamentary oversight while removing any period of uncertainty would be to make Advance determinations subject to an affirmative resolution process. An example of this process is set out in section 10B of the *Health Insurance Act 1973*, which provides that certain determinations do not come into effect until they are approved by resolution of each house of the Parliament.[87] If such a process were implemented for Advance determinations it would be possible for a determination to swiftly come into effect with the positive approval of the Parliament. For example, each house of the Parliament could approve the determination on the first sitting day after the determination is made.[88]

Conclusion

The High Court's decision in *Wilkie* has emphasised that it is largely the role of the Parliament (and not the courts) to exercise control over appropriations, particularly use of the Advance to the Finance Minister. Put simply, so long as the text of the

85 *Public Governance, Performance and Accountability Act 2013* (Cth) s 79. From a parliamentary oversight perspective, one concern about the process set out in section 79 is that it provides that the relevant determinations can only be disallowed if a house of the Parliament *positively passes* a disallowance resolution within the five sitting day disallowance period. This means that if a motion is unresolved at the end of the disallowance period, the determination remains in effect. Both the Scrutiny of Bills Committee and the Senate Standing Committee on Regulations and Ordinances have expressed concerns about such modifications to the disallowance procedure on the basis that the modifications would undermine the Senate's oversight of delegated legislation in cases where time is not made available to consider a motion to disallow within the disallowance period. See Senate Standing Committee on Regulations and Ordinances, *Parliamentary Scrutiny of Delegated Legislation* (Canberra: Department of the Senate, 2019): 114–115; Laing ed., *Odgers*, 445.

86 Revised Explanatory Memorandum, Public Governance, Performance and Accountability Bill 2013 (Cth) 48.

87 *Health Insurance Act 1973* (Cth) s 10B(2).

88 As noted above, some provisions prescribe a combination of an affirmative resolution process and a modified disallowance process. For example, the s 198AB of the *Migration Act 1958* (Cth) provides that a legislative instrument designating a country as a regional processing country does not commence until immediately after both houses of the Parliament have passed a resolution approving the designation, or immediately after five sitting days have passed since a copy of the designation was laid before the relevant house (and the house has not passed a resolution disapproving the designation), whichever occurs earlier.

Advance provisions remains the same, the courts will not get involved in determining in any meaningful way whether expenditure under the provisions was objectively urgent—this determination is in the hands of the Finance Minister. If the Parliament considers that the Advance provisions, as currently drafted, provide too much leeway to the executive government to expend money without sufficient parliamentary oversight it is up to the Parliament to take action in this regard. *Wilkie* has made it clear that the High Court will not get involved.

APPENDIX

Advance to the Finance Minister Provisions for 2019–2020

Appropriation Act (No. 1) 2019–2020

10 Advance to the Finance Minister

(1) This section applies if the Finance Minister is satisfied that there is an urgent need for expenditure, in the current year, that is not provided for, or is insufficiently provided for, in Schedule 1:

(a) because of an erroneous omission or understatement; or

(b) because the expenditure was unforeseen until after the last day on which it was practicable to provide for it in the Bill for this Act before that Bill was introduced into the House of Representatives.

(2) This Act has effect as if Schedule 1 were amended, in accordance with a determination of the Finance Minister, to make provision for so much (if any) of the expenditure as the Finance Minister determines.

(3) The total of the amounts determined under subsection (2) of this section and subsection 10(2) of the *Supply Act (No. 1) 2019–2020* cannot be more than $295 million.

(4) Subsection (3) of this section prevails over subsection 10(3) of the *Supply Act (No. 1) 2019–2020*.

(5) A determination made under subsection (2) is a legislative instrument, but neither section 42 (disallowance) nor Part 4 of Chapter 3 (sunsetting) of the *Legislation Act 2003* applies to the determination.

Appropriation Act (No. 2) 2019–2020

12 Advance to the Finance Minister

(1) This section applies if the Finance Minister is satisfied that there is an urgent need for expenditure, in the current year, that is not provided for, or is insufficiently provided for, in Schedule 2:

(a) because of an erroneous omission or understatement; or

(b) because the expenditure was unforeseen until after the last day on which it was practicable to provide for it in the Bill for this Act before that Bill was introduced into the House of Representatives.

(2) This Act has effect as if Schedule 2 were amended, in accordance with a determination of the Finance Minister, to make provision for so much (if any) of the expenditure as the Finance Minister determines.

(3) The total of the amounts determined under subsection (2) cannot be more than $380 million.

(4) A determination made under subsection (2) is a legislative instrument, but neither section 42 (disallowance) nor Part 4 of Chapter 3 (sunsetting) of the *Legislation Act 2003* applies to the determination.