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Politics and the Media in Australia Today*

Dr Sally Young

As I was wondering what to focus on for this lecture—so many interesting things happened during the 2007 election—I was also writing two academic papers and the contradictions between these two papers struck me as symptomatic of the changing nature of media/politics in Australia and led me to what I would like to talk about today.

The first paper I was writing was about Sky News.¹ Before the 2007 election, Sky promised ‘the most comprehensive coverage Australian viewers have ever witnessed’ and I think, in terms of TV, it achieved that. Aside from dedicated programmes, news bulletins and breaking news headlines, programs were interrupted to broadcast—usually live and in full—media conferences, policy announcements and other key events. There were multiple hours of election-related content every day during the election.

But, at the same time, I was writing a paper where I presented the results of a study into how free-to-air TV news covers election campaigns.² Analysing primetime TV news stories, I found that the average election-news story is only two minutes long—and during this story, the reporter and host speak for more than half the time while

* This paper was presented as a Senate Occasional Lecture at Parliament House, Canberra, on 11 July 2008.

¹ Sally Young, ‘Tradition and innovation in the reporting of election campaigns: Sky News and the 2007 election’, *Communication, Politics & Culture*, vol 41, no.2, 2008, pp. 47–61.

² Sally Young, ‘Political discourse in the age of the soundbite’, Australasian Political Science Association Annual Conference, University of Queensland., Brisbane, 7–9 July 2008.

politicians speak only in 7 second soundbites. The average news story about the 2007 election devoted less than 30 seconds to letting politicians speak in their own words. For example, on the 12 November, the day of the Coalition's campaign launch, John Howard delivered a speech for 42 minutes but that night on the evening news, voters heard only 10.4 seconds of it. We know from American research that the soundbite has shrunk over time, keeps on shrinking and that they have less soundbites on their news compared to ours. So, if we follow American trends in news production—and we often seem to—this will happen here as well.

This led me to start thinking about the contradictions between the growing options for political junkies (as epitomised by a 24 hour news channel) versus the 7 second soundbite on commercial TV news. It also got me thinking about how this fits with the internet because so often we hear that it is going to revolutionise democracy and expand political participation. We hear these claims in Australia, as in 2007, an election that was dubbed 'the internet election'.

But before I come to look at specific media, I need to sketch a better map of who I'm talking about in terms of politics and news audiences.

Who are the media audience for politics in Australia?

An experienced political pollster estimated a few years ago that only around 10per cent of the population in Australia takes an active interest in politics. A lot of what we know about Australian attitudes to politics comes from work performed at the Research School of Social Sciences (RSSS) at the Australian National University including the Australian Survey of Social Attitudes and the Australian Election Studies.

These studies show that indicators of extensive (or deep) formal political participation are low—only about 4per cent of Australians are members of a political party for example, compared to the 45per cent who belong to a sport or recreation group.³ Or, another example—during an election campaign, usually less than 5 per cent of Australians will attend a political meeting or rally.⁴ If measured in terms of wider civic engagement (such as membership of auto associations or voluntary associations), Australians are not disengaged from civic life. However, this seems to me to be quite a different measure than involvement in formal politics or the political process.

Although people have a tendency to overestimate 'good' qualities such as civic involvement in surveys, 17 per cent were willing to admit in 2007 that they had 'not much' or 'no' interest in politics and 12 per cent surveyed in 2007 said they wouldn't vote at all if it were voluntary.⁵

³ Andrew Passey and Mark Lyons, 'Voluntary associations and political participation' in Shaun Wilson and Gabrielle Meagher, Rachel Gibson, David Denmark and Mark Western (eds) *Australian Social Attitudes: The First Report*. Sydney, UNSW Press, 2005, p. 68.

⁴ Ian McAllister and Juliet Clark, *Trends in Australian Political Opinion: Results from the Australian Election Study 1987–2007*. Canberra, Australian National University, 2007, p. 4.

⁵ Ibid. p. 21.

This builds up a broad picture of the two extremes of the spectrum—about 5–10 per cent of people who are highly interested in politics while 12–17 per cent are so uninterested that they freely admit it and might not vote if not for compulsory voting. Given that people may be reluctant to acknowledge a lack of interest in politics in an election or politics survey, this number may actually be larger. What we can say then, very broadly, is that for every Australian who is highly engaged with politics, there are at least two who aren't interested much at all. In the middle of these extremes are the rest: the majority.

Now that we have this very broad sense of the proportion of dedicated 'seekers' of politics news versus the indifferent we can consider where (if at all) these groups get political news and information via the media.

The news and politics junkies

Just as political interest divides us, when it comes to how we use media to get political news and information, we are also a nation divided.

If we are interested in politics and political news, there are a now host of options available. There are still traditional places including ABC and SBS news and current affairs programs, broadsheet newspapers and public radio, but two other major options have opened up—pay TV and the internet.

Let's look at pay TV first. In terms of political content pay TV has Australia's only locally-produced 24 hour news channel. But by international standards, the take-up of pay TV in Australia has been very slow. It's growing but at 2005, only about 23 per cent of Australian households had pay TV compared to around 88 per cent in the US and 50 per cent in the UK.⁶ Even taking this into account, Sky News' viewing figures are small. As an overall percentage of TV viewing, Sky News captures only around 0.5 per cent of the Australian TV viewing audience.⁷ It's a fantastic resource for anyone interested in politics but this is what and who it is for—news junkies and political junkies.

Now let's turn to the internet. It's true that the amount and variety of political information on the internet has dramatically increased over the past few years. Let me illustrate by imagining an extreme caricature of a political junkie, someone who has a dedicated interest in politics, and his average day (we'll make him male as research shows the online political junkie is more likely to be male) and we'll call him Johnny.

Johnny begins early in the morning by reading all of the major newspapers online, then he listens to the *AM* program (through his PC of course). Because he likes to get an alternative view as well though he also goes on indymedia to check how others are reporting the day's top story or to see what news stories aren't being covered in the mainstream media. At 10am, there is a parliamentary inquiry on political donations that he's interested in so he goes to the aph.gov.au website and watches live as a

⁶ AFC, 'What Australians are watching: Pay TV: Analysis', Updated November 2005, <http://www.afc.gov.au/gtp/wptvanalysis.html>, viewed 28 November 2007.

⁷ OzTam 'National subscription TV report: Week 29, July 15–21 2007', http://www.oztam.com.au/documents%5C2007%5CB1_20070715.pdf, viewed 3 January 2008.

witness gives evidence. While he's there he also reads a few of the written submissions to the inquiry. He's on the email list of three political parties so he then reads the emails they sent him that morning including their press releases. Then, to catch up, because he missed yesterday's Question Time, he goes on to the ABC newsradio website and downloads the podcast which he listens to on his ipod while he goes for a walk. When he gets back he reads Crikey which has just arrived in his email inbox. After that he goes onto the ABC website or Sky News Active and watches Question Time live. An MP answers a question about education policy which makes him curious so he visits four different political party websites so he can compare their policies. He makes up a list of how they differ and posts this on his blog and emails it to his friends (yes, he has some!). Then he emails his local MP and asks her a question about a new road that's proposed in his electorate.

Throughout the day, he checks back with his favourite online newspaper to see the latest breaking news. In between, he reads OnlineOpinion, New Matilda and Australian Policy Online. When these get a bit too serious, he logs on to Youtube and watches a funny satirical clip about the prime minister. When he opens his FaceBook profile he has two new messages from other politically interested friends who are part of a lobby group and tell him about a meeting they're holding. This makes him nostalgic for the times when political meetings and rallies were more standard fare so he looks up some political history resources including the National Library's PANDORA archive and the University of Melbourne's Soapbox of election materials. By 8pm, he's watched the primetime TV news and current affairs programs (which disappoint him), so, because he likes psephology, he reads the latest posts at his favourite political blogs including mumble.com.au and the poll bludger. Then he goes to bed.

This, of course, is *not* the average Australian. My point in imagining him is to show just how many options there are to the modern media/politics citizen. But it's also to illustrate how, on the one hand, there are more and more options for engaging with politics and political news—particularly on the internet—but on the other hand, these options are predominantly for the deliberate, dedicated seeker of political information. You have to seek them out—they are unlikely to be options that you just happen across while on the internet.

While there are now these many different resources, are Australians using any/many of them?

Things move fast in new media use but back in 2003 when asked what medium they used to get news and information—and this is general news so including sport, weather and entertainment—only 11 per cent in Australia said they used the internet daily to get news.⁸ Since then, more people are likely to have turned to online news and online newspapers specifically. The figures can be hard to capture accurately but the Australian Press Council reports that online newspaper use is growing fast.⁹ Still, the 2008 ACMA report indicated that when Australians are on the internet, accessing

⁸ David Denemark, 'Mass Media and Media Power in Australia' in Shaun Wilson et al, op. cit., 2005, pp. 222–3.

⁹ APC '2007 Supplement', p. 17.

news is fifth on the list of things they're doing online, behind e-mail, banking and paying bills.¹⁰

When we're talking more specifically about politics or election news, the figures are even lower. Data from the 2007 election suggests about 5 per cent used the internet to get election news.¹¹ And this statistic included people who said they used the internet only 'once or twice' to seek information on the election so it's a fairly generous estimation.

There is still a digital divide in Australia in terms of income, age, gender, education and geographical location. Not surprisingly, Australian research has found that the younger a person is, the more likely they'll use the internet for news and information. Being male and having a university degree also more than doubles the likelihood of relying on the internet for news.¹²

So despite all the focus on the internet, at this point in time, TV is still by far the most popular medium in Australia and it's the place where the accidental audience is most likely to come across political news. TV is in a transition phase. Its audience has declined (or fragmented depending upon how you look at) and there are other worrying signs for the future. Yet, for the moment, it still remains immensely popular with nine out of ten Australians watching TV every week.¹³ On average, Australians watch over three hours of television a day.¹⁴ As David Denmark notes, it 'dominates Australians' lives at home'.¹⁵ By comparison, although it's growing, when it comes to getting information and news about politics or a federal election, the internet is still a niche medium in Australia. This is changing but, at the moment, far more people rely on the traditional media.¹⁶

Traditional media use and the loss of the accidental audience?

Given the lack of political junkies, we know that most people don't actively seek out political content. In fact, many try to avoid it and choose other options. When surveyed about what sort of media content they prefer, 'political analysis' was ranked last after other categories such as news, sports, entertainment and music.¹⁷ In my study of soundbites, I found that the more popular a TV channel is, the less election news stories it has on its primetime news program—which suggests something important about why the soundbite is so short and particularly on the commercial channels. In terms of media use, people vote with their feet (or eyeballs in this case). The top rating programs each year are sporting events and reality TV shows. The best selling newspapers are not those with the weightier, longer politics sections but tabloids. The same is true of online news. While mainstream newspapers have

¹⁰ ACMA, *Communications Report 2006–07*. ACMA: Canberra, ACMA, 2008. http://www.acma.gov.au/WEB/STANDARD/pc=PC_310950

¹¹ McAllister and Clark, op. cit., p. 3.

¹² Denmark, op. cit., p. 223.

¹³ ACMA *Communications Report 2006–07*, op. cit.

¹⁴ AFC, *Get the Picture*, 2008 <http://www.afc.gov.au/gtp/wftvviewage.html>

¹⁵ Denmark, op. cit., p. 228.

¹⁶ McAllister and Clark, op. cit., p. 3.

¹⁷ Productivity Commission, *Inquiry into Broadcasting*. Report No. 11, Melbourne, 2000, p. 21.

attracted audiences it is ninemsn—with its lighter approach to news—that is the most visited website.¹⁸

But the traditional media contained places where people came across politics even if they didn't deliberately seek it out.

People who thought they weren't particularly interested in formal politics might be reading a newspaper and, in flicking through to get to the weather, cartoons, movies or sport, see a politics story that catches their eye and read it. They might be watching TV news on a commercial channel after work and, while (again) waiting for the weather or sport, see a few news stories on politics. Then, when they leave the TV on that channel, they might see a current affairs program that had stories on politics or even a political interview with a prime minister or opposition leader.

Now, those 'accidental' options are declining. TV news still has stories on politics but less people watch it (especially at the evening news time slot) and there are shorter stories with politicians speaking less often.

Current affairs program on commercial TV once had some 'incidental' political content in between other stories—for example, a politician being interviewed or political issues being reported and analysed. But now there's barely even a pretence that the programs operate that way. Celebrity interviews and the staple fare of neighbourhood disputes, small time con-artists, diet and cosmetic surgery stories have replaced national politics with politicians now increasingly seen as a 'ratings killer'. When he was host of the program *A Current Affair*, Ray Martin declared that: 'Anyone who suggests that you get ratings by having the Prime Minister or Leader of the Opposition on is a dope ... Australians don't want that ... they don't watch ...'.¹⁹

On TV, three key factors indicate a changing conception of the audience for political news and a move away from letting politicians talk in their own words: 1) the absence of politics stories and declining emphasis on formal politics; 2) shorter soundbites and 3) greater editorialism with more space given to reporters and experts than politicians. This last feature is epitomised by the practice Ken Inglis dubbed 'goldfishing'—where politicians are more likely to be seen than heard as 'the voice heard most is the reporter's, paraphrasing or analysing or even deriding what the member is saying. ... [so that] we just see his or her mouth moving ...'.²⁰

And it's not just TV, of course. In printed newspapers, where once there were lengthy transcripts of politicians' speeches or reports on parliamentary debates, there is now more space for lifestyle topics such as travel, cooking and fashion—topics that 'attract advertising revenue' and allow for articles to be pre-written so that there can be 'more advance printing and the use of the same material in many newspapers within the same company.'²¹ In online newspapers, the presentation of material is quite different from the hardcopy with more emphasis on celebrity and entertainment and with the

¹⁸ APC, *2007 Supplement*, p. 17.

¹⁹ ABC *Four Corners* program, 'The Uncertain Eye', 2 February 1998.

²⁰ K. Inglis 'Parliamentary speech', *Australian Journal of Law and Society*, vol. 12, 1996, p. 149.

²¹ Australian Press Council, *State of the News Print Media in Australia*. Sydney, 2006, p. 5.

‘most read’ story indicators suggesting that the more ‘tabloidesque’ stories attract more hits.

To me, the way newspapers are presented online, the changing format of TV news and the decline of commercial current affairs programs, are symptoms of how traditional media are ditching politics or, at least, consider it a niche rather than a general interest for their audiences.

As a result, the options for ‘accidental’ engagement with politics seem to be declining and this raises the spectre of an increased division in the future between the politically-informed information seekers and the rest—especially online. Given sufficient neglect, some of these unaddressed may become politically marginalised and alienated, viewing politics as something quite separate from themselves. But is this a likely scenario?

The decline of ‘accidentalism’?

When a new medium comes along there can be a temptation from some quarters to hype it up and overestimate its positive potential or, from others, to demonise it and fear its consequences. Both of these things happened with TV and are now happening with the internet. I’ve used Johnny as an example of the positive potential for engaged citizens so now, at the risk of adding to the demonisation, let’s examine some theories about the potentially negative impact of the internet.

According to one strand of thought, online newspapers represent the problem of a declining ‘accidentalism’. When you go to an online newspaper, you choose which links you click on to read a full story. It’s true that, when reading the hardcopy print version, you might also have flicked straight past the politics section and read only the classifieds or some other section. But, where once an article might have caught your eye while turning the page or while you were reading the article above or below, you now have only a list of headlines in the online version and you choose which ones you read and which you don’t. Your eye doesn’t tend to accidentally stray over other content—text and photos—just over other headlines which can be more easily ignored.

There is also the technological capacity with online news sites and search engines to ‘personalise’ your news content. This can be done voluntarily. You can ask for your news to be customised—for example, just to have sport news—or it can be done surreptitiously by the website proprietor who keeps track of your reading and selectively funnels content to you. (This is similar to what Amazon does in keeping track of what books you buy and then, when you logon, it suggests new ones in the same topic area for you). Yahoo news and Google News—now some of the most popular online news sources—work like this already (see <http://cm.my.yahoo.com/?rd=nux> and <http://news.google.com/nwshp?hl=en&tab=wn>) so that you select what sort of news you want and they filter out content that you haven’t indicated a preference for.

Fragmentation compounds this. Let me give a Victorian example. Where once someone who was interested in sport might have bought the *Herald-Sun* or the *Age* and gone to the back sports section (with the option of perhaps stopping to read the

general or politics news on the way), they can now just go straight to sports.yahoo.com, the AFL website, ESPN.com or other sports-news-only sites.

Should we just let them go?

There are some uncomfortable choices in here. Part of the ‘problem’ I’ve just described is due to greater media choices. Whereas once there were just five free-to-air TV channels all of which broadcast the news at roughly the same time, now there will be more choices available at different times, in different formats and with different content. And, given the option of having news without politics, many people may well take it. Therefore, if people are given a choice and they don’t want politics news, then who am I to suggest that they should? In response, I’d suggest that people haven’t really been given an adequate choice in the past. Lack of diversity in media ownership, the commercialisation of news and its imperatives, the standardised format of TV and newspaper news and the lack of imagination and change in recent years in relation to these formats have meant, arguably, that few good choices have been available.

I could also point to the one area where there has been growth in TV audience share as a sign of hope—a sign that if there is well-presented political news, people may choose it—the rise in audience share for the ABC and SBS (which I discuss more below).

Finally, I could suggest a proverb: ‘What interests people is not always good for them. What’s good for people does not always interest them.’ This is very paternalistic but I fear the opposite stance may be worse. You do the politically disengaged no favours by supporting their exclusion (whether self-chosen or not) and, on balance, a democracy without politically aware citizens is more dangerous.

If I was at a media or cultural studies conference, among academics who argue that *Australian Idol* and *Big Brother* are representations of real democracy and just as valid as formal politics, I’d have to justify and explain this argument about audience choice in far more detail but I think it’s safe to assume that I’m among people who believe that participating in, and knowing about, formal politics is important.

I’d like to now think about the future and consider how realistic or unlikely scenarios of a dwindling accidental audience are. For the sake of analysis, I’ve divided the following discussion into two parts: signs of concern and signs of hope for the future. But the dichotomy isn’t as clear cut as this, of course. As we’re in the midst of all of these changes (and still in an ‘apprenticeship’ phase of using the internet), some of these trends are very difficult to interpret and I’ve indicated where I think the difficulties lie.

Signs of concern

If we take as our premise that printed newspapers have been a bedrock of political news, whereas the shape of online news is far more ambiguous, there are signs of concern. A 2006 Australian Press Council report noted that ‘[n]early half of those who read Australian metropolitan newspapers are over fifty’ which doesn’t bode well

for the future.²² Nearly 70 per cent of metropolitan newspapers' readers are now aged over 35 years.²³ In the four years between 2000 and 2004, the biggest decline in audience share for newspapers was in the 18–24 year old group.²⁴ *The Economist* argued in August 2006 that newspapers are 'on the way out [and that] half the world's newspapers [are] likely to close in the foreseeable future.'²⁵ Eric Beecher, co-owner of Crikey and former newspaper editor has argued that the money that has underpinned quality journalism in Australia is no longer available and new models will have to be found.²⁶

The majority of Australians still rely on free-to-air TV and especially commercial TV news to get political information.²⁷ But, as I've said, use of free-to-air TV is declining, news and current affairs audiences are declining (or fragmenting) and these programs devote very little time to politics. Young people are turning away from TV in general but also TV news and current affairs. Despite moral panics about young people watching too much TV, adults over 55 years are the heaviest viewers, averaging 4 hours and 17 minutes of viewing per day, while young adults, teens and children are now the lightest users, averaging under 2.5 hours per day. In sum, people under 40 are watching less TV now than they were in 1991.²⁸

Young people are moving to other media including music, cinema, magazines, the internet, TV, radio and video games, that don't necessarily emphasise formal politics.²⁹ They're turning away, in particular, from free-to-air TV news and current affairs.³⁰ These are genres that have been derided, by young people, as 'boring', 'complex', 'distant' and unrelated to their own lives but also as lacking context or background that they can use when stories, events or individuals are unfamiliar to them.³¹

Young people seem to be especially abandoning conventional journalism in the form of printed newspapers and TV news and current affairs.³² Jason Sternberg found that commercial prime time news and current affairs seem never to have attracted more than 18 or 19 per cent of under 24 year olds.³³ Much has also been made of how media-savvy young people are now and, in light of their knowledge about media formats (including from programs such as *Frontline*), they are aware of how

²² APC report, 2006, p. 1.

²³ Ibid. p. 21.

²⁴ Jason Sternberg, 'Youth Media' in Stuart Cunningham and Graeme Turner (eds), *The Media and Communications in Australia*. 2nd ed., Crows Nest, NSW, Allen and Unwin, 2006.

²⁵ Quoted in APC report 2006, p. 1.

²⁶ Eric Beecher, 'Crumbling pillars?' *Media International Australia*, vol. 122, 2007.

²⁷ Denmark, op. cit., pp. 222–3.

²⁸ AFC, 2008, <http://www.afc.gov.au/gtp/wftvviewage.html>

²⁹ Sternberg, op. cit., and Denmark, op. cit.

³⁰ Vanessa Evans and Jason Sternberg, 'Young people, politics and television current affairs in Australia', *JAS, Australia's Public Intellectual Forum* no. 63, 1999, p. 103. See also Ward, op. cit.

³¹ Eg. see Ward, op. cit.

³² Jason Sternberg, 'Rating youth: A statistical review of young Australians' news media use', *Australian Studies in Journalism*, vol.7, 1998, p. 101.

³³ Ibid. pp. 105–6.

patronising, sensational, unethical and nonsensical some current affairs program content is.

So, while such programs have increasingly taken politicians off in an attempt to retain or attract audiences, it hasn't necessarily worked. In 2007, *A Current Affair* averaged its lowest audience for this decade and both *Today Tonight* and *A Current Affair* are stagnating or declining in terms of ratings.

This is one of the trends that I'm not sure how to read. On one hand, I'm tempted to say that the commercial news and current affairs programs are so bad that it's a good thing that they're dying. Optimistically, I could wonder whether this might even herald a new dawn of a different type of programming that could include engagement with politics in a way younger viewers find appealing. But, on the other hand, I still worry that nothing (or worse) may fill the void of 'incidental' or 'accidental' political news that such programs used to provide. On balance, at least for the moment, I'll choose to interpret it as a sign of hope that they'll need to reinvent their tired and unpopular format.

As evidence of my more optimistic interpretation I'll offer again as a sign of hope the fact that the ABC—with its focus on substantive political news and current affairs—is doing well in the current media climate. Its audience share has increased over the past three decades (and so has SBS) as other channels have declined (Table 1). Perhaps this indicates that there is an audience for 'quality' political news and current affairs? But I'll also note a different interpretation of this trend that's less favourable: the ABC is doing well because TV is now an 'old people's medium' and older people like the ABC. (This is an interpretation that I'm investigating in more depth by examining ratings by program type and demographic over time.)

Table 1

Audience share by TV station, 1983, 2003 and 2007

	7	9	10	ABC	SBS
1983	30.8	30.9	24.9	11.9	1.5
2003	25.6	31.2	23.2	15.6	4.5
2007	29.1	26.9	21.9	16.7	5.5

Source: AFC, *Get the Picture*, 2004 and 2007.

I've focused on news and journalism so far which means that one of the main ways that people 'accidentally' come across political content is one that I haven't yet mentioned—through political parties' advertising. Presuming that a viewer watches only one TV news program in the evening, s/he will see about two minutes of political news. But if, during an election, they keep watching TV until bedtime, they will likely see several minutes (in total) of political advertising over the course of the night. Depending upon where they live and how sought-after they are in terms of marginal seats/swinging voters, they may also get direct mail letters, telephone voice-recorded messages, emails and SMS messages. If political content in journalism forms reduces,

these methods will become even more central ways in which voters access political material. I've put this as a sign of concern because I think this raises issues about the content of such advertisements as well as their costs (social, political and economic).

The changing media landscape

What of the online audience? Is the Internet the solution? As we've noted, internet use for political purposes is an area where we in Australia lag behind the US considerably. This is due to a range of factors but perhaps we will narrow the gap. The Pew Internet and American Life Project found that, during the 2008 US primary campaign for the presidential election, 40 per cent of Americans had used the internet to get political news.³⁴ This had grown rapidly in 8 years, from 16 per cent of all adults in 2000 to 40 per cent during 2008.

The extent of detailed research in the US is useful to pointing where trends in Australia are likely to head although we're moving at a much slower pace in terms of political news use. The American research suggests that the number of people using TV and newspapers to learn about politics will continue to decline while the proportion of people using the internet to learn about election campaigns will increase (in the US it more than doubled between 2000 and 2008).³⁵ In particular, young people will continue to abandon TV and instead turn to the internet. This phenomenon is happening very fast. In the US, the internet now takes up 30 per cent of the media consumption hours of young people aged 12–24 years.³⁶ Table 2 shows the trend in young people's media use for election news in the US from 2004 to 2007.

Table 2

Young people (18–29 years) media use for election news in the US
2004 and 2007

Get most election news from ...	2004 per cent	2007 per cent	Change
Television	75	60	-15
Newspapers	30	24	-6
Internet	21	46	+25
Radio	10	10	0
Magazines	1	4	+3
Other	4	6	+2

Source: The Pew Research Centre, 'Social Networking and Online Videos take Off: Internet's Broader Role in Campaign 2008', 11 January 2008, p. 4.

³⁴ Aaron Smith and Lee Raine, *The Internet and the 2008 Election*, Pew Internet and American Life Project, Washington D.C., 15 June, 2008, p. i.

³⁵ The Pew Research Centre, *Social Networking and Online Videos Take Off: Internet's Broader Role in Campaign 2008*, Pew Research Centre, Washington D.C, 2008, p. 1.

³⁶ Margaret Simons, *The Content Makers*. Camberwell Vic., Penguin Books, 2007, p. 26.

Clearly, the internet will play a central role in the future. But will it be able to capture the ‘accidental’ political audience or will it push them further away from formal politics?

Signs of hope: will there be a new accidental audience?

If we believe that political news can be interesting and can find a wide audience then there are some hopeful indicators. In particular, there are some signs of hope for an ‘accidental’ audience to be found online. In the US, a majority of internet users said they didn’t go online for the sole purpose of learning about the 2008 election campaign but instead ‘came across’ campaign news and information ‘when they [were] going online to do something else.’³⁷ This is promising.

In 2008, this seemed to occur largely because political information was being spread via online social networks—emails from friends, funny videos posted on YouTube and messages through social networking sites such as MySpace and Facebook.

Social networking sites are one of those phenomena that media experts are still unsure about (just as they are still unsure what to make of blogs). They could go either way—a flash in the pan or a long-term trend. At the moment, these sites seem to be playing an important role for Americans aged 18–29 years—in 2008, 27 per cent of this age group said they used these sites to get primary campaign information.³⁸ How does this work? For example, to drum up a crowd for a Hillary Clinton campus visit with only 2 days notice, the president of a Hillary support group at a university sent an online invitation to the meeting to her Facebook friends who then forwarded it on to their friends and, within 24 hours, she estimates 800 students on campus had received the invite with 400 people showing up for the meeting.³⁹

We’ve seen some experimentation with the format in Australia. In 2007, the ALP claimed to have had 117,000 unique visitors to the Kevin Rudd MySpace profile.⁴⁰ Unfortunately, we don’t have the same level of public meetings as occur in the US so this holds it back from some potentially very good uses.

One of the other major sources for politics and election news in the US for young people is comedy shows such as *The Daily Show* with, perhaps surprisingly, surveys finding people who watch such shows are as well informed as the audiences of ‘elite news sources’ such as newspapers. This seems to be largely because these audiences seem to be heavy news consumers who use a range of other sources as well but there’s also some academic research on how important these shows are in reaching people who find conventional presentations of politics boring.⁴¹ Similarly, breakfast and light entertainment shows reach audiences who don’t necessarily choose to watch politics. This means that programs that mention formal politics or have politicians on, such as *Good News Week*, *Sunrise*, *Rove*, *The Chaser* etc. seem to play an important

³⁷ Pew Research Centre, ‘Social networking ...’, op. cit., p. 2.

³⁸ Ibid. p. 9.

³⁹ Carrie Dann and Ronald Brownstein, ‘Fast-forwarding networked politics’, *National Journal*, 19 April, 2008, www.nationaljournal.com/njmagazine/cs_20080416_1054.php.

⁴⁰ ‘Internet not a force for Aussie pollies’, *The Age*, breaking news, theage.com.au, 1 February 2008.

⁴¹ Pew Research Centre, ‘Social networking ...’, op. cit., p. 5.

role in reaching an accidental audience. Although I've focused on TV and newspapers, the same can be said of radio including when politicians go on programs that don't normally have political content such as on FM radio.

Finally, in terms of pay TV, there is also some hope that more people will watch a 24 hour news channel as pay TV gains more penetration in the Australian market with American research suggesting that young people do turn to 24 hour news channels—particularly when events or crises occur. However, the fact that pay TV is very expensive in Australia probably negates the possibility of it becoming widely available to a broad and 'accidental' audience in the near future.

Conclusion

I don't want to romanticise the past. Just because newspapers used to print long transcripts of parliamentary speeches doesn't mean that everyone read them. Just because there were public meetings and lunchtime rallies, doesn't mean everyone went. Then, as now, there were always people who were highly engaged—attended meetings, read widely or protested—as well as the less-interested who shied away from formal politics.

What I am suggesting though is that if these non-interested people did interact with media (read a newspaper or listened to radio or, later on, watched TV), it seems they were more likely then, as opposed to now, to happen across political content even if they weren't looking for it.

There were a range of factors for this but one of the key ones seems to have been an underlying belief, on the part of journalists and media organisations, that politics was of general interest to citizens and, if it wasn't of interest to them, that it should be. That attitude may now be viewed as either paternalistic—telling people what's good for them—or as being extremely important and socially beneficial with its aim of forging an inclusive public sphere.

While the internet has given us a range of new materials—political websites, YouTube videos, RSS feeds, podcasts and blogs—not all Australians are using them. As we saw with the introduction of television, having more and/or better tools to engage in politics doesn't automatically equal use of those tools. Existing actors, structures, systems and preferences still play a key role.

Beyond the hype and demonisation, it's likely that the internet will be both helpful in transmitting political news as well as a place where there will still be great divisions between us in terms of our levels of political interest and our accessing of political content. In this context, while there has been a lot of focus on the 'quality' of news media outlets and their products, *opportunity* now seems just as important.

Providing outlets for the interested is now comparatively easy. There are a host of options online and these are growing. But reaching and engaging the uninterested is far more challenging. Somehow we also need to have a degree of 'happenstance' about political news and information so that people come across it in their day to day lives and see it as relevant and interesting. Given what we know about media

audiences and political interest, this may demand a different approach than conventional journalism has traditionally provided.



Question — I should explain before I make this comment that I am a mongrel. I am half French and half English and because of that I am able to compare the way television news is broadcast in France and in Australia. I watch the French television news every morning on SBS. I lived before that 20 years in France so I was watching it regularly. One thing I notice in France is that politics is made more interesting in the television news by the quality of the presenter. The presenter in Australia I'm afraid to say, is just that, a presenter. In France the presenter has to be able to interrogate, rather in the style of Kerry O'Brien shall we say, and this makes the political section of the French news far more interesting. People are always waiting to see politicians of any party being tripped up by a good interrogator. Isn't it a pity that that isn't the case in Australia?

Sally Young — I think partly that has to do with the limitations of the format. Two minutes of election news is not much time to analyse or pick apart or interview people. I think there are great many problems with the way news is presented in Australia. And I think the international comparison is very interesting because if you look overseas there are examples of how this is done better and differently.

Question — I have two things to say. The first is a reflection on your point about ABC and SBS attracting more audiences, and I wonder if partly if it has something to do with the fact that those two broadcasters seem to have a slightly more global flavour to them. They are not as parochial in some ways as some commercial channels. Since younger people have a sense of belonging to a more dispersed community, maybe that appeals to them more.

I don't know if there are examples in Australia, but certainly overseas, and one example of this would be the *Telegraph* in the UK, there is a sense of converging media platforms. Radio and broadsheets are increasingly going online, but not just providing written worlds, but they are actually having short presentations from their own journalists. So there is a complete changing of the platform on which media is presented. The way that you will come across things is changing and it's not just going to be statically reading an article and pulling it up; you'll come across clips that you didn't intend to come across.

Sally Young — Yes I think that's a good point. In terms of convergence, and they also call it intermediation, about how things are merging, in Australia in our online newspapers there are already examples of that. Sometimes during the election reporters will do blogs or they will post clips on the web sites and so on. So yes, the format of news is changing but I still think that you have to go to those sites to get that so you have to think in the morning when you get up: 'OK, I want to read a paper today' whether it's online or not and when I go there if there is a clip about the election I will watch it. So it needs to have a degree of seeking that information out.

And in some sense that was always the case: you always had to go and buy a hard copy of a newspaper. The format is definitely changing, but perhaps that more visual presentation online will be more popular or perhaps it will come across the same sorts of problems that exist on television as well. The one thing I can say as a positive sign about that is that the lack of advertising interspersed between, as you have at the moment with news, creates more space and probably creates the potential to have a different kind of news as well. Thanks, that's an interesting point.

Question — Dr Young, looking at the small percentage who are very interested in politics, have you been able to find out whether they follow politics on the media to reinforce their views, their own beliefs in politics, or partisan support? Or are they looking for a challenge to their views, are they open minded? What is the purpose of people who are in that small percentage going through the news?

Sally Young — Again an interesting question. Not a lot of specific research has been done that I know of, but if we look at the demise of the *Bulletin* for example, commercially these people aren't necessarily enough to keep that afloat if that's what the proprietor's aim is. But in terms of whether they use it to reinforce their own political views or challenge them, the general view would be that people like to read news that agrees with what they are already thinking and doesn't particularly challenge them. But then again, I guess that people who are really interested in politics do seek out different viewpoints. For example, I know that a lot of academics might read political columnists that they don't necessarily agree with but they want to see what they are saying and what sort of agendas are coming up in those columns. That's academics who are particularly interested in left politics for example, and obviously the same thing happens on the other side. My short answer would be that we don't know enough about what sort of media they are using. The people who would know are the media organisations; they must have this sort of research. One study that was done recently looking at terms of preferences was a Roy Morgan survey and it found, for example, that Labor supporters watch the ABC more whereas Coalition supporters watch channel 9 more. They have particular programs that they prefer. So there were some divisions, but that's the only one I have seen and it was a short survey.

Question — Dr Young, I am interested in your opinion on onlineopinion.com and Crikey.com and NewMatilda.com as blog sites, the democratisation of opinion. If you think about what Chomsky said: who gets to say, who gets to know, who gets to decide, that's one of the growth areas that you alluded to, but I just wanted to know if you think that's the difference between the US and the Australian populations and why there is a difference?

Sally Young — It's hard to know precisely. There is a different sort of political climate, there's a different political system, there are technological factors going on. In terms of the sites that you are mentioning, I think that these are all great things. The more discussion we have the more different sorts of sites, the more political blogs and so on, the better. The more we have and the more diverse they are the more chance that people will go to them and seek them out. My worry in this presentation as I said was the people who aren't interested already, and they are harder to capture. That doesn't negate the fact that I think some of these sites are doing incredibly good

things and providing interesting alternatives to that traditional media format and presentation of politics. Why Australians don't go to them more is an interesting question. Some of the bloggers have posited that the media in Australia being so heavily concentrated in terms of ownership has sort of killed the blogger-sphere. Blogs are far more vibrant and do more interesting things in the US. Sometimes they break news for example, and we haven't seen a lot of that here in Australia. Some of their individuals are better resourced to do that sort of thing. One blogger was suggesting that the mainstream media sites are linking to things like YouTube because they see that as a more controllable space. To get people to watch a clip is very much a part of the sound bite culture. Directing them to really detailed political blogs is something quite different, and one blogger suggested that the mainstream media (because they see blogs as a threat), has co-opted them. So it has cherry picked some of the bloggers and has put them in their own organisations or it links to some of them and not others. Some of the bloggers think that there might be an element of mainstream media in Australia not doing them any favours.

Question — Thanks for a good talk there Dr Young. I was just wondering if your study has factored in the accidental peer to peer exposure of news reports that goes on online specifically in comments pages, forums, messenger services. Young people are very good at informing each other and you can often find issues blow up very quickly on these types of web sites. Say a gaming forum discussing censorship for instance. You do see a lot of politics out there and I was wondering whether that had been factored into the stuff you had been looking at?

Sally Young — That's sort of in the realm of those positive signs of hope that we were talking about, that part of the way this is going on is peer to peer and social networking conversations. Family and friend groups are very important, particularly to young people. Even in terms of political news, women often nominate that as a place where they get political news and information, from people they are talking to, and when that is going on on-line, it's replicating that same sort of thing as well. So I think that is all important and valuable. Academics argue a lot amongst themselves about 'what is "politics?"'. Talking about Big Brother and who exited from the house and whether that was rigged or not, for example, could be called politics. Whereas other people say it is only formal politics, to do with policies and parties and parliament and so on. I think those are interesting viewpoints. In terms of what young people are talking about a lot of the time, they are talking about issues rather than perhaps what their local MP just voted on, or what new policy has come out. Whether you judge that to be in the same category, I think it's all important and conversations are an important way this is going to lend itself, and perhaps that's one of the best signs of hope for the internet; this social networking. Its supposedly called Web2. What we have seen so far is a very static internet. It hasn't allowed us to really do the things that we predicted would help democratise politics, whereas a Web2 that is more interactive might allow more for this to occur.

Question — My question really follows on from the last point. If you are looking at America vs. Australia certainly the primary elections did seem to engage in politics a lot of people who normally hadn't been engaged in politics, and some have sensed the Obama campaign was predicated on this and certainly used the internet, especially social networking, to achieve that. But it seems to me that this related very much to the American political system, which is a lot more open in terms of individual

candidates and individual candidates being able to reach voters than occurs here. My question is, would we expect to see this type of internet environment in politics in Australia directed at formal politics, particularly the major parties, or would we expect it to result in a much greater involvement in, I suppose, protest groups, interest groups, environmental groups, all the rest of it. Noting the rapid speed of GetUp and that type of internet. In other words, I'm suggesting that maybe in Australia formal politics is not where we will see the internet's political impact but rather through a much greater range of activities.

Sally Young — That's what a lot of the research suggests as well about the political parties in Australia and how they have used the internet. There has been a lot of criticism that they haven't used it in a way that opens politics up and as we were saying with the example I used about Hillary Clinton, they have primaries that stretch out for a long period of time. The candidates can go and sit in a coffee shop one day with three people, the next day they can address a rally of seventy-five thousand. There is a level of interactivity and excitement that goes on around that. Whereas in Australia, politics is presented quite differently, and perhaps, and this is the worrying thing, the internet will mirror that, there will be a lack of interactivity on-line just as there is in real life and maybe that's why we are not seeing such a high takeup in Australia for these sorts of structural factors that you have pointed to. In terms of formal politics people think that the internet is not a place to go, and that's why it hasn't been used in that way. But you have raised some good points. The political system and the attitudes around it and the way it currently works are important in how it is going to be used on-line as well.

Question — Dr Young, would you comment on the introduction on editorial content into direct news broadcasts. The sort of thing I have in mind is that, for example, when referring to comments by a premier who is under criticism they will describe him as the embattled premier; or when referring for example to the shadow treasurer they will also refer to him as the leadership contender. An editorial content in a direct news broadcast; would you comment on that?

Sally Young — That's an example of how you can see something as both a positive trend or a negative trend at the same time, because on the one hand people might say that pointing out the conflict involved and the background and making it more interesting, using language that opens it up, is an example of how the news can be accessible. But someone else might point to that and say, that's an example of the media not being objective and presenting politics in a superficial sort of gladiatorial contest way. So it's a very interesting example of how you can look at the one thing and come up with two different takes on it. What I can say is that the research that I'm looking at in terms of comparing American news and Australian news found that this is likely to be where we will head. That there will be more editorialism. When I looked at their news clips, American reporters talked for longer, they had more experts and talking heads and commentary even on their news programs, let alone current affairs. The media seems to think that politicians are a turn off, that if you get reporters and commentators and so on talking, that that would draw in an audience. That seems to be a perception that underlies that changing format. So I think we are actually going to see more of that in Australia as well.

Question — We haven't talked about the alleged dumbing down effect of the new media. Politicians, it has been argued now, can't present subtle nuanced arguments because they will be accused of not knowing where they stand and flip flopping and so on. What do you think about that?

Sally Young — I probably sidestepped the whole question of dumbing down because it's that question of quality news. If you want people to engage with politics, are you going to also demand that they only consult the sources that you think are good? That they are going to go those ones that you call 'quality' news sources? In terms of the dumbing down, what can you say in two minutes, what can you say in 30 seconds on a news clip? That's basically it. If 80 per cent are using television to get their election news, and what they are seeing is a two minute clip with 30 seconds of politicians talking broken down into seven second sound bites, it is going to be a dumbed down version of something. You can't present a lot of material in that time. Is that better than nothing? I think that's the question we are facing with the internet and what I was talking about with the accidental audience, would we rather people get that two minutes, because in the future, they may be able to skip that all together? You might be able to program your TV: 'just give me the sports news', or 'I'm only going to turn on to this channel and it doesn't have any politics on it, I don't like politics'. I used to worry a lot about declining standards in the media and how politics was presented, but I am starting to get to the point where I think, even dumbed down stuff is better than nothing at all. If that's the choice.

Governing the Market: Threats to Australia's stability and security*

Dr Peter Brain

Core message

This lecture represents an update of my 2001 Alfred Deakin Lecture, namely 'The Australian Federation 2001: Political structures and economic policy'.¹ The basic message here is that unless Australia adopts a middle course between the highly successful corporatist state model of development and the extreme neoliberal model that Australia has selected as its development framework then Australia's internal stability and national security could well be severely degraded over the next two decades. In short Australia will have to relearn and reapply some strategies and instruments to govern the market.

This will involve some restoration of the practices and institutions that were swept away in the name of micro-economic reform over the last two decades. Australian will never be able to match the efficiency of the informal governance structures of corporatist states. For Australia the leadership will have to be provided by its governance institutions in general and Parliament in particular.

* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra, on 8 August 2008.

¹ Published by ABC Books, 2001.

To paraphrase Harvard's Stephen A. Marglin's recent book *The Dismal Science: How Thinking like an Economist Undermines Community* ² the message of this lecture is 'The Australian Neoliberal Model: How thinking like an economist will degrade economic performance, social stability and national sovereignty.'

Australia has a limited understanding of history. The defeat of Communism was not a defeat for models aimed at governing the market. It was the defeat of one particular model by far more efficient models for governing the market.

The 2001 Alfred Deakin Lecture

In my 2001 Alfred Deakin Lecture I set out to explain:

- (i) why Australia in the 1980s had adopted the extreme neoliberal (or the economic rationalists) model as its development framework; and
- (ii) some likely consequences of that choice.

Put simply, under the neoliberal model the State plays a largely passive role with many of the key decisions that will determine the direction and quality of Australia's economic development and its social consequences being left to the market. The explanation for why Australia adopted the model was, in part, attributed to the relatively weak state of Australia's parliamentary institutions as a representative democracy, strong executive and strong party discipline.

This is not to say that the Australian system does not produce good outcomes for many decisions. The problem is that for some key strategic decisions the tendency is to select simple, easy to market solutions for economic and social problems that reflect the capacity, interests, and vision of the leadership group which will include those established interests that have an affinity with the political leadership.

More complex solutions that require the input of the broader political community and the design of new governance structures that may lie beyond the control of strong established, including bureaucratic interests, tend to be eliminated at an early stage. The likely consequences for the future noted in the 2001 lecture included:

- (i) increasing wealth/income inequalities;
- (ii) increasing foreign ownership and narrow based economy;
- (iii) no solution to Australia's high current account deficit and foreign debt;
- (iv) financial instability from the capacity of the financial sector to expand debt to whatever level that was in its interest; and
- (v) a vulnerability to negative economic shocks and a poor capacity to respond which is now an important issue in the context of a likely carbon price shock.

² Harvard University Press, 2008.

The focus of this lecture is to elaborate on the likely consequences of the adoption of the neoliberal model for Australia.

The Corporatist state model

The neoliberal approach focuses on market conduct and structures on the assumption that if market conduct and structure is appropriate then optimal outcomes will be achieved. Whatever outcomes are achieved by market forces will in the main, by definition, be optimal.

Corporatist states tend to approach development from the reverse direction. Objectives are specified in terms of social, political, security, export and industry output/cost targets. The means are then designed to mobilise whatever is necessary to achieve the defined objectives in the minimum time subject to global resource constraints and global if not local market forces.

The strategies, that is means, of corporatist states to achieve objectives involve reducing the risks to the institutions (governance and commercial) charged with the responsibility of ensuring the objectives are achieved by:

- (i) building large scale enterprises to dominant markets and supply chains, reaping maximum economies of scale and scope, and reducing market risk to a minimum
- (ii) ensuring that all necessary resources in terms of finance, skills and technology are available for the task;
- (iii) ensuring that any other domestic or foreign organisation cannot impede the performance of the chosen organisation(s) for the task; and
- (iv) tending to rely on regulation rather than the price mechanism.

An early corporatist state, Germany, in the 1930s grew by 12 per cent per annum between 1933 and 1937, with the unemployment rate cut from a third back to full employment while most developed economies had an inferior performance though not necessarily by much. The superiority of Germany by 1937 over the United States compared to 1929 levels of GDP was 17 per cent, although it was the German ability to reduce unemployment that caught attention.³ What is important is not whether a more neoliberal approach would have been more effective but that the approach was different and it seemed to work. It changed history.

The North Asian countries took note of the German strategies and applied them post war with astonishing results. To take one example, the case of South Korea is miraculous. In 1961 South Korea had an annual income of US\$82 per person, or less than half that of Ghana at the time. Today it is one of the wealthiest countries in the

³ R.J. Overy, *The Nazi Economic Recovery 1932–1938*. The Economic History Society, 2nd ed., New York, Cambridge University Press, 1996.

world. It took the United Kingdom two centuries and the United States one and a half centuries to achieve the same result.⁴ More importantly Korea, Taiwan, and Singapore continue to maintain per capita GDP growth rates well beyond the level achieved by other countries with a similar high level of per capita income.

In this context there are three categories of corporatist states:

- (i) the social market model of Western Europe with democratic institutions where policy institutions rely on codified statute and regulations with some reliance on non-parliamentary governance bodies representing stakeholder interests;
- (ii) the corporatist state model of Singapore, Korea, Japan and Taiwan which may or may not have effective democratic institutions but where the governance is non-transparent, relying on networks between governments, bureaucracy and businesses with decisions made in the interests of the collective irrespective of codified statutes and regulations. The penalties for non-compliance are exclusion from social networks and business supply chains with severe consequences for social standing and material advancement;
- (iii) the extreme authoritarian models of Germany/Italy in the 1930s and Russia and China today, where along with social and commercial exclusion, violence (i.e. loss of property, liberty and in the extreme cases life) is a penalty for non-compliance. The extreme authoritarian model has an impenetrable informal governance structure.

The Germans showed in the 1930s that the arrest of an individual for economic treason when it is clearly understood that the real crime was the import of product instead of using the favoured domestic supplier was a very effective form of industry policy which did away with the need for costly tariffs, subsidies or other financial inducements. In this context it is interesting to note that the criteria applied in determining what foreign enterprises can and cannot currently do in China is expressed in terms of largely undefined parameters based on the concept of national economic security.

Many countries aspire to the status of corporatist states. Few however have the capacity to reach the desired status. On this criteria the classification of Russia as a corporatist state is problematic.

China where to?

Of high importance to Australia's national interest is how China will evolve. Neoliberals tend to assume it will evolve into a market based economy.

China is not going to be transformed into a neoliberal market economy. Instead, it may well transform itself into perhaps the most efficient corporatist state model of all time with, over the next 2 to 3 decades:

⁴ HA-Joon Chang *Bad Samaritans: the Myth of Free Trade and the Recent History of Capitalism*. New York, Bloomsberg Press, 2008, pp. 3–4.

- (i) a large number of its state-owned (or indirectly controlled) enterprises (70 per cent of business assets are still under direct government control) becoming the largest companies in the world dominating the control of capacity in many industries; and
- (ii) a Communist Party that will grow rapidly and in influence on the basis of generating individual material advancement that will also provide an informal governance framework that will be simply impenetrable. No matter what the codified statutes, China will have a machinery of governance capable of doing the opposite on non transparent command. In this context who owns the enterprises will be irrelevant.

The Chinese see large scale foreign investment in China mainly as a short term strategy to:

- (i) introduce new technologies, management expertise and new skills generation; and
- (ii) construct distribution systems to the world economy

in the shortest possible time. It is likely as their own enterprises are built up to world competitiveness, the assets of foreign enterprises that directly compete with and are of no strategic value if left independent to a mandated Chinese enterprise will be taken over by a combination of intimidation (as per the Russian approach to BP and Shell assets in oil and gas sites), financial incentives and frustration of which the recent creation of Communist Party control of Trade Union cells in foreign enterprises will be a useful tool. At worst foreign enterprises exiting China may find that they will lose a significant proportion of non-Chinese assets and intellectual property and, in the extreme, the entire enterprise.

The only major uncertainty about China is the extent to which extreme nationalism will become a hallmark of its external relations similar to what occurred in Germany in late 1930s.

The recent signs in this regard are not encouraging. There are signs that strong nationalism is taking root amongst the young with the state having the capacity, like Germany, to manufacture out-pourings of mass nationalism triggered by suitable incidents. The optimists assume that massive environmental problems and widening inequalities will trigger a move, at worst, towards the social market model. The pessimists contend that threats to the legitimacy of the elite in the context of severe resource and environmental constraints will result in the sustained administration of the drug of extreme nationalism and the rectification of past injustices at the hands of the West.

To quote Robert Kagan in his recent assessment of China:

If East Asia today resembles late-nineteenth- and early-twentieth-century Europe ... a comparatively minor incident could infuriate the Chinese and lead them to choose war, despite their reluctance. It

would be comforting to imagine that this will all dissipate as China grows richer and more confident, but history suggests that as China grows more confident it will grow less, not more, tolerant of the obstacles in its path. The Chinese themselves have few illusions on this score. They believe this great strategic rivalry will only 'increase with the ascension of Chinese power'.⁵

All that has to be done is to assume, as is the case here, that China behaves no worse than the United States as a global power or no worse than the Western European powers behaved towards China in the Nineteenth Century to arrive at the conclusion that a difficult period for Australia lies ahead. This is returned to below.

The governance riddle

The riddle is that the leadership of corporatist states is even more politically exclusive and dominated by existing bureaucratic and commercial interests than what is the case I have described for Australia. Yet these states, because of a combination of history, culture, ethnic homogeneity, strength of nationalism, genes, a common view of economic competition as warfare by other means, requiring the nation to be on a permanent war footing, or whatever, are capable of delivering high performance sustainable outcomes on a long term basis.

My only answer to this riddle for Australia, based on observed Western European outcomes, is that the appropriate response to the corporatist states is not to emulate them in political structures and conduct, but to achieve similar outcomes by strengthening the institutions of representative democracy. That is, governance and the institutions of governance are important in contrast to the neoliberal view that governance is relatively unimportant.

The focus here, in regard to some of Australia's current and future economic problems, is how a corporatist state solution would differ from the actual or likely neoliberal solution.

Monetary policy

In the 2001 lecture I pointed to the Australian neoliberal 'privatised' monetary policy regime where no intermediate target for credit growth was set as is the case for the monetary policy of the European Union. Provided CPI inflation is within the desired bounds then debt accumulation could be at whatever level the market was willing to absorb. For the European Central Bank (ECB), inflation in the long run is a monetary phenomena and any credit growth on a sustained basis in excess of desired nominal GDP growth will result in undesirable inflation. In Australia credit growth in excess of desired nominal GDP growth is taken as a sign of a healthy economy. For the ECB monetary growth should be little more than desired nominal GDP growth.

As Table 1 indicates, the ECB has achieved its objective since 1996, while in Australia the growth in M3 (liquid liabilities) relative to nominal GDP has been 28

⁵ Robert Kagan, *The Return of History and the End of Dreams*. New York, Alfred A. Knopf, 2008, p. 36.

per cent. This does not seem much but, as will be outlined below, the consequences for long run economic and social stability will be very large.

Over the years I have criticised the Australian approach to money policy as irresponsible. That is, I have agreed with the ECB view provided inflation is defined as including established asset prices (shares, dwellings) as well as newly produced goods and services.

Therefore, sustained credit growth in excess of desired nominal GDP growth will:

- (i) increase the vulnerability of the economy to negative shocks by encouraging borrowing for consumption and driving down household savings ratios;
- (ii) create an increasing proportion of households in ‘serf’ status by forcing households to pay high debt service/rent payments as a proportion of income over an extensive period of their life cycle;
- (iii) lead to house prices (and rents) putting home ownership beyond the reach of an increasing proportion of the population; and
- (iv) easy short term growth diverting energy and attention from the constant resource mobilisation effort required for long run sustainable growth.

Table 1

Ratio of M3 to GDP

	Australia	Euro
1997	0.20	0.25
2007	0.25	0.25
Per cent change	28	0

Source: IMP Financial Statistics

The excess monetary growth for Australia drove the build-up in asset values (Figure 1) which encouraged households to borrow and spend (Figure 2).

Figure 2 shows the precipice the Australian economy is now sitting on. Non-dwelling investment borrowings by households over the last half decade have increased from 5 per cent of income to currently around 15 per cent. If only a third of this is used to support consumption, then a repeat of the 1991 experience of household borrowings for non-dwelling investment turning negative, would cause the household savings ratio increasing by 5 to 7 percentage points, plunging the economy into the severest recession since the depression.

In the context of Figure 2, the current (August 2008) dilemma facing the Reserve Bank of Australia (RBA) is self evident. Although inflation is 1.5 per cent per annum above the 3 per cent upper bound of acceptable outcomes, the RBA can either

maintain tight monetary control and risk of a severe recession, or abandon tight monetary policy and risk the return of longer term unsatisfactory inflation thereby simply postponing the day of reckoning to greater pain down the track.

The RBA has only itself to blame for this as it is simply the result of a decade of irresponsible monetary policy. It knew of the ECB approach, but showed no intellectual leadership and simply went along with the short term political objective of maintaining the financing of the new aspirational society. Indeed a good case can be made that Australia's low inflation rate over the decade to 2006 was in spite, not because, of the RBA. That is from the 'China price' effect, the productivity potential of the economy created by the 1991 recession, the reduction in protection etc. Its only effective task in this period was to ensure that financial structural disequilibrium did not occur. It failed.

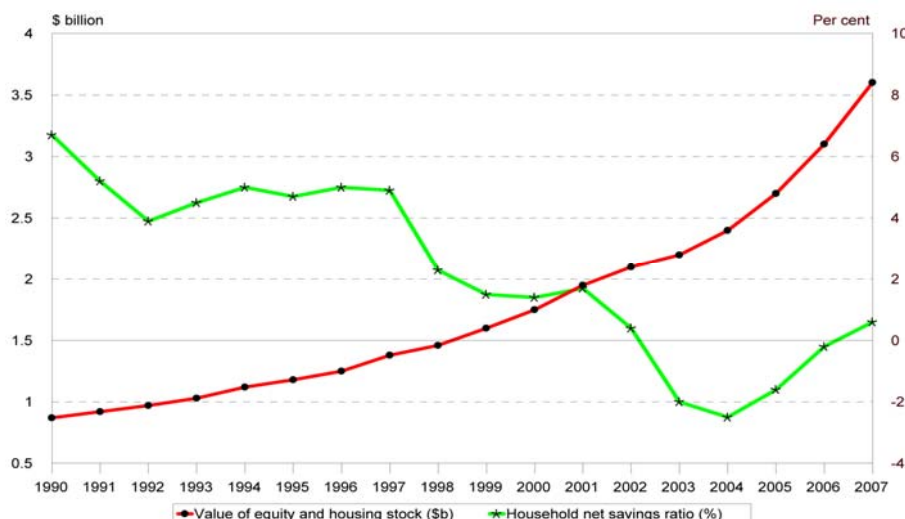
Ultimately, Parliament will be held responsible for delegating without appropriate guidelines a core governance responsibility to unelected officials.

Towards debt serfdom

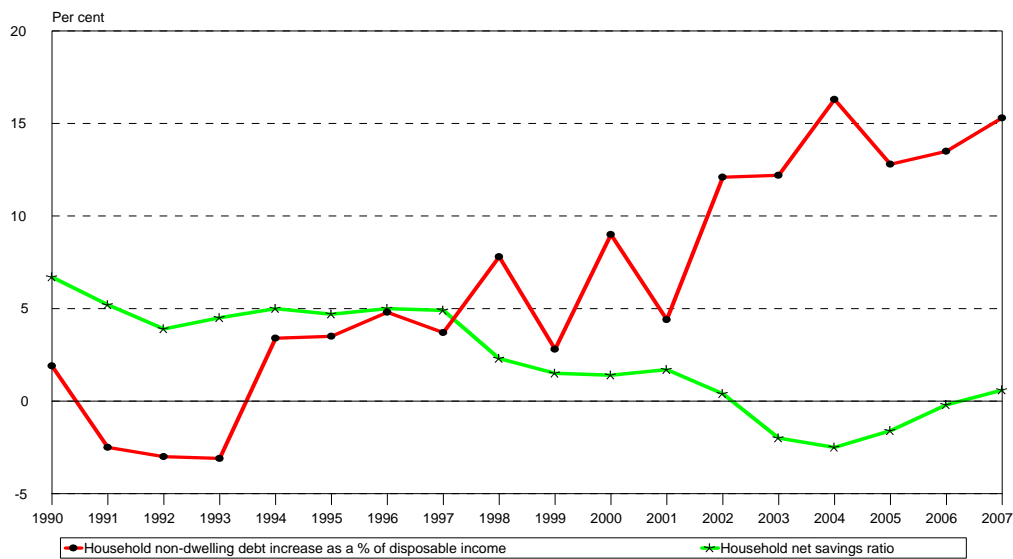
But what if Australia escapes the current policy difficulty and interest rates start to come down within a year or so? The current undersupply of housing (a shortage of around 150,000 units by 2010), is increasing rents and when interest rates come down will trigger a rapid rise in dwelling prices as many try to escape rental status. In other words, the 2003 to 2007 cycle will be repeated with a further increase in the proportion of households that could be classified as 'serfs' risking longer run social stability.

Figure 1

Asset value growth has allowed expenditure levels to be maintained well in excess of income



Source: ABS, 'Australian National Accounts', Catalogue Number 5204.0

Figure 2**Household debt has allowed savings ratios to fall**

Source: ABS, *Australian National Accounts*. Catalogue Number 5204.0. NIEIR has adjusted the data for estimates of borrowings for new dwelling construction and renovation.

To elaborate on the concept of serf status. The origins of serfdom in Russia were based on the need to keep labour fixed in place because of the excess supply of land relative to labour with high marginal physical product of labour resulting from the large territorial gains from conquest with small populations. Market forces would have driven wages to very high levels. Various tactics were tried to constrain labour mobility, such as finding replacement labour before a peasant could move. Another tactic was for the landlord (the farmer of the day) to willingly lend to peasants all that was needed and more (for implements, livestock, fencing etc.). Another unfortunate linking of readily available finance with an emerging aspirational society.

Droughts, wars, plagues, would force more lending until peasants were hopelessly in debt. This debt serfdom facilitated legislated serfdom with the peasant tied to the land with the requirement of up to three days a week work for the landlord. As other family members could work on the serf's allocated land or in the cash economy modern serfdom 'status' will be taken here to arise when households pay over 35 per cent of income in debt service and rent.

The recent Australia history of more than doubling of the household debt to income ratio since the mid 1990s is well known. However, there is little recognition of what this may mean at the micro level. Both Tables 3 and 4 clearly spell that out. It means less homes in fully owned status and more households paying more than 35 per cent of income in rent and debt service costs. In terms of mortgage households the 2008 estimate of the share of households paying more than 35 per cent of income in debt service costs is 23 per cent due to interest rate rises since June 2006. It should be kept in mind that from the 2006 Census those households paying more than 35 per cent of

income in debt service costs were paying an average debt service cost of just under 50 per cent of income. That is the living standard of a household with no debt would on average be twice that of the average household of serf status despite both households having the same income.

By 2018 on current conservative trends (an increase in the household debt to income of 30 per cent from current levels and interest rates declining from current levels), it is estimated that at least 22 per cent of households will be paying more than 35 per cent of income in debt service and rent costs, or a doubling since 1996 levels. This excludes the high debt of fully owned households.

It might be claimed that the use of the concept of ‘serf’ status in the modern context is over the top as households can eventually escape debt status and Russian serfdom was inter-generational. I would counter argue that in fact the intergenerational aspect of serfdom is de facto also emerging in modern times.

Table 2

Share of Households by Ownership Status

	1996	2001	2006	2018
Mortgage	26.2	27.6	34.1	39.0
Rent	28.9	28.1	28.1	29
Fully owned and other	44.9	44.3	37.8	32.0
Total households	100.0	100.0	100.0	100.0

Source: ABS Census and NIEIR

Table 3

Per Cent of Households with Debt Service and Rent over 35 Per Cent of Household Income

	1996	2006	2018
Mortgage	14.0	20.0	28.0
Rent	26.0	26.0	39
Total (Mortgage plus rent households—per cent of total)	11.2	14.1	22.2

Source: ABS Census to 2006, adjusted for non-mortgage debt service costs from 2004 ABS HIS survey. Rent has been similarly adjusted.
The 2018 rent estimates assume a 30 per cent rise in the household rent income ratio between 2006 and 2018, a process that is now well underway.

The movement towards neoliberal solutions in education and health means that access to quality services is determined by household circumstances. The greater the number of households in serf status, the more likely the serf status will be passed on to their children from underinvestment in social capital complemented by increasing resort to

reverse mortgages allowing a life time of high debt service costs with little or no inheritance for children.

This is consistent with findings from the United States vis-a-vis Sweden. For the United States the correlation coefficient between status of parents and children is around 0.5 while for high taxing equal opportunity education/health service across Sweden it is 0.2.⁶ The irony is that the United States is a society that is approaching as rigid an intergenerational class structure as what prevailed in Europe in the Eighteenth and Nineteenth centuries which in part forced the migration to the United States.

The likelihood is that if something radical is not done there will be a high degree of intergenerational correlation in serf status. This will leave Australia with an unenviable choice around 2030 of, either a severe one-off tax on wealth to 'emancipate' the serfs, or suppression of the serf class to maintain social stability.

In any case a society in 2018, characterised by the results given in Table 2, will be a very grumpy place. Economists have discovered that after national per capita income is greater than US\$20,000 happiness is a function of relative incomes not absolute incomes. The greater the serf class the greater the inequality of discretionary income and the greater the unhappiness.

Housing affordability

One of the core solutions to arrest the march towards a serf society is to significantly increase housing affordability for first home buyers. In this regard the case of Germany is important since German house prices in nominal terms are only a little more than what was the case a decade earlier and have fallen in real terms. In other parts of Europe house prices have doubled, such as Italy, so that although ECB tight monetary policy has helped it is a necessary not a sufficient condition for maintaining high levels of housing affordability. For Australia over the same period the increase in house prices has been a little under 180 per cent. You would think that current German housing market policies would be at the top of the agenda for all Australian governments.

Corporatist state type housing solutions have been followed in Austria and Germany for decades. These are called social partnerships. These policies aim at coordinating and accommodating conflicting interests between landlords, tenants, financial institutions and government. One core feature is risk shifting from the private sector to the state.

In terms of the rental market, the features of the German housing market are:

- (i) long term contracts for tenants 3 to 10 years;
- (ii) can only be terminated from the landlord's perspective on a narrow range of criteria and 3 to 9 months mainly conversion to owner occupier status;

⁶ A. Bjorklund and M. Jantti. 'Intergenerational Mobility in Sweden Compared to the United States', *American Economic Review*, Vol. 87, 1997. See Also *The Economist*, 'Even higher society even harder to ascend', 29 December 2004.

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- (iii) defined rules for rent increases (e.g. CPI indexing);
 - (iv) housing benefit support based on monthly income for both renters and owner-occupiers; and
 - (v) strong public sector housing construction with municipal housing construction providing around 10 to 15 per cent of housing stock.

In terms of dwelling construction and the supply of housing, there is direct subsidisation of housing construction at the state level taking into account the regional housing market situation. Construction support via preferential interest loans, grants, guarantees/ securities, provision of land etc. is allocated to housing companies, housing associations and individual builders on application.

Direct financial support comes from federal government/state financial institutions. The focus of loans is for:

- (i) housing stock renovation;
- (ii) CO₂ reduction retrofitting;
- (iii) Rental new housing construction; and
- (iv) low interest loans for the construction or purchase of owner-occupier housing.

A CO₂ Building Renovation Program of 25 billion Euro was introduced in 2008 for the modernising of heating systems and energy efficiency optimisation of the building shell for both renters and owner-occupier stocks.

Accelerated depreciation allowances (9 per cent over 8 years and 7 per cent over remaining 4 years) was provided for renovation expenditures in listed buildings or precincts, for commercial property owners, with a similar depreciation scheme for owner-occupiers.

Regulation makes it difficult to borrow more than 60 per cent of house value, with German lenders reluctant to allow top up of mortgage if the home increases in value.

The overarching German objective is to ensure that the supply of houses runs well ahead of demand.

In an unequal society increasing housing affordability and equal opportunity for housing affordability can only come from one strategy, namely the rationing of opportunities by rationing of finance and a very targeted list of incentives. This is how the market was governed to allow Australia to solve its last major housing crisis after World War II. Each state had different strategies. Victoria rationed credit via the State Savings Bank while New South Wales (which lost its Saving Bank in the Depression)

focussed on public sector housing construction. There were many other niche instruments which were swept away over the last 20 years under the mantra that the market will solve everything.

The Federal Government has introduced new supply side measures. However, what is clear about housing policies is that they have to be comprehensive to stop ‘leakage’ into house prices if they are to achieve the delivery of affordable housing to those who need it.

Telecommunications

If the corporatist states are as good as I am inferring in economic development then it would be expected that they would be well ahead in the provision of quality telecommunications infrastructure. This is the case. As at mid 2008 the average download speed in the United States is 1.9 Mbps, 61 Mbps in Japan, 45 Mbps in South Korea, 18 Mbps in Sweden and 17 Mbps in France. Eighty per cent of households in Japan can connect to a fibre network at a speed of 100 mlps, 30 times the average speed of the United States, while modem or DSL connections are at roughly the same cost.⁷

Australia is 30 per cent to 50 per cent below United States levels. Australia has announced a supply side initiative to improve things but the past delay in trying to incorporate market forces into the process will mean that like electricity to Timbuktoo Australia will get there but only when quality telecommunications is a competitive necessity and no longer a competitive advantage. Also the image of Australia being a technological laggard is not a good one to attract investment. The same approach in many other economic aspects has and will cost Australia dearly.

Greenhouse gas abatement policies

There is no better example of this than the approach to greenhouse gas abatement policies (GGAP). The design of GGAP regimes currently being undertaken in Australia is proceeding along strict neoliberal lines. The central touchstone is that the market is the most efficient platform to engineer the appropriate changes. All the government has to do is set an emissions cap and the resulting price changes will miraculously allow the emissions objective to be achieved. To quote:

The miracle of the market: ‘There are two distinct elements of a cap and trade scheme—the cap itself and the ability to trade. The cap achieves the environmental outcome of reducing greenhouse gas pollution. The act of capping emissions creates a carbon price. The ability to trade ensures that emissions are reduced at the lowest possible cost.’⁸

The reality is it won’t. Let’s consider by illustration a segment of the adjustment effort, mainly the electricity sector. Assume that a target is set to reduce total

⁷ L. Cohen in testifying before the United States House Sub-committee on Telecommunication and the Internet.

⁸ *Carbon Pollution Reduction Scheme Green Paper—Summary*. Canberra, Department of Climate Change, July 2008, p. 12.

emissions by 20 per cent below 2005 levels, which would represent a (EU 2020 target) 223 million tonnes reduction from a 2020 Business-as-usual (BAU) level in 2020.

Of the 223 million tonnes, a large part of the reduction would need to come from the electricity sector. Around 91 million tonnes would need to come from replacing about of 11 000 megawatts of coal fired plant. To do this the price of carbon would need to (on NIEIR and ACIL-Tasman estimates) quickly ramp up to around \$55 a tonne by 2020, based on long run marginal cost of alternative supply in order to achieve the long run marginal costs of CCGT (combined cycle gas turbine) plant in combination with the mandated Federal renewables target.

A corporatist state would immediately conclude that the Australian market of independent generators independently bidding for supply would not be successful even if the \$55 CO₂ price were achieved. The market won't react because to achieve the target around 50 billion dollars in generators, gas development, pipeline and plant/pipelines, transmission investment would have to be spent. In an unfettered market environment the risks would simply be too great.

The risks would include:

- (i) **Existing supplier risk.** Yes, the asset value of existing brown and black coal plant would be reduced by over 90 per cent. However, bankruptcy would merely mean that the new owners would be willing to supply some of the market at short run marginal cost which **might** require an additional \$20 to \$25 a tonne in CO₂ price (that is \$80 a tonne) to reduce the risk. If they continued their pre-ETS output the cap would not be attained;
- (ii) **Technology risk.** Electricity generation technologies are rapidly changing. At any point in time technological change may well reduce the real LRMC by 20 per cent to 50 per cent in 10 year's time. Few are going to be building a 2 billion dollar plant today that could become obsolete shortly after it becomes operational;
- (iii) **Regulatory risk.** If \$60 to \$80 a tonne CO₂ price results in excessive economic damage the CO₂ price will be lowered and cap attainment strictly regulated, for example by applying mandatory gas targets as now applied in Queensland. Without compensation guarantee of future prices few will risk large investment funds; and
- (iv) **Gas supply risk.** Yes, long term contracts for gas supply will be negotiated with existing suppliers. However, at any time now gas discoveries could result in suppliers willing to supply long term gas at a fraction of current prices, especially if the location were remote from existing gas distribution infrastructure **or** the global LNG market were over-supplied.

One option a corporatist state would readily implement would be to combine all the generators into a single body. The arithmetic is simple. Under the present structure of

independent suppliers a \$55 a tonne carbon price would result in costs per megawatt hour increasing from \$45–\$50 to around \$90, or around 80 per cent in the wholesale price. If these costs could be spread over the entire capacity, as it would be the case under a single entity, then the wholesale price increase could be limited to 20 per cent, or about 7 per cent for the price increase at the retail level which would represent a minor irritant.

However there would be further short term savings. The price increases would be phased in as plants are completed. In terms of cost savings, the strict neoliberal approach to the current Australia situation would result in cumulative CO₂ price costs imposed on the economy between now and 2020 of anywhere between a minimum of 110 and 150 billion dollars to allow for market instability and required risk margins without any guarantee that much of the required capacity would be completed by 2020.

The corporatist state would allow a guaranteed outcome for total cumulative electricity costs increases of between 15 and 20 billion dollars. All other risks are reduced to zero by allowing a monopoly.

It is this logic that explains why the electricity sector was nationalised in Australia in the first half of the Twentieth Century as state after state gave up trying to induce the required supply response at the right price from an albeit regulated private electricity sector.

A good corporatist state that didn't want to renationalise the generating industry in Australia would sit down with the generators and hammer out an agreement for ownership change, exit arrangements on reasonable terms, and a regulatory environment that delivered an outcome in line with the old nationalised model where the private sector could still play a part. The current Queensland model for encouraging the use of gas in electricity generation would be a good place to start. The ultimate model would probably resemble this model and the model used by Victoria to run its train system.

The Garnaut recommendation to ignore private sector losses is not the right way to go. Governments are going to have to rely on the private sector (albeit with substantial risk shifting to the public sector) to undertake a substantial portion of the hundreds of billions of expenditures needed for greenhouse gas reduction.

Any rational corporatist state approach to CO₂ reduction would place the emission trading system at the end point not at the beginning in policy design. It would work out all the possible regulatory, technology and mandatory market incentives (by directly paying tradesmen to retrofit dwellings with insulation, solar panels, gas, etc.) with the carbon price then set in terms of financing requirements and long term strategic direction.

A corporatist state would laugh off the suggestions of the neoliberals that Australia needs a high CO₂ price for energy efficiency. Yes there is some low lying fruit but this isn't the main game. Australia makes little equipment so energy efficiency gains will depend on how overseas suppliers respond to the world carbon price. Accelerated

depreciation allowances, tied investment allowances and energy efficiency performance regulation would be far more efficient in encouraging speedy adjustment. High carbon prices by themselves would simply result, in many cases, in plant shutdowns when they reached the end of their commercial life.

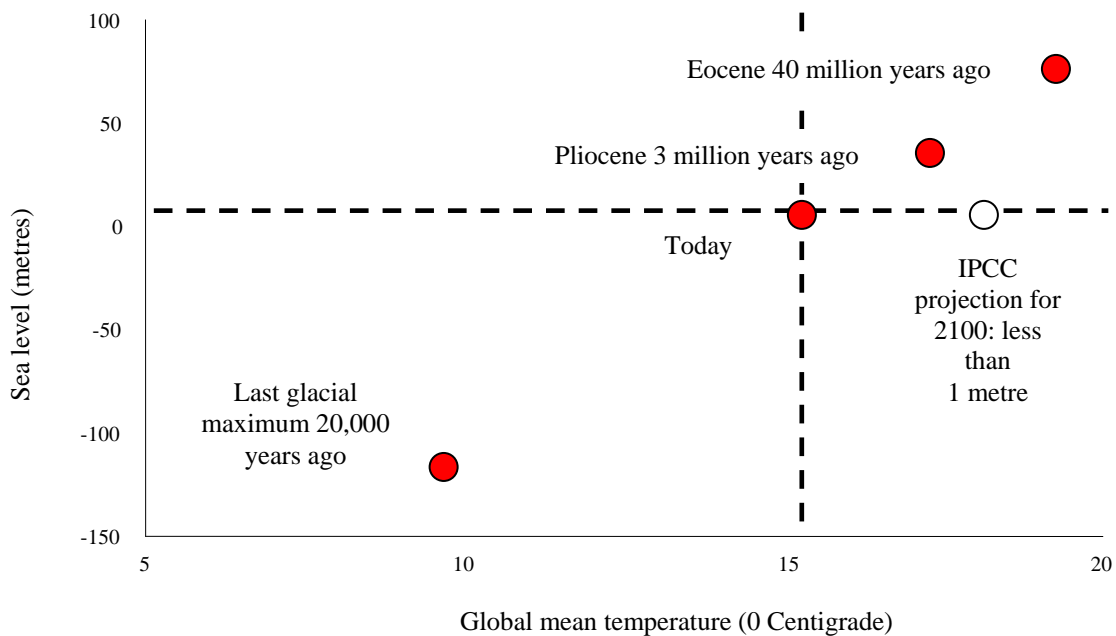
If the Treasury modelling into carbon prices simply assumes that the market operates optimally with ‘near perfect’ substitution between factors of production then it should be immediately thrown into the bin for the rubbish it will be.

In this context one of the best things the Federal Parliament could do for climate change is to give back to the states their income tax base set in line with their responsibilities so they can build the necessary transport infrastructure and urban design to minimise the CO₂ content of connectiveness. The situation is now reaching the extreme position where an increasing number of households in major metropolitan areas will not have the time and/or financial incomes to reach their place of work on a regular basis.

To do this requires the Federal Parliament to stop the practice of spending what should be state resources on income tax cuts to enhance its short term election prospects.

Figure 3

Global temperature and sea level



Source: David Spratt and Philip Sutton, *Climate Code Red: the Case for Emergency Action*. Melbourne, Scribe, 2008, p. 41.

Finally in relation to climate change if the implication of figure 3 is correct then by 2100 the IPCC may well revise up the sea level rise by 2100 to 10 to 20 metres in the same way that predictions of an ice free summer Arctic have been quickly brought forward from a hundred years time to the near term. That is the 2 to 4 degrees Centigrade predicted rise in global temperatures even with substantial emission reduction success would still result in tens of metres rise in the sea level. This would require a response to reduce CO₂ in the atmosphere back to the 1990 level of 350 parts per million which would in turn require a near zero emissions target by 2050. This would necessitate drastic action but the tools of the corporatist state could enable it to be done albeit with no increase in living standards (consumption per capita) for decades.

National security

In the 2001 lecture I gently suggested that to protect the national interest and economic sovereignty it was desirable to bring foreign investment decisions more under parliamentary control and not leave it to an effectively unaccountable body. This has become more urgent.

There is no national interest in allowing major customers (that is, Chinese enterprises) to control Australian resources. The objective here is simply to transfer value from Australia to China to enhance international competitiveness and real incomes.

The concept of sending tax inspectors to Beijing to politely ask to see the books of what will be the biggest companies in the world owned by a potentially hostile country to try and recoup billions of lost tax revenue is laughable.

The only possible reason to allow China (or any other major customer) to buy Australian resource assets would be if the supply resources at prices that would prevail if Australia was an occupied colony was in fact a part of our defence policy. If indeed it is part of our defence policy it is unlikely to work. The thing about global powers is that the stronger they get the more they want realised projections of that power to feel secure. In the not too distant future China will establish bases in Timor or nearby to 'secure' their trade routes. China will have the economic resources to 'buy' many countries. If they secure these bases and if Chinese enterprises owned substantial Australian resource assets, then it would be a simple matter to organise the blowing up of an offshore oil rig (which they would own) and then deploy navel units to the North West Coast on the grounds that this was necessary to protect their assets which Australia could no longer do. Once there the region would be effectively annexed using the same tactics that Western European powers used to effectively annex Chinese and Japanese key trading ports along with control over their national commercial policies in the Nineteenth Century.

A good case can be made that Australia is heading towards a classic "banana republic" status. The phrase 'banana republic' was invented to describe a country like Honduras where foreign interests (United States) controlled the region producing the principle Honduras exports (bananas) and all supporting infrastructure. The region was run like a private chiefdom in which companies kept order, and crushed labour dissent by the use of their own security forces or when necessary by calling in United States troops, who then established military bases in the country.

The irony is that it was the aim of preventing Australia from becoming a banana republic (Paul Keating 1986) that was one reason for adopting the extreme neoliberal model. It wouldn't be the first time that a policy shift achieved the reverse of what was intended.

In this context for Parliament not to take back control of foreign investment decisions could well be seen from the hindsight of 2030 as pure treason. The immediate task is to reduce Chinese foreign investment in Australian mineral resources to zero.

When doing this Parliament could usefully abolish the Productivity Commission and replace it with a body directly under parliamentary control, focussed on protecting Australia's economic and political sovereignty. The Productivity Commission can do good work but, unfortunately, its ideological blinkers can result in it unintentionally operating as a fifth column within government, reinforcing those private and foreign messages and demands that have and will undermine the national interest. This is an intolerable situation.

The United States and Australian security

Whether the above can occur depends in part on the speed of the decline of the United States relative to China.

Over the next decades Australian security very much depends on the relative decline in political economy strength of the United States being as slow as possible so as to allow the region to develop balanced multi-polar counterweight power centres in which Australia can enhance its security. Unfortunately, trends in this regard are not optimistic.

The United States has seemed to have gotten itself into an unstable political cycle where the Republicans are hell bent on exhausting the Federal treasury (largely for the benefit of their own constituency) so that when the other side obtains office there are few resources available to correct some of the United States' fundamental problems (not all that dissimilar to Australia's), except absorb the odium of raising taxes, ensuring the political cycle will continue.

This, when coupled with established interests being able to influence both parties for changed regulation, removal of regulation and less regulatory oversight for the enormous benefit of a few and the eventual misery of many does not bode well for a political response that will arrest America's relative decline.

In this context not surprising is the outcome that during the Bush administration three quarters of the economic gains went to the top 1 per cent of taxpayers.⁹ To sustain its economic strength and combat climate change, the United States, like Australia, requires a redistribution of resources from consumption to investment. The magnitude of such a change probably can only be done with very strong political leadership that, in relatively normal times, would only effectively come from a leader from the right, that is, a Republican such as Teddy Roosevelt. This avoids the charge of class

⁹ *The Economist*, 1 August 2008, p. 43.

warfare. For a Democrat leader to engineer this outcome it would require a massive economic or security crisis as per Franklin Roosevelt. This might of course occur but the probability is that the United States will continue to experience destabilising political cycles that will sap its economic and political strength.

The point may well be reached sooner than any of us think when the United States will have to decide, as Britain had to in 1902 with the Anglo-Japanese treaty, what were its strategic interests and what had to be let go. That is, the United States will have to decide what will remain in its sphere of interest and what will have to be conceded to China, India etc. The more Australia becomes vital to the Chinese economy and the greater Chinese investment in Australia the more likely, irrespective of history, culture and tradition, that the United States may have to decide that Australia can no longer be justified as being a member of its sphere of influence.

From this perspective the faster Australia can diversify its trade and the stake of countries in Australia the greater the ability Australia will have to protect its effective sovereignty. This gives industry policy a strategic security status which is common to most corporatist states.

Industry policy

The record of Australian industry policy has been appalling. As Table 5 indicates, the relative fall in Australia's non-mining merchandise exports has accelerated over the last decade, which would be expected given the Coalition Government's downgrading of industry policy. Australian service exports in real terms have been virtually stagnant since 2000.

The resort to trade agreements will not be successful. NIEIR investigated the impact of the trade agreements to the end of 2007, including the United States Free Trade Agreement, and found the effect to be small, in terms of manufacturing.¹⁰ They might have been successful 20 years ago but now Australia's trading relationships are being massively overshadowed by the growth of Asia and Latin America. The neoliberal policy focus is largely irrelevant. The concept of an Australian-China free trade agreement is an oxymoron.

To succeed in the future Australia will have to integrate itself into the informal networks of Asia, using whatever levers it has to lift the glass ceiling applying to Australia as set by informal governance structures. These levers would include defence relationships, foreign investment in Australia, ethnic networks operating from Australia, cultural affinity, the strategic foreign investment in selected countries, etc. For success this requires a coordinated effort from many.

¹⁰ NIEIR, *An evaluation of the impact of Australian Free Trade Agreements to the end of 2007*, for the AMWU, 9 April 2008.

Table 4

Change in share of Australia's nominal non-mining merchandise exports of selected regions export totals—per cent per annum

	1980-1996	1996-2006
Asia	-4.4	-5.6
North America	-1.8	-2.7

Source: World Trade Organisation

Conclusion

The outlook over the next 20 years realistically has to be approached with a sense of pessimism. Left unabated current trends suggest that Australia will be facing increasing external pressure coupled with internal economic malaise and a growing feeling that political institutions are not working. The most recent period that is likely to be similar to the future was in the mid 1970s from a combination of intense Cold War pressure and economic meltdown from an energy crisis.

The mid 1970s was a strange time with coups, quasi coups and attempted coups in a number of places including the UK where the early stages of an attempted coup centred on Lord Mountbatten and was terminated by the resignation of the British Prime Minister of the day, Harold Wilson.¹¹

To avoid similar circumstances prevailing, Parliament's role is clear. It must be seen and be effective in putting in place institutions and policies which will govern the market in such a way that the current and future challenges are controlled, stemmed and defeated. The consequences of failure to do this are unthinkable in that it will resemble, and perhaps in some ways be more intense than, the political and economic pressure applied to Australia between 1931 and 1942. More intensive is that a large percentage of the population could have a very poor long term expectation of the future and this time around Australia could be without powerful friends. To effectively combat the three challenges of climate change, external security, and internal stability the requirement is for the adoption and maintenance of a semi wartime footing in policy focus and implementation.



Question — Dr Brain, I wonder if you might care to comment on Australia's seemingly ever-burgeoning foreign debt levels over the past decade or so. I understand that foreign debt isn't really a problem, so long as you can service the debt. What sort of likelihood do you think there might be of Australia getting into problems with servicing that debt?

¹¹ Jonathan Freedland, 'The Wilson Plot was our Watergate', *The Guardian*, 15 March 2006.

Peter Brain — A large part of my speech was about the fact that who owns the debt could be quite important to Australia's future security. In terms of the foreign debt, what you might be alluding to is the fact that although we had a large mining boom and returns of trade escalation the current account deficit hasn't improved and that is because the mining sector is now about 75 per cent foreign owned, and it has very little operating costs relative to other industries. For every dollar that we get from a price increase, probably over 50 per cent flows back into the current account deficit and foreign debt because it accrues as profits to foreign enterprises.

To some extent, that has been disguised by the fact that some of those profits that have been credited to foreign enterprises are re-spent in Australia to expand the mining sector. So the current account deficit has gone up and has offset the terms of trade rise and we have the benefit of the investment. I suppose the real problem comes when that all stops, and terms of trade track back down again and we no longer get the capacity expansion. Then the full extent of this will only be seen in future difficulties. It has been largely neutral but will not be in the future. The fact of the matter is that the impact on the current account deficit hasn't improved because as terms of trade have gone up, the income has flowed out and secondly invested here, which has required the importation of more capital which has entailed more foreign borrowing with more interest credited to the overseas lenders. So we have been in a neutral situation; despite the all time high terms of trade boom nothing has happened. The consequences are when it stops, the music stops. Does that answer your question, or not really?

Question — I don't know if I fully absorbed your answer, to be quite frank.

Peter Brain — The other thing I suppose you are talking about, yes we have one of the highest current account debts in the world. We have seen a number of countries recently such as Iceland, which had high current account deficits and debts, where their exchange rates plunged. So Australia is obviously vulnerable to the current world slow down. If oil and coal prices turn back down again sharply, then the Australian currency will plunge, inflation will go up, we still have four and a half, it will go up to six or seven, and then interest rates have to go through the roof and then we will be in almost a depression-type situation. That's the risk. Does that answer your question?

Question — Pretty well, just a final comment. When Prime Minister Howard came to office, our foreign debt was about 29 per cent. I think of GDP, and the sky was about to fall in. It is 55 or 60 per cent now currently.

Peter Brain — Well the other figure I was mean to put in my talk but I didn't was the fact that foreign ownership of Australian corporate income in 2008 & 2009 will be over 50 per cent. I think that really put us in banana republic status.

Question — We are told that the market is the best regulator of the economy but yet we have the situation where we have Enron, we had our home-grown HIH, now we have Freddie Mac and Fannie Mae in the United States. We read that there was legislation in place to actually prevent disaster such as these occurring, disasters which are now affecting us all. We are told that the market, this supreme being,

obviously has no morals, no ethics, no scruples, and no memory which is a bit of a worry. Action in terms of failure is always retrospective and it is so geared that it is never going to lose because it always has its hands in the taxpayers' pocket. Its ability to convert us back into serfs you mentioned already. Would you like to comment please?

Peter Brain — It all comes back to excessive monetary growth. As soon as you have excessive monetary growth in relation to basic requirements for real sector stability, you get the things I have talked about: over bias of households for consumption, house prices going up, drift into serf status, but also financial shenanigans that drive up the value of financial assets. Illusionary. People think that they are wealthy but they are not, financial engineering, so it all comes to an end just like any ponzi scheme. So really, what you are talking about is when you get too much excessive monetary growth you get all the things mentioned plus financial engineering, which undermines financial institutions and that was behind my quote: 'for the benefit of few and the misery of many'. It's just another reason for keeping very tight monetary control.

Question — Does that mean that we should never have floated the dollar?

Peter Brain — No, it just means that we should have put in a monetary regime that was more appropriate, more defined and more in terms of European standards. The monetary policy regime that we put in really was a benefit to short term political interests because it was non-capped so to speak; there was no cap on the credit that was floating around, and it created periods of intense aspirational euphoria. Which politicians always like because it means that they get re-elected

Question — You raised the question of returning to history. Until we look at history we should not even start to look at the alternatives.

Peter Brain — I agree 100 per cent. What strikes me especially about Australia is that we all start at year zero. Year zero is now. We are starting from year zero as if we didn't learn anything over the past 100 years. The capacity of Australia to do that is just simply amazing. The capacity of other countries such as the Europeans and obviously the north Asians is that history is so vital to the understanding of where they are going forward. Unless we start doing what you're saying, then we won't deserve to survive as a nation. A nation that starts everything at year zero in terms of its intellectual capital, it's not a very good way to go about things.

McCain v Obama: What the 2008 US election means for Australia*

Professor Geoffrey Garrett

The McCain-Palin ticket may have stolen the headlines and taken the lead from Obama-Biden in America. But a recent BBC survey shows that Barack Obama overwhelms John McCain in global opinion by a whopping four-to-one margin. Australia ranks as the fourth most pro-Obama out of the 22 countries polled, behind only the homeland of Obama's father, Kenya, and Europe's anti-Bush bastions, France and Italy. Almost two-thirds of Australians think America's global relations would improve under a President Obama. Only one in five Australians think things would get better under a McCain administration.

These dramatic differences reflect a clear mismatch between what Americans and Australians want from the next US president. They also set up the world to be both challenged and disappointed by what 2009 brings. In Australia, this may mean: more pressure for Australia to be a bigger player in Afghanistan than it wants; less leadership on climate change than Australia covets; less interest in Asia than Australia expects; and the rising protectionism that Australia fears.

* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra, on 12 September 2008. It includes material previously published in the *Sydney Morning Herald* ('Either president may disappoint us', 12 September 2008) and *The Diplomat* ('Great expectations: what a post-Bush world will mean for Australia', September–October 2008).

The US-global opinion mismatch

Amid the deepest economic downturn in a generation and still haunted by 9/11, Americans today are anxious about their future at home and abroad—a far cry from the supremely confident country that elected George Bush eight years ago.

Like people around the world, many Americans are excited by Obama. But they just haven't yet convinced themselves that now is the time to risk putting the presidency in his untested, even if inspiring, hands. There may be lots of warts on McCain, but Americans think they know McCain, an experienced leader who will come through in a crisis.

Much of the world wants to turn the page on the Bush years, embracing Obama as the anti-Bush in so many ways. McCain's strident and unwavering support of the Iraq war tars him with the Bush brush. Selecting Governor Sarah Palin, a cute but feisty and socially conservative attack dog from Alaska, as his running mate and claiming the mantle of change from Obama is working wonders for McCain in the US. But it is testing the bounds of credulity elsewhere, even as the world is transfixed by this public soap opera on the biggest possible stage.

This election itself will not end the mismatch between American and global perspectives. It may even exacerbate them.

The world would embrace US leadership under Obama, but only grudgingly accept it under McCain. Either way, the harsh realities of the challenges facing America mean that the differences between Obama's global feel good and McCain's ho hum sameness will soon dissipate, leaving only frustration and disappointment over continuity and insularity.

Whoever is the next US President will have simply no choice but to make his highest priorities expanding the scope of the war on terrorism from Iraq to Afghanistan, Iran and Pakistan and turning around the US economy in a way that calms the anxieties of Middle America.

America's twin economy-war on terrorism focus will have significant knock on consequences for Australia on the issues most important to it.

Afghanistan and the war on terrorism

The public mudslinging and vitriol over the invasion of Iraq goes on, but just below the surface an elite American consensus is emerging on Iraq. The US will draw down the majority of its 150 000 troops in Iraq over the next four years, perhaps on the 2010 Obama timeline. But assuming Iraq allows it, a sizeable US 'residual' force (at least several tens of thousands of troops) will stay on indefinitely. A Vietnam-style exit is just not on the cards. But a South Korea-style garrisoning certainly is.

The next president will pay more attention to Afghanistan, sending at least 20 000 more troops there. Right now the American public is blissfully ignorant of the enormous commitment required to win in Afghanistan, especially as the conflict increasingly bleeds into an unstable and already nuclear Pakistan. As the grim realities

become clearer, Americans won't tolerate another war based on an indefinite commitment and no exit strategy on top of the trillions spent, thousands of lives lost and relentless troop rotations in Iraq.

The US will again come calling on its allies to do more in Afghanistan. After Bush's failures, will the next president do better? Continental Europe's knee-jerk pacifist predilections run deep. Canada has been at war with itself over Afghanistan for years. And the political instability in Britain leaves it in no position to stand up as it did in Iraq.

That leaves Australia. Kevin Rudd artfully won US support for Australia's withdrawal from Iraq. But he did so by committing Australia to Afghanistan for the long haul. Sooner rather than later, America's next president will want to cash in the ticket. How to honour it looms as large for Rudd as entering Iraq did for John Howard.

Executing the 'less Iraq, more Afghanistan' pivot is not the only major Islamic extremism challenge facing the next US president. The trajectory of Iran's nuclear program is not sustainable, if for no other reason than because Israel insists it must respond to an escalating Iranian nuclear program with force if the world does not. Add to the mix the Tehran-controlled Shiite crescent stretching as far as Gaza and Lebanon, and the possibility of a US-Iran war cannot be discounted even after Dick Cheney leaves the stage.

It is hard to imagine that the Rudd Government will do anything other than support the US over Iran. But if the rockets start firing, Australia's fidelity will be sorely tested.

Two conclusions seem clear about the fight against Islamic extremism. First, the war on terrorism will be no less a priority for the US in 2009 than it is today. Second, Australia will be under at least as much pressure to remain committed to US military adventures as it was during the Howard-Bush years.

Globalisation in reverse

A strange thing has happened on the long road to the US presidency. After almost five years of constant and blanket coverage of Iraq, the economy is now the voters' number one concern. The sub-prime meltdown and the doubling of oil prices have been a devastating one-two punch in the guts of Middle America.

The financial sector has incurred half a trillion dollars in credit losses and asset write-downs over the past year. Fannie Mae and Freddie Mac, guaranteeing half the country's mortgages, have been given a blank cheque bail-out. The once mighty greenback has lost 15 per cent of its value. At the same time, the prices Americans pay to feed their families, drive their cars and run their businesses are all rising alarmingly quickly.

Cool heads say the US economy will bounce back as it has many times before, and that the worst thing government can do is overreact. But the presidential candidates

must ignore this advice and propose to do something, anything, to salve middle class economic anxiety and insecurity.

Home ownership and housing appreciation, pillars of the American dream, lie in ruins. House prices are down more than 15 per cent from last year. Twenty million homes stand empty, with another 25 million in negative equity. Foreclosures exceed sales in many states.

This body blow to Middle America could not come at a worse time. Inequality is at its highest level in nearly a century. Job security is eroding. Wages are stagnant. The twin crises of health care and retirement benefits loom. Voters think their lives are getting worse, not better.

The next president will have to feel the electorate's pain. US support for further globalisation will be a primary casualty. Almost two-thirds of Americans believe that free trade has been bad for the country. A decade ago, globalisation's opponents were limited to Americans without a tertiary education. Today, globalisation's supporters are limited to America's globetrotting elite with postgraduate degrees.

George Bush has a surprisingly feeble record of furthering globalisation. Notwithstanding the protectionist and populist grandstanding of the Democratic primaries, there is no reason to expect the next US president to do any better.

The North American Free Trade Agreement won't be undone, much less the FTA with Australia. But even if the US can't or won't roll back globalisation, it is in no position to push for more of it. Victims of faltering US leadership will range from mega deals like Doha to agreements with tiny Colombia and Panama. Ambitious regional goals like an APEC free trade area seem at best fanciful.

This can only be bad news for an Australia whose future is so tightly tied to an open and dynamic Asia-Pacific economy. Predictions of a global 'decoupling', with the Chinese growth engine unaffected by problems in America, seem at best premature. If America's downturn ends up curbing China's insatiable appetite for raw materials, the impact on Australia could be devastating.

Energy independence, not climate change

The climate change cause is another likely victim of America's economic blues. The next US president will certainly talk a greener game than George W. Bush, but whether he will be able to move the policy needle is entirely another matter.

Even Bush now concedes that climate change is probably real, human action contributes to it, and America must do something about it. Both presidential candidates have gone much further, not only announcing reductions targets but also proposing emissions trading schemes to reach them.

But economics unconditionally dominates environmentalism in the US. The challenge of climate change just does not touch Americans in the visceral way it has Australians, whose sunburnt country is confronted every day by drought. Energy independence, not climate change, is the rallying cry when it comes to sustainability.

First John McCain, and now Obama, have said that renewing American offshore oil drilling should be part of any comprehensive energy policy.

The Rudd Government is now saying that getting global agreement on a post-Kyoto regime by the end of next year may be a bridge too far. But coordinated national action is now the mantra, and Australia is clearly hoping that the US will enact a serious emissions reduction scheme very soon.

Don't hold your breath. Less reliance on Middle Eastern oil is considered an unequivocal good in the US. But the winning political move is squeezing more oil out of America's soil and waters, not punishing companies and consumers for their carbon emissions. When it comes to the global climate change game, all the indications are that the standoff between the two largest emitters, the US and China, over who moves first, will continue.

Power balancing, not institution building in Asia

Scapegoating China is easy political sport in the US. But the Bush Administration's implicit leitmotif has been old style China power balancing. Its China-specific policies have been remarkably even-handed. The Bush team has ignored the protectionist catcalls of Congress and engaged Beijing's leaders behind closed doors. Pentagon bureaucrats obsess over China's military aspirations.

At the same time, the Administration went way out on a limb to support India's admission to the global nuclear club, knowing full well that this would open it to damaging double standard critiques at home and abroad. But Bush pressed on, clearly believing that such a landmark agreement between the world's largest democracies is the best way to balance China's growing power in Asia.

If the Indian civilian nuclear deal finally comes into force, neither candidate will have much incentive to overturn it. The non-proliferation regime costs have been borne by the Bush Administration while the next president will simply inherit any benefits from the US-India agreement.

There has been no room in this geo-political chess game to embrace Asian institution building. Kevin Rudd may want an Asia-Pacific Community to grow out of APEC, but most Americans are happy to let this Clinton legacy wither into insignificance. They haven't noticed, much less cared, that the US has been conspicuously not invited to Asia's flagship political forums.

How much will all this change in 2009? Probably not much. McCain and Obama have been close to silent on the subject of Asia. When they have spoken, their words have had all the trappings of dutiful foreign policy wonks, not top of mind enthusiasm. The contrast with Australia could not be starker.

McCain is more hawkish than Obama on China's military aspirations. Obama is more likely to take China to task over its trade practices and human rights record. Both will voice concern over China's efforts to corner the global market on natural resources.

But the broad framework of peaceful but wary coexistence with China will most likely continue.

Broader Asian issues will likely stay off the political radar in Washington. The US will probably still want Canberra as its deputy sheriff and eyes and ears in South-East Asia. But don't expect the US to reciprocate by stepping up as co-conspirator in Kevin Rudd's Asia-Pacific ambitions.

Business as usual isn't so bad

It makes perfect sense after the last eight years that expectations for the next US president are high. That these expectations will likely go unsatisfied is less newsworthy but no less important.

This does not mean, however, that the US's global impact will be any smaller. There is much more to America's worldwide impact than Washington's foreign policy, and the dynamism of America's globalised private and not-for-profit sectors shows no signs of slowing down.

Silicon Valley innovations in information and communications technology have not only made for a smaller, more efficient, more connected and more interesting world. They also empower the people-to-people connections that will ultimately help weaken the foundations of Islamic extremism. The next generation of American innovations in clean, alternative and efficient energy may end up doing more for climate change than any carbon policies the next US administration might adopt—just as the efforts of the Gates Foundation have arguably done more for HIV/Aids than the World Bank and the World Health Organisation.

The US Government may not sign any new free trade agreements, and it may stay on the sidelines of Asian institution building, but this will not stop American-headquartered multinational firms designing, financing, producing and selling products around the world. Building deep roots in China, India and the rest of emerging Asia is at the very top of their must-do lists. Though poverty reduction and political empowerment are not their proximate objectives, they will likely be the lasting consequences of the quest for new markets.

The new president will enter the Oval Office in January squarely focused on the great challenges he will inherit and conscious of his equally significant limitations in meeting them. As a result, America will look and act more like a normal country in 2009 than it did during the more imperious and impetuous days of the Bush Administration—far from a bad thing. But this humbler and more inward looking America will be in no position to offer the inspiring global leadership the world is looking for.



Question — When you were talking about Sarah Palin, who is obviously an issue at the moment, you were saying that you thought that perhaps she was a short-term bump for McCain in term of whether he is likely to be elected or not, like the dead man's bump I heard it described. There is only a two months until the 4th November, so do you get the feeling that that bump will last long enough to tip him over the line?

Geoffrey Garrett — The answer is I don't know. If you were thinking about what are the biggest questions that will determine the final result, that's probably in the top two or three for me. Can Palin withstand what will be the withering intensity of questioning of her understanding of the world, I think, is going to be an enormous question and the questioning has already started. I do think that what used to be the most boring event in the entire calendar, the vice presidential debate, is now likely to be one of the world's most watched political debates. And the difficult thing there is going to be for the arrogant Joe Biden to be able to resist the temptation to talk down to Sarah Palin because that would be the worst thing he could possibly do. So Biden in that debate is going to have to project all his knowledge of the world without ever appearing to talk down to Palin. That will be tough for him. It may be tough for anybody but I think it may be tougher for Joe Biden than most.

On Palin's side clearly what they are going to do is try to school her up as quickly as possible so that the fact that her international experience up until last year extended to Canada, which one must go through to get back to the continental US; and Mexico, I don't know if she went there for a vacation or something. I would be trying to get out of Alaska if I could in the winter. So that's one. The second one: is can McCain credibly continue to run as a change agent when his policies? If you sheared away the gloss, his policies look pretty conventional Bush-style policies. Can he continue to win the change game from Obama? Third and most important is, can Obama do something to recapture the buzz that surrounded him a couple of months ago? As I said I don't think one should date McCain's ascendance to his decision to pick Palin. I think that the change in the dynamic of the campaign pre-dated that and it was Obama's decision to become much more of a conventional Democrat that made all this possible for McCain. So now the question is something the Obama people are asking themselves on a second by second basis: what can we do to get the magic back for our candidate?

Those would be the big three. I don't know how they are going to break and of course events in the real world might have a big impact. Something that might happen internationally in the US; if the Georgia/Russia crisis became an overnight: 'Oh my God, what have we forgotten about? Is the cold war back?' Something like that. Or the failure of a very large American financial institution like Lehman Brothers. Those could affect the campaign. But I think the three questions that I enunciated are the ones that are likely to determine ultimately who wins.

Question — There is of course another set of elections that take place in November; that's the election for the Senate, the House of Reps and indeed governors. The Republicans from your analysis would probably be expected to do less well in that outcome. First of all can you comment on that, and secondly, what effect will possibly a stronger Democratic Congress have on either president, Obama or McCain?

Geoffrey Garrett — Your supposition I think is entirely correct. That is that the Democrats will do very well in the Congressional elections because the Republican Party as a party is at least as unpopular as President Bush in the US at the moment. There have been some stunning local election results confirming that. What it will mean ultimately? It would be obviously that both potential presidents would be pretty heavily constrained in their legislative agenda by what Congress would go for and a Democratic Congress is likely to want as much support for middle America as they can possibly get in an environment where it's going to be hard for the country to pay for that.

I guess if you force me to make predictions about domestic policy, my prediction would be quite a few things that are of big symbolic value but probably not as much of substance. On the foreign policy side, it's always the case that there tend to be battles between Congress and the executive branch irrespective of whoever is holding power on both sides. I would expect those to continue, but at the end of the day it's what the President says that goes in foreign affairs, including decision to commit troops. I'm not sure if Congress will affect foreign policy so much. With the exception of things that have to be ultimately ratified by treaties such as new economic agreements, free trade agreements, and there as I said, I just don't expect much action because I don't think the country is in a place to embrace free trade and globalisation. It's feeling insular, inward-looking and anxious at the moment.

Question — I think a lot of us have a really simple background worried feeling about this election. That is that Senator Obama may have come a little bit too early and that when it comes to the day America is still not prepared to put a non-white in the white house.

Geoffrey Garrett — I think it would be naive to believe that race is not a factor. How big of a factor race is with respect to Obama I'm not sure. It's my feeling that the reason Barack Obama is not ten solidly ten points ahead in the opinion poll, which is what the state of the economy and the unpopularity of the President would predict, is that the country is not convinced in a time when it's anxious that they can risk putting Barack Obama in the White House. Some of that might have to do with race, some of it might have to do with age, some of it might have to do with lack of experience.

The one thing that Obama can do: he can't change his race, he can't change his age, he can't change his inexperience, but he can connect with the American people in the form of a narrative about who he is in a way that they can understand. I don't think he has done that effectively thus far. If you go back and look at the convention acceptance speeches for example, the strongest part of McCain's speech by far was when he was talking about the changes that literally went through him as a person during his incarceration in the Vietnam War: 'I went from thinking about myself to knowing I had to serve and thank my country.' If you look at the Obama speech all Obama said was: 'McCain tells you I'm a celebrity, but I'm going to tell you that my heroes are my regular working mother and grandparents', and then when he went for the soaring oratory, it wasn't oratory about him, it was oratory about John F. Kennedy and Martin Luther King, clearly his two heroes and the people he is most often compared to. But it had this feeling, to me at least, that it was a bit distant. That he understands full well what's inspiring, but he can't do this: 'This is who I am' thing in a way that regular folks go for.

Interestingly, the sort of ‘who is Barack Obama?’ question is something that both the left and the right in the US concentrate on. There was a typically lengthy but fascinating story in the *New Yorker* a couple of months ago where a *New Yorker* columnist went to Chicago to discover Barack Obama’s roots because Chicago has a famous black political machine on their side. And the person was just struck by the fact that no-one in the black Chicago Democratic political machine had very nice things to say about Obama. Because they didn’t think that he was one of them, he didn’t earn his stripes there he didn’t stay there and he doesn’t go back there. He shot meteorically through that world then he spent a couple of years in Springfield in the state assembly then he was in Washington and now he is running for President. He hasn’t been there long enough for people to know who or what he is. So it’s a long winded way of saying one should not discount residual racial considerations in this election. I think there is a lot more going on with this seeming unwillingness of middle America to embrace Obama than just race.

Question — This question sort of reflects concerns that I have found when talking to my students and other people, teachers. As I understand it, George W. Bush gets a lot of support from the Christian right in America. Sarah Palin is an evangelical Christian and there have been a couple articles I have read published about her background and religious beliefs. Do you think there is an opportunity that McCain can use that to mobilise the Christian right in America to vote for him? I see that as an issue because there are single issue votes for things like abortion, stem cell research, same sex marriage which all have a religious moral dimension. Do you think that would be a factor in the upcoming election?

Geoffrey Garrett — Yes. One could muse on this for a long time. Let me make a couple of pointed comments. The first one is that the religious right is solidly in the republican camp and would have been ‘trapped’ to vote for McCain anyway. If one goes back to the 2004 election, the re-election of George Bush, it wasn’t actually the religious right, it was the so-called security mums who ended up being the critical constituency. That was middle-class women driving their children to soccer games, not the ice hockey games that Sarah Palin talks about. That is a constituency that is hard for Obama to win because Obama’s core support bases are African-Americans and young people; 18 to 29 –year-olds who otherwise wouldn’t participate in politics, who are just so excited by this guy.

The Palin thing was more about the Hilary Clinton voters, because McCain could read the polls as well as anybody else with all of these people who voted for Hilary Clinton, mostly women, in the Democrat primary, saying they just could come to vote for Obama. It has been the case that when the Democrats have won, they have won on the back of women’s’ votes. In 2004 John Kerry didn’t do nearly as well among women as he needed. If Barak Obama doesn’t do well, that won’t go well for him.



**Wanted: Treasure House of a Nation's Heart:
The Search for an Australian Capital City, 1891–1908***

Dr David Headon

When you look at any one of the iconic photographs of the Federation founders, at the Convention meetings of the 1890s or in the first years of the Federal Parliaments in Melbourne, it is hard to avoid resorting to stereotypes. They do project as a group of natty middle-class lawyers, judges and businessmen, and the odd aspirational labour man—which they basically were. All men, sober, sedate, apparently satisfied and—mostly—hirsute. An abundance of facial hair was the fashion of the era. A snapshot judgement today might well describe them as a bunch of boring old farts.

Nothing, of course, could be further from the truth. The reality is that the overwhelming majority of these men emerge as extraordinary characters—gifted, engaged, single-minded when needed, occasionally partisan, and very, very human. Most of them loved a joke. They lived in large times, and spoke—and for some like jovial George Reid, ate—accordingly. They applied themselves with rigour and patience to the dominant public issues of the day, demonstrating a capacity, determination and eloquent self-assurance often missing in our national conversations of the twenty-first century.

This resolute attitude of the Federation founders is never more apparent than in the parliamentary debates and community controversy surrounding the narrative accurately and distinctively labelled at the time as the 'Battle of the Sites'. One of the

* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra on 17 October 2008.

most interesting individuals destined to play an active role in the national capital narrative is William Astley—journalist, notable *Bulletin* short-story writer on convictism and ... an incorrigible opium addict. For well over a decade, Astley happily assumed the role of promoter of the town of Bathurst's claims to being the national capital. In all likelihood he wrote most of the 'Note Prefatory' that appeared in a 1901 Bathurst tourist booklet in which the future, much-coveted capital site is described as '*the treasure-house of a nation's heart*'.¹ The competition nationwide to become that 'treasure-house' was keen from the start.

In the nearly twenty-year period throughout which the 'Battle of the Sites' raged, from the early 1890s to 1908, numerous towns came and went, crashed and burned, sometimes re-emerged, phoenix-like, from the flames, only to burn again, until, in the last months of 1908, amidst controversy and name-calling, brinksmanship and hectic behind-closed-doors number-crunching, the site that was marketed as 'Yass-Canberra' emerged victorious.

But it was a desperately close-run thing. Indeed, after the House of Representatives voted 39–33 for 'Yass-Canberra' over Bombala on 8 October 1908—one hundred years ago last week—the Senate settled down to its own session on 28 October, an exhausting debate which continued until 6 November. There could be no Seat of Government Act without the Senate's endorsement, and after many hours of discussion, argument and abuse, the 36 Senators—there to decide, finally, between 'Yass-Canberra' and Tumut, were deadlocked, 18 a-piece. The NSW senators went *en masse* for 'Yass-Canberra', the Victorians for Tumut, and it was only when the Victorian James Hiers McColl switched his vote—to the disgust of his fellow-Victorians and, later, Melbourne's *Age* newspaper, which accused him of 'ratting' on his state²—that the bill progressed to obtain the necessary royal assent on 14 December 1908.

The ensuing *Seat of Government Act (1908)* brought to an uneasy close a process which involved no less than seven Commonwealth Governments, five NSW Governments, two Royal Commissions, nine Commonwealth Ministers for Home Affairs, four lapsed Bills and three Acts of the Commonwealth Parliament.³ This 'Battle of the Sites' might be more accurately described as a war of attrition.

In this paper, taking my lead from a former Clerk of the House of Representatives who said that the full story was 'too long and devious' to recount in one evening, I will discuss this search for our nation's 'treasure-house' city, in one lunchtime, in terms of two distinct periods: the decade from 1891 to Federation, and the seven years from 1902 to 1908. While I will provide the basic details of the story, I don't intend to trawl over the established linear chronological narrative as such. That's been done capably by Roger Pegrum in his soon-to-be-republished book, *The Bush Capital—How Australia Chose Canberra as its Federal City* (1983). I want to focus on particular aspects of the story, some of them up until now hidden aspects, that

¹ 'Price Warung' [William Astley], *Bathurst—the Ideal Federal Capital*. Bathurst, NSW, Glyndwr Whalan, 1901, p. 3.

² See Roger Pegrum, *The Bush Capital—How Australia Chose Canberra as its Federal City*. Sydney, Hale & Iremonger, 1983, p. 141.

³ See Gavin Souter, *Acts of Parliament*. Melbourne, Melbourne University Press, 1988, p. 104.

encourage us to reassess the received narrative and put some new faces into the frame. The more you get to know the men behind the suburban and street names of Canberra, the more compelling they become, and the more the absorbing Canberra story comes to life.

First, some necessary background detail. The search for an Australian capital city site effectively began with two important political events at the beginning of the 1890s. The first of them was the Australasian Federation Conference in Melbourne, in February 1890—where Sir Henry Parkes, that long-white-bearded, impressively virile, grand old charlatan of a man rallied infant national sentiment, a full ten years before Federation, with his creative reference to ‘the crimson thread of kinship [that] runs through us all’.⁴ At the same conference, the emergent leader of the Federation movement in Victoria, Alfred Deakin, spoke loftily of the commonality shared by all six Australian colonies—‘a people’, as he put it, ‘one in blood, race, religion and aspirations’.⁵

At the second and far more significant meeting, the National Australasian Convention, held in Sydney in March/April 1891 and destined to adopt a draft Constitution Bill to constitute the Commonwealth of Australia, the rhetoric from the leading delegates was similar to Melbourne. Parkes’ banquet toast was to ‘One People/One Destiny’, and his subsequent address anticipated the inhabitants of the southern continent becoming ‘an Australian people’, and their country ‘the brightest jewel in the crown of the Empire’.⁶

Yet despite this consciously elevated tone, this agenda manipulation, the problem with the Melbourne and Sydney meetings—the elephant in the room that could only be kept docile for so long—was that the utterances of Parkes and Barton and Deakin and their ardent fellow-Federationists present could only temporarily disguise the tension of colonial rivalry and colonial jealousy. Deakin might well trumpet that all present at the Convention were one in blood and aspiration, but everyone there knew that NSW/Victorian antipathy already had a long and often bristling history. Since the discovery of gold in the early 1850s, and consequent rapid Victorian advancement, they had been constant rivals.

At the Melbourne Conference, the uneasy truce collapsed when one of the NSW delegates, the Treasurer in the NSW Government, William McMillan, gave a foretaste of what lay ahead when he verbally brandished the superior role and claims of his own colony—triumphantly referring to NSW as ‘the Mother Colony’. Let delegates be in no doubt, said McMillan, if Federation did occur, it would be NSW making the greatest sacrifices.⁷ Understandably, such a provocative line failed to impress the non-NSW delegates, especially the Victorians.

And then in Sydney in 1891, exactly the same thing happened. This time George Dibbs, a NSW delegate and future NSW Premier, dropped what became known as

⁴ See David Headon, *The Symbolic Role of the National Capital—From Colonial Argument to 21st Century Ideals*. Canberra, NCR, 2003, p. 14.

⁵ See Kathleen Dermody, *A Nation at Last. The Story of Federation*. Canberra, AGPS, 1997, p. 8.

⁶ Ibid. p. 11.

⁷ Headon, *op. cit.*, p. 14.

Dibbs' 'bombshells', when he proposed, as the capital city of a future Federation ... Sydney—his own home town, his patch, 'favoured by Nature', gushed George Dibbs, 'favoured by the great Creator himself ...'.⁸ Dibbs put the motion, and the cat, among the pigeons: Sydney must be the new nation's capital. While the motion predictably failed dismally, amidst widespread mirth and cynicism among the other delegates, it was clear that if Federation did occur, then the issue of where the national capital would be sited was certain to be controversial. South Australia's very dignified Richard Chaffey Baker referred to it as 'the burning question', and he advocated postponement. The entrenched Federationists among the delegates to the Convention could not agree quickly enough. With Federation still only a possibility, the national capital issue was simply too hot to handle.

But while the politicians judiciously paused, the citizens of the colonial continent enthused. Postponement was the catalyst for continental aspiration. Cities, towns and regions across the country began to fancy their chances of becoming this 'treasure-house' of a nation. What started, almost immediately following the 1891 Convention, was a lively and at times undignified scramble, by a host of opportunist individuals—and their cities, towns and regions—to assert their pre-eminent claims. Propaganda booklets began popping up like mushrooms; propagandising journalists leapt into print to tout the next big thing, the next speculative national capital site.

The cocky residents of the two urban powerhouses, Sydney and Melbourne, thought they were certainties, but the queue was forming quickly, with a myriad list of possibilities—the vast bulk of them drawn from the colonies of South Australia, Victoria and NSW. Sydney surveyor and engineer, F. Oliver Jones, in 1894 called his imagined 'imperial capital' *Pacivica*—a 'model "City Beautiful"' in the virgin bush of Ku-ring-gai Chase on the banks of the Hawkesbury.⁹ Character-building and nation-building sport would be played, as Jones put it, on 'a Pan-Britannic Sports Ground'¹⁰ in a revival of the ancient Olympic Games. And remember: this was two years before the Olympic Games were revived in Athens in 1896. Jones promoted a model 'Empire-Building' community, shaped on 'new yet British lines'.¹¹

Others dreamed more adventurously, if even less practically. In August 1894—the same year that Jones proposed his 'Pacivica'—the *Bulletin* ran an elaborate article entitled 'Democratic Federation', by the radical Queensland journalist and politician J.G. Drake, in which he imagined a grand capital of some 50 000 square miles situated at Cameron Corner, where the arid inland borders of NSW, South Australia and Queensland meet. As Professor Duncan Waterson writes, Drake's national capital was 'to be dry—free from coastal heat and debilitating alcohol—alien and aboriginal free, socially pure, and productive of superior Australian Britons in terms of physique,

⁸ Ibid. p. 16.

⁹ See Tessa Milne, 'An Australian Atlantis: Jones' vision.' *The New Federalist*, No. 3, June 1999, p. 26. I would like to acknowledge the excellent background papers included in this issue of *The New Federalist*, most of which focussed on the 'burning issue' of the prospective national capital site. Several papers are quoted below.

¹⁰ Ibid. p. 27.

¹¹ Ibid.

intellect and institutions'.¹² Drake's ideal citizens, in a vision consistent with the race-driven community values of the era, would be 'the superior prototypes of the new Australian clean white warrior race'. Such a race would apparently populate and purify the nearby towns of Cunnamulla, Charleville, Thargomindah and Bourke.

Drake's proposal was so seriously discussed that, in 1896, it was published in a stand-alone booklet in Brisbane under the title: *Federation, Imperial or Democratic*.¹³ Clearly, the inland utopia built with eugenic community bricks got others thinking, for in the same year that Drake's dream was reprinted and promulgated, another *Bulletin* writer conjured something similar, this time located in the isolated MacDonnell Ranges of South Australia—a utopian home intended to 'open up the interior' and keep out blacks and 'black-labour syndicates'.¹⁴

Most proposals, however, were not as extreme as those of Jones and his clones. Murray River towns such as Echuca, Corowa and Albury, for example, portrayed themselves as an ideal compromise for the dominant three colonies. Ballarat—the heavily supported 'Marvellous City of Ballarat' according to one commentator—packaged itself as a city with undeniable 'national prominence', a city built on 'gold, the Eureka Stockade and democracy, gardens, Lake Wendouree and civil amenity'. According to the *Ballarat Courier* of February 1898: 'gold, loose and in nugget form, shouted the name Ballarat to all corners of the globe'.¹⁵

When the Hon. Edmund Barton, soon to be Australia's first Prime Minister (what country doesn't know the name of its first Prime Minister?) visited Ballarat in February 1898 he consciously avoided any discussion of Ballarat's capital claims—refusing, as he said, to 'encroach on a rather delicate subject'—but he could still be fulsome in his praise of the city's 'great industries, and fertile fields', its prosperous infrastructure.¹⁶ Industry was also the keynote of the bids of South Australia's Port Augusta and Mt Gambier—the former, based on inter-colonial and international ocean trade, and the latter promoted because of its superior climate and scenery, central location, and proximity to the nearby harbour port of Portland, just over the Victorian border. Within months of the Australasian Federation Conference in Melbourne at the beginning of 1890, South Australian Legislative Councillor, Dr Allan Campbell, addressing the citizens of Port Augusta with a talk entitled 'Federation and South Australia', could not contain his enthusiasm. He concluded with the flourish of a rich rhetorical question: 'Where then can a situation be selected for the future seat of Federal Government possessing such advantages as Port Augusta offers? I do not see one on the whole map!'¹⁷

¹² See Duncan Waterson, '“Progress, Purity and Prohibition”: J.G. Drake's Federal Inland Capital Proposal, 1894–1899.' *The New Federalist*, No. 3, June 1999, pp. 51–2.

¹³ Ibid. p. 51.

¹⁴ See John Bannon, 'Queenliest Cities: Australia's capital in the central state', *The New Federalist*, No. 3, June 1999, p. 49.

¹⁵ See Gay Sweeney, '“Federation and fizz”: Ballarat's bid to be the ACT.' *The New Federalist*, No. 3, June 1999, p. 38.

¹⁶ Ibid.

¹⁷ See Bannon, op. cit., p. 45.

While few outside Port Augusta would have agreed with Councillor Campbell, sentiment like his infected the entire nation throughout the 1890s. Patently, no town, no spot, was ruled out amidst the ambition, wild hope and barely suppressed euphoria of an otherwise difficult decade.

But then, as has been well-covered elsewhere, a so-called ‘secret’ deal at the hastily convened colonial Premiers’ Conference, in January/February 1899, abruptly changed the rules of the game. After the first Federation referenda failed in 1898—because a truculent NSW insisted that there must be the arbitrary figure of 80 000 ‘yes’ votes, rather than a simple majority—NSW Premier George Reid, ever the experienced showman and cunning politician, perceived advantage for his home colony. He played his trump card at the Premiers’ Conference: if NSW, the self-ascribed ‘Mother’ of the colonies, did not get the nod to host the capital, then, Reid told his fellow-premiers, he could not see the colony ever wanting to be in a continental Federation.

This was crude, ‘gunboat’ politics, but it obtained the desired result: a rewriting of the relevant part of the Constitution draft, Section 125, to read:

The seat of Government of the Commonwealth shall be determined by the Parliament ... and shall be in the State of New South Wales, and be distant not less than one hundred miles from Sydney.

Yes, the capital would be in NSW, but the other states had made certain that Sydney would be excluded. And more, until there was such a capital, the Victorians secured the compromise deal that Melbourne would be the temporary site. Many Melburnians were soon of the opinion that their sizeable foot in the Section 125 door would eventually get them the capital permanently.

The draft Constitution, with these very specific national capital clauses, was signed into British law by the Parliament and Queen Victoria in July 1900. The leading Australian politicians of the day—among them, Edmund Barton, Alfred Deakin and Charles Kingston—revelled in their triumph. It has been said that after the vote they retired with appropriate dignity and decorum to a Westminster committee room, whereupon they joined hands and danced a jig of unbounded celebration.

Australia had its Federation, its Constitution, and its Section 125.

What began then was a far more formidable set of engagements in the ‘Battle of the Sites’ when, for six more years, 1902 to 1908, a newly energized bunch of NSW towns began to assert their fresh claims to being Australia’s new capital city. It was a battle fought as tigerishly and as tactically as any wartime conflict, but, right from the start, in 1901–2, the written and unwritten rules of the battle were well understood by the combatants.

- the site had to be in NSW, a hundred miles from Sydney;
- the site would be inland, for a coastal city risked both the outbreak of disease and bombardment from foreign ships;
- the site must have a plentiful water supply;

- the site must be a beautiful one, a place where Nature could elevate and inspire—a place combining the attributes of the ‘City Beautiful’ and the ‘Garden City’; and perhaps most significantly at the time,
- the site must be in a cold region.

In the second half of this paper, I want to focus our attention on arguably the three most intriguing combatants involved in the ‘Battle of the Sites’, three key case studies, if you like: first, the town of Bathurst, its bold bid and poised promotional strategy brought unstuck by the harsh reality of Section 125 (poor old Bathurst was perceived by those who counted to be just inside the 100-mile limit—it was just too close to Sydney); second, the remote Snowy River town of Dalgety, the focus of such close attention in 1904 and again, briefly, in 1908, that it went within a whisker of actually becoming Australia’s national capital—and there is a *Commonwealth Government Seat of Government Act (1904)*, of 15 August 1904, to prove it; and finally, the option known as ‘Yass-Canberra’, which would receive the royal assent at the end of 1908.

Case Study 1: Bathurst

The lament of the failed Bathurst bid. Bathurst was such a busy colonial town, such a constant production-line manufacturer of sporting and cultural achievers, that by the 1880s it had become a thriving metropolis. The town attracted many quality citizens from elsewhere, not least William Astley, the man destined to make a literary name for himself, under the pseudonym of ‘Price Warung’, for his classic stories on convictism published in the *Bulletin*, and read throughout the country. But that would be in the 1890s. In the 1880s, Astley paid a visit to go-ahead Bathurst, and stayed, soon obtaining a following with his searching political columns in the *Bathurst Daily Times* and the *Bathurst Free Press and Mining Journal*, a number of them exploring his passionate commitment to the Federation cause.¹⁸ Astley sought to educate and enlighten his readers.

In white Australia’s centenary month, January 1888, he took the symbolic opportunity to question the manifest failings of British Imperialism (thus anticipating his anti-transportation short stories to come) and he proposed the idea of what he called a ‘Federal Compact’ for the Australian colonies.¹⁹ Three years later, energised by the 1891 National Australasian Convention in Sydney, Astley wrote no less than sixteen editorials for the *Bathurst Free Press*, over a one-month period in May/June 1891, in which he enlarged on Federation and its principles.²⁰

It was a more or less natural progression when, in September 1896, in an intentionally provocative letter to the editors of Bathurst’s newspapers, Astley began to push the claims of his treasured Bathurst as the best available choice for the coming ‘Nation’s Capital’.²¹ In the same letter, he also proposed a ‘People’s Convention’, to be held in

¹⁸ See David Headon, ‘Bathurst: “Treasure-house of a Nation’s Heart”.’ *The New Federalist*, No. 3, June 1999, pp. 32–6

¹⁹ *Ibid.* p. 33

²⁰ *Ibid.*

²¹ Dermody, *op. cit.*, p. 28.

Bathurst as soon as possible in order to re-ignite popular interest in the Federation issue, and no doubt to strategically position his adopted town. Despite a history of debilitating lapses as a result of opium addiction, Astley over a number of years had gained respect and a well-earned reputation. Accordingly, his ‘People’s Convention’ idea was immediately acted upon, with Astley appointed as its Organising Secretary. Incredibly, the large-scale event took place just months later, in November, and it went script-perfectly, except for the fact that Astley got arrested and gaoled during the gathering (for a fifteen pound debt). The historic Bathurst People’s Convention of November 1896 was widely credited at the time with ‘popularising federation’²²—and a number of historians since have confirmed this conclusion. It attracted over 150 delegates, went for a week and proceeded smoothly thanks to a thoughtful agenda put together by the absent, imprisoned Astley.

Throughout the Convention, Astley’s compelling letter of a couple of months earlier would have been keenly discussed. His brash promotion of Bathurst drew attention to a number of the town’s special advantages, its claims to being the capital city: centrality, accessibility, a salubrious inland location in the event of foreign invasion, independence from and a healthy attitude to both Sydney and Melbourne, and imposing public buildings.²³ Bathurst’s Kings Parade/Machattie Park complex, structured around a government building group designed by renowned Colonial architect James Barnet, was a particular source of local pride.²⁴

Yet despite Astley’s, and Bathurst’s, timely initiative, when the ‘secret’ premiers’ deal established the wording of Section 125 of the Constitution, Bathurst found itself in no better position than any other NSW town or region. In fact, by cruel chance it was worse off, on technical grounds, for despite the vigorous campaigning by an energetic citizenry; despite being a thriving town, well-located inland and chilly in winter, with more impressive public buildings and parks than most; despite having arguably the finest promotional material circulating amongst the key decision-making politicians—no less than three volumes written by Astley between 1901 and 1904, the first of them with the attention-grabbing title, *Bathurst: the Ideal Federal Capital* (1901);²⁵ despite all of these obvious credits, by 1902, when the real work of locating a capital started, Bathurst had effectively run its race, and disappeared from view. Why? That immovable, immutable Section 125’s 100-mile limit. Bathurst, it was concluded, lay just inside. In the *Ideal Capital* volume, in a preliminary note, the book’s printer and publisher, Glyndwr Whalan, desperately sought to diffuse the problem, but you can sense his anxiety when he writes:

The men whom the Nation calls to the task will surely not lack either the judgement or the courage to say, if need be, to the people of Australia: ‘Enlarge the radial limit by a fraction, and we will give you a perfect site for the Territory and Capital’.²⁶

²² Ibid. p. 35

²³ See Robert Freestone, *Designing Australia’s Cities: Culture, Commerce and the City Beautiful, 1900–1930*. Sydney, University of New South Wales Press, [2007], p. 50.

²⁴ See Headon, *The New Federalist*, op. cit., pp. 32–3.

²⁵ Ibid. p. 32.

²⁶ Headon, *Symbolic Rule*, op. cit., p. 21.

The plea was ignored. The chicken bone in Bathurst's throat, that wretched clause, choked its initially confident if ultimately ill-fated bid to be the 'treasure-house of a nation's heart'.

Case Study 2: Dalgety

The third and concluding meeting of the three Australasian Federal Convention meetings of 1897–8, held in Melbourne in the summer months of early 1898, adopted the amended draft Constitution. The attending delegates sweltered in the intense January Melbourne heat, so it was no surprise when the popular John Forrest, gifted surveyor, noted explorer and West Australian Premier since 1890, crystallized the popular sentiment of the gathering when he gave voice to what has since been referred to as the 'cold climate myth'—that widely held belief of the time that the Anglo Saxon and Anglo Celtic peoples functioned at their best, their British Empire best, in a cold climate. That's right. White intelligence and the leadership instinct revelled in the frost, wind and snow. Forrest, despite the obvious implication for his own colony, applied the belief directly to the national capital debate when he stated that the new capital 'ought to be a cool place; indeed the coolest place in Australia'.²⁷ In the years that followed, this pervasive stance largely drove the debate. The 'cold climate myth' meant that otherwise attractive NSW locations, such as Port Macquarie or beautiful Byron Bay, were not considered. The Federation founders, in search of their 'ideal' federal capital, looked for inspiration northwest to Armidale, west beyond unlucky Bathurst, and especially straight south of Sydney. Snow-capped mountains, not beaches, were the geographic fashion of the era in an Australia still very, very British.

American import, the 'legendary' King O'Malley, another active participant in the national capital narrative, would develop a particularly soft spot for Bombala in the more remote south. When he visited the town he asked, only just tongue-in-cheek, whether it was true that to start a cemetery in Bombala the locals had to import dead men from Sydney. In the House of Representatives debates of October 1903, O'Malley was more expansive: 'If ever there was a spot set apart by the Creator to be the capital of this great Australia—the pivot around which white civilization should revolve—it is Bombala'.²⁸ Waxing Biblically lyrical, he continued: 'I could almost see the Garden of Eden at Bombala. I could see Adam and Eve leaving after they had eaten of the tree of life—for the tree of life is growing there today'. Bombala was, for O'Malley, the tangible proof that the 'history of the world shows that cold climates have produced the greatest geniuses ...'

While such extremes were characteristic O'Malley, part of the spruiker's craft, they do give us some insight into the values and mores of the era. And it was in this context that distant Dalgety, near Bombala but more remote still, emerged. Dalgety presents a revealing tale.

One man destined to play a highly significant, if now forgotten role in the hunt for the capital was long-time NSW politician Sir Joseph Carruthers. In 1927, when the *Canberra Times* brought out a special 'commemorative issue' on the day of the

²⁷ Ibid. p. 24.

²⁸ *Canberra Times*, 9 May 1927, p. 3.

opening of the provisional parliament in Canberra, the 9th of May, it was Sir Joseph Carruthers, a former NSW state politician and former NSW Premier, who was invited to recall the story of the federal capital's birth.

Typically forthright, Carruthers in an long article systematically recorded the details of what he called 'the Battle of the Sites', and his leading role in it. Curiously, the article is neither a jubilant nor even a particularly satisfying recollection for the writer. Quite the contrary. At one point in his opening paragraphs he confesses:

It is none too pleasant to revive these memories of other days, and if there has been any change for the better in these last 20 years one could afford to close the veil. But they have continued from 1901, right down to 1927, and will only now cease ... when the Federal Parliament [meets] at Canberra, and the real seat of Government [is] inaugurated there.²⁹

'They' have continued', 'they will not cease'. Who is he talking about and what were their motives in meddling? Disrupting? Undermining? These questions need answering, but to do that a little more detail is needed.

After the euphoria of the new nation's celebrations in 1901, the Federation parliamentarians well knew that they had been entrusted by the nation with (as it was put at the time) 'expeditiously' finding a permanent capital. So began the search ... the extraordinary 'Tours' of the senators and members of the House of Representatives. By train. By sea. By coach. And when necessary, by foot.

The first group to head out into the bush of NSW were the senators, for three weeks in February 1902; the members of the House of Reps, even more enterprising, went at a breakneck pace over two weeks in May. Between them, they looked at sites in Armidale, Orange, Lyndhurst, Bathurst, Goulburn, Yass, Tumut, Bombala, Albury, Lake George and Canberra, via the Queanbeyan railway station. At one point heading south, they jumped on a ferry at Nowra to hasten the trip to the potential capital city port town of Eden/Two-fold Bay, where the town (typical of the time) erected a Federal Capital arch to welcome the visiting parliamentarians.

For the wonderful visual record of these site visits, we have the photographer Edward Thomas 'Monte' Luke to thank, for he accompanied the parliamentarians—and captured them on his elegant gelatin silver images, sometimes in formal mode, and at other times full of mischief, spontaneity and, as historian Manning Clark put it, sheer 'buffoonery'. The album containing Monte Luke's photographs, a real national treasure, is now safely housed in the Pictorial Section of the National Library.³⁰

These first tours were orchestrated by the former NSW Premier and former anti-Federationist Sir William Lyne—after whom the Canberra suburb of Lyneham was named—a big hulk of a man whom Billy Hughes, our controversial seventh Prime

²⁹ J.H. Carruthers, 'Reminiscences', *Canberra Times* 9 May 1927.

³⁰ See E.T. Luke, 'Tour of the Senators' album, Pictures Collection NLA.PIC-AN 10801466, National Library of Australia, 1902.

Minister would describe as 'one of the most remarkable men in our history'.³¹ Though NSW and federal politician, Sir George Reid, our fourth Prime Minister, would sardonically refer to these 1902 tours as 'Lyne's picnics',³² we know that the astute Lyne had a political agenda. He was the member for the massive southern NSW electorate of Hume, which stretched all the way from Wagga to the Victorian border, and he desperately wanted the capital in his electorate.

Lyne lobbied hard for Albury or Tumut, but his federal neighbour, Austin Chapman, a robust Federation personality who has also given his name to a Canberra suburb—and was the first member for the 'bell-weather' seat of Eden-Monaro—Chapman, with equal determination, wanted the capital on his own turf. So he promoted Bombala, and the even more remote town of Dalgety.

Lyne and Chapman engaged in their own battle for the ultimate prize, and nearly three years of intense parliamentary debates later, on 15 August 1904, the first Labor Federal Government, led by the charismatic Chris Watson, saw through its only significant piece of legislation during a heavily contested four months in office. The seat of government would be Dalgety.

Dalgety? While historian Geoffrey Blainey in his *Shorter History of Australia* writes that 'freezing' little Dalgety was 'more suited for a penitentiary than a seat of government',³³ what we can say with the benefit of one hundred years of hindsight is that the town's plentiful water supply, inland location and cold, cold winters did give it contemporary appeal. The sheer abundance of water, so engaging to the eye in the then surging waters of the Snowy River running right through the town, powerfully influenced the two most significant surveyors at the time: Sir John Forrest, and Charles Scrivener, a NSW District Surveyor and the man who would eventually produce the Commonwealth survey of the Canberra site in 1909, and later be appointed to the prestigious position of Director of Commonwealth Lands and Surveys. Forrest and Scrivener were adamant in 1904 that Dalgety was the best site for the nation's capital. Their reputation and status could not easily be ignored, not even by the NSW politicians determined to see the capital much closer to Sydney.

But against the considered research of Forrest and Scrivener was the first-hand testimony of the federal parliamentarians who experienced Dalgety for themselves. Most found the site impossibly cold. As we would expect of any one of his descriptions of towns in rival Eden-Monaro, William Lyne dismissed Dalgety as an 'outlandish, freezing place' where the climate, he said, would 'kill half of the older men'.³⁴ Queensland House of Representatives member Sinclair, used to balmy climes, was utterly intimidated by the stunted timber and howling winds—winds so severe, he declared, you had to hang on for dear life.³⁵ On one excursion to Dalgety, a delegation of which Billy Hughes was a member established the 'Order of the Blue Legged

³¹ W.M. Hughes, *Policies and Potentates*. Sydney, Angus and Robertson, 1950, p. 28.

³² See Pegrum, op. cit., p. 78.

³³ Geoffrey Blainey, *A Shorter History of Australia*. Port Melbourne, Mandarin, 1995, p. 73.

³⁴ See Ian Warden, 'A capital climate', *Canberra Times*, 19 May 2008, Times2, p.4.

³⁵ Ibid.

Pelicans’—a very weird society, Hughes would write, formed at ‘a place where the highest flights of Nature’s beauty are associated with her *lowest* temperatures’.³⁶

When the Federation founders were engaged on these regular visits a century ago, there were two hotels in Dalgety: the Buckley’s Crossing Hotel and ‘Keating’s Horse and Jockey Inn’. A few wonderful stories of those stays have survived. When the esteemed members of the Order of the Pelican were cosily ensconced in Keating’s one typically brisk night, one of their number was almost the first fatality of the Federal Tours, having suddenly found his trousers alight because he was too close to the fireplace. However, dousing the flame evidently proved more problematic than it might otherwise have been—for the reason that the member in question had a wooden leg! They managed to put him out safely.³⁷

On another night, with all the visitors imbibing and in garrulous mood, it was decided that a representative of the parliamentarians—the local state member, Gus Miller—and a press representative, the leader of the Parliamentary Press Gallery, George Cockerell, would compete for what was described as ‘supremacy in song’. Patriotic offerings such as ‘The Death of Nelson’ and ‘Let Me Like a Soldier Fall’ filled the air. Hughes was the competition judge and, adept politician that he always was, he gave a popular decision to the local boy, Miller, ‘by a nose’.³⁸

Most our Federation era forebears, Australian Britons to the core, embraced winter weather. But it seems that with Dalgety, they were prepared to draw a line in the snow. Sir Joseph Carruthers, in his 1927 *Canberra Times* reminiscence recalled a meeting with a number of Tasmanian and Victorian members of the Federal Parliament where he, Carruthers, mentioned Dalgety’s inaccessibility. Whereupon one of the members said: ‘Yes, that is exactly why I voted for Dalgety’. ‘What do you mean?’ asked Carruthers, and the reply was: ‘Don’t you realise that quite a lot of us deliberately voted for the most impossible site in order to destroy the possibility of having a ‘bush capital’ inflicted on Australia?’³⁹

Now in the last months of 1904 Carruthers, as Premier of NSW, knew nothing of these Victorian tactics. But he did know his constituency and he did know the extent of his considerable power. The Australian Constitution stated that the capital had to be in NSW, but before any selected site could be operational the NSW state government had first to give the land to the Commonwealth. The NSW Government had the whip hand—in effect it had a right of veto. In a parliamentary speech Carruthers, no doubt playing to his immediate and wider community audience put it with crystal clarity: ‘... not one acre, not one foot, not one inch of our territory can be taken away or withdrawn from our governing powers without our consent and authority.’⁴⁰

The ink of the Governor-General Lord Dudley’s signature to the Dalgety Seat of Government Act had hardly had time to dry on the page than Carruthers made clear to

³⁶ Hughes, op. cit., pp. 54–69.

³⁷ Ibid.

³⁸ Ibid, p. 66.

³⁹ Carruthers, op. cit.

⁴⁰ See Derek Drinkwater, ‘How McDougall reached the shore: the Senate and the federal capital site 1901–1910.’ *Canberra Historical Journal*, new series, No. 42, September 1998, pp. 28–30.

the Prime Minister of the day, George Reid—and his successor soon after, affable Alfred Deakin—that he was not happy. For Carruthers, like most of his NSW Government colleagues, Dalgety, on the same latitude as Nimmitabel and Thredbo, was so close to the state of Victoria that it might as well be in that state. Besides, Dalgety was just too bloody cold.

The Dalgety option disappeared. It would reappear briefly—and potently—in the final discussions of 1908, but with the benefit of hindsight, we can say that the Dalgety bid died on the parliamentary tables of Macquarie Street, Sydney, in late 1904.

Case Study 3: 'Yass-Canberra'

The self-interested parliamentarians in the NSW Legislative Assembly were only too well aware that the nation's new capital had to be at least 100 miles from Sydney, but they didn't want it to be much further away. '*At least 100 miles*' was soon interpreted by many of the Mother Colony's, the Mother State's, more parochial and vociferous politicians as '*about 100 miles*'. No more.

With characteristic bluntness, Carruthers wrote to the Federal Minister for Home Affairs, Dugald Thomson, on 11 April 1905, providing him with a list of Dalgety's 'more prominent disqualifications'. The NSW Government had vetoed the Federal Government choice. Simple as that.

But distant Dalgety's eclipse signalled the beginning of more accessible and amenable Canberra's rise. But why?? Why the Canberra region rather than, say, appropriately frosty Armidale, or nippy Orange, or even the more southerly and snowy hamlet of Tumut?

In part at least, this question has a grass roots explanation. It is a local story. It was the great fortune of the Canberra/Queanbeyan area—in the 1880s, 1890s and into the new century—to have as its NSW parliamentary representative, one Edward William O'Sullivan. O'Sullivan was the Member for Queanbeyan for almost twenty years, from 1885 to 1904, during which time he played a highly productive community role, first in helping to educate the area's citizens about the benefits of a possible Federation (like William Astley in Bathurst); and, secondly, as one of the first colonial public figures to push the Canberra region's suitability as the national capital site.

O'Sullivan was a great Australian and something of a Renaissance man in his broad cultural interests: one of our country's earliest republicans, he was also a supporter of the labour cause, an outspoken advocate of women's suffrage, a keen supporter of the arts (especially women in the arts), a playwright (of popular plays such as *The Eureka Stockade* and *Coo-ee*), a novelist, a theatre-lover, a sport lover—and, above all, a serial founder of philanthropic organisations and promoter of worthy causes.⁴¹

⁴¹ See David Headon, 'On the side of the angels: E.W. O'Sullivan as republican, feminist and federationist', in David Headon and John Williams, eds, *Makers of Miracles—the Cast of the Federation Story*. Melbourne, Melbourne University Press, 2000, pp. 141–152; Bruce Mansfield, *Australian Democrat—the Career of Goward William O'Sullivan 1846–1910*. Sydney, Sydney University Press, 1965, p. 294.

The *Bulletin*, always eager to lop the heads off society's tall poppies, couldn't help but admire O'Sullivan's civic devotion. As one *Bulletin* journalist wrote:

He has helped to run more newspapers ... led more political agitations, and delivered more democratic exhortations than any other man who ever looked upon the Southern Cross ... He is the kind of man whom one would rather be fighting with than against...⁴²

When O'Sullivan became the Minister for Public Works in the NSW state government in the Federation year of 1901, he was, according to his biographer, 'the most dynamic force in [his] government'.⁴³ The Queanbeyan electorate admired him, and learned much from him; he, in turn, recognised their political acumen, once memorably referring to his politically engaged constituents as 'the free selectors, farmers and the intelligent democracy' of Queanbeyan.⁴⁴

The region was switched on, so much so that when William Lyne, as NSW Premier, in 1899 asked the reputable President of the NSW Land Appeal Court, Alexander Oliver, to head up a Royal Commission to analyse the claims of the scattered Federal Capital Leagues—nearly two full years before Federation—it was no surprise that the Canberra/Queanbeyan democracy was ready to go, and none more so than long-term local citizen John Gale. A statue of Gale, standing proudly on the corner of Low and Monaro Streets in Queanbeyan, flamboyantly declares him to be the 'Father of Canberra'. He wasn't, but he undoubtedly played a creative, facilitating role. For it was Gale who first encouraged O'Sullivan to stand for election in Queanbeyan; and it was Gale who immediately followed up O'Sullivan's success in the 1899 election with a plea to his *Observer* readers to reject what he termed 'stultifying provincialism' in favour of 'a higher platform of united Australian nationhood'.⁴⁵

In October and November 1899, in the pages of the *Observer*, Gale provided specific detail on the unanimously preferred national capital site of a recently formed local working committee:

the area of ten miles square of which the Church of St John the Baptist on Canberra Plain forms at once the centre and the most desirable site for the federal City itself ...⁴⁶

It's a pretty accurate description, you'd have to agree, of Canberra city today.

This early, determined and sophisticated push by the citizens of Canberra/Queanbeyan to host the capital ensured that, in the years after Federation as the 'Battle of the Sites' raged, the region would always be prominent in discussion.

⁴² Mansfield, *Ibid.* p. 91.

⁴³ *Ibid.* p. 163.

⁴⁴ See Susan Mary Woolcock Withycombe, *Gale Force. John Gale and the Siting of the National Capital*. Queanbeyan, NSW, Queanbeyan & District Centenary of Federation Committee Inc., 2001, pp. 79–83.

⁴⁵ Mansfield, *Ibid.* p. 79.

⁴⁶ Withycombe, *op. cit.*, p. 82.

Carruthers and his government disqualified Dalgety at the end of 1904; in the eighteen months that followed, the NSW Premier went firmly on the front foot, committing his government to investigating quality alternative sites. And he would not brook Commonwealth interference with this task. When Prime Minister Deakin, in July 1905, ventured to taunt Carruthers with the resurrected corpse of Dalgety, Carruthers sent an outraged reply, calling this gesture a breach of the Mother State's 'good faith' and 'the honourable spirit' of the Constitution compact.⁴⁷ Incredibly, in the conclusion to his letter to Deakin of August 1905, Carruthers could even resort to the barely veiled, yet age-old threat of secession:

Until this question can be answered in the affirmative, there will be a grievance which will sorely strain the loyalty of this State to the Union.⁴⁸

Carruthers ultimately got his way, sending the cream of his NSW Public Works Department in search of sites. This bunch of highly capable individuals, men at the top of their respective design professions, soon interpreted the new policy as an encouragement to look south of Sydney, but not too far south.

Pretty soon everyone wanted to sneak a peak at the fine southern sites around Yass, Canberra and Lake George. The visits of the federal politicians to the region sharply increased. Queanbeyan's Federal Capital Site Committee, re-energised and refreshed, quickly got their orientation package together to accommodate this sudden—and welcome—demand.

Arguably the turning point in the process was the winter months of July and August 1906, when Prime Minister Deakin, hitherto a Dalgety man by default, finally began to take notice of the increasingly popular Canberra site. More importantly, it was during this period that the future capital secured its most influential supporter: Labor's first Prime Minister, the debonair and popular Chris Watson. Watson had every reason to stick like glue to Dalgety. As earlier mentioned, it was his government's only substantial piece of Commonwealth legislation, but once he came to Canberra, and saw Canberra, he was overwhelmed. On 15 August 1906, Watson wrote to Carruthers, alerting the NSW premier to Canberra—what he now regarded as the best possible national capital site.⁴⁹ Some 36 Senators and MHR's accepted Carruthers' invitation to inspect a range of southern sites in mid-August, including Mahkoolma, Lake George and Canberra.

According to one participant, on this visit Canberra simply 'dazzled'.⁵⁰ Watson was delighted, quite certain that Canberra was the most beautiful site. In the forthcoming two years, a majority of his parliamentary colleagues would come to agree with him. Canberra's charge, fuelled and fostered by a politically literate Monaro plains citizenry, had begun in earnest—and it would prove successful.

⁴⁷ See letter from J.H. Carruthers to Prime Minister Alfred Deakin, 1 August 1905 in 'Copies of Correspondence—re Federal Capital Site', National Archives of Australia.

⁴⁸ Ibid.

⁴⁹ Withycombe, *op. cit.*, pp. 99–101.

⁵⁰ Ibid.

When Frederick Watson in his important early volume, *A Brief History of Canberra* (1927), commented in his preface on the ‘battle of the sites’ (for he too used the phrase), he stated that he had ‘omitted purposely the intimate history ... as I think it would be unwise at present to publish the full details.’ The birth of Australia’s capital city was no easy delivery, but while parochialism and provincialism could at times dominate, these motivations were countered, and finally negated, by a spirit of nation—a spirit embraced by many individuals who find themselves on the suburb and street signage in Canberra today. Such a tribute is the least we can do to recognise their formidable contributions to the national story.



Question — Am I correct to say that the Australian Capital Territory was part of the division of Werriwa at the time of separation from New South Wales? It’s just that you mentioned who the members for the other places were but you didn’t mention who the member for what became the Australian Capital Territory was.

David Headon — It straddled Eden-Monaro and Werriwa and the member for Werriwa around 1908 was a gentleman by the name of Hall.

Question — I wanted to ask about the Lake George site and exactly where around Lake George was the proposed site and was there any water in the lake at the time?

David Headon —To answer the second part, there is that splendid water colour by Charles Coulter which was on the cover of the Proceeding of the Congress of Engineers, Architects and Surveyors in Melbourne in 1901. When you look at that you see an Australian Venice to all intents and purposes. In fact, it was dry throughout this entire period. It was certainly dry through the first decade post-federation.

The proposed site was, I think, down the Bungendore end of Lake George. Hence you had people like John Gale, prominent in Queanbeyan, also being on the Lake George Committee.

Question — Where did the word ‘Canberra’ really come from?

David Headon — That’s a tough one. I was yesterday out at the National Capital Exhibition where one of the guides suggested that it came from Canberry.

We know that there are three possibilities. When you look at Frederick Watson, who was mentioned in my paper, or some of the earlier non-Aboriginal writers about the area, most suggest that it came via Canberry. When you look at possibilities in terms of Aboriginal languages of the area, we know that there are two possibilities that emerge in the literature.

One is Canberra as meeting place, and the other is Canberra as a woman’s breasts, looking at both Black Mountain and Mount Ainslie as the two breasts of the woman.

We seem to have settled on meeting place, I suspect because it fits the agendas of the moment.

Question — Where is Canberry?

David Headon — It is an English town. Has anyone been to Canberry [Canbry] in England?

Question — Wasn't there a property named 'Canberry?'

David Headon — Absolutely, which is the name that was brought from England.

Question — Wasn't it J.J. Moore who owned the property?

David Headon — It was. John Joshua Moore. Yes.

Question — I didn't properly appreciate, until you gave your speech today, what a remarkable event it was that Melbourne, having got the national capital, and possession being nine-tenths of the law, actually ended up not keeping it. With the deliberations, were there any clauses around time-lines, that they had to make a decision by a certain period of time, or could it have just gone on forever?

David Headon — It could have gone on forever, and of course that's what many Melburnians were hoping for. As the epilogue to this story, there were two or three mentions in the *Age* in the early 1950's about getting the capital back. It was suggested that Canberra was so run down circa 1951, '52, '53, that it should revert to Melbourne. Written into the constitution was that Melbourne would be the temporary site until there was a permanent site and, of course, exactly as you said, Melbourne was hoping that possession was nine tenths of the law.

Question — What about Yass in the description 'Yass/Canberra'? I assume that was just a ruse to delude the Victorian members into thinking it wasn't too far away and on the main line railway.

David Headon — That's exactly right, and it was a package. It seems that both Chris Watson and George Reid moved ultimately to support it. Reid, ever the tactician, had finally decided that the capital wasn't going to be just west of Sydney, where he originally wanted it. It was crucial then that Reid and Watson swung around to support the Yass-Canberra option, a less defined option, and this less threatening and more appealing.

Question — Would you argue that this history continues to have some sort of sub-conscious influence on perceptions of Canberra, or does it just go with the territory by being a national capital that it is perceived the way it is?

David Headon — That's an interesting question. It appears that the high point of the disparagement of Canberra in the twentieth century was at the back-end of the 1930's, 40's and early 50's, when phrases such as Canberra as the 'cemetery with lights' or 'the ruin of a good sheep station' or 'seven suburbs in search of a city' or 'the best

way to see Canberra is from the back of a departing train', and so on, originated. Menzies, in the 1930s, 'hated' Canberra, but ultimately became, to use his word 'an apostle' for Canberra in the middle to later 50's and beyond. These days it is so easy for commentators to use the generic term 'Canberra', when they in fact mean the politicians.

Question — I have a question and a comment, if that's ok. First of all a comment. One of my favourite books is Bill Bryson's *Down Under*, which is a wonderful book, and very informative but I don't think I have read a book that bags Canberra so badly. I think it describes it as a city hidden in a bush and the author never finds it and gets drunk on his own and leaves in disgust. If you are involved with the celebration of Canberra, I know that Bill Bryson comes back every year for the writers' festival and maybe you could engage him and show him the better side and get this terrible entry in his book fixed up because I would love to recommend that book but I have great reservations because of his experience. The other question I had was, I was told that the guidelines for the national capital did not allow it to be on the coast line and that the Department of Defence had put that in because they didn't want to have the national capital subject to a naval bombardment. Is that correct?

David Headon — Certainly. The notion of being inland was precisely for that reason. Going inland was a) to escape bombardment and b) many had the sense that if you were at sea level then disease was far more likely to afflict the city. So they went inland for those two reasons.

In the case of Bill Bryson I'm sure many people in this audience would welcome any kind of engagement with him. I only respond by saying that we are a population of just on 330 000. In the last two or three weeks, we have heard the suggestion that we will be aiming at 500 000 not too far down the track. As someone who feels so passionately about this city, I would like to see it slowly going up from 330 000 pretty much until I die and become a part of the soil of this place. Human scale is one of the delights of our town, but not appealing to all, unluckily it seems not to Bill Bryson

I was very closely involved few years ago in the study known as the 'Griffin Legacy' and one of the most enjoyable parts of that experience was reading into the history of city beautiful and garden city ideas. The ACT Government, through the Centenary of Canberra Unit, has commissioned six booklets which will come out in either in March or April of next year. Greg Wood is doing two of them, I'm doing two, Ian Warden is doing one, and Stuart Mackenzie, who did the Griffin Legacy with me, is doing another. What those booklets are basically doing is diving a little more deeply into the extraordinary background history of this city as a city built on progressive ideas.. People like Henry George, in terms of Canberra being leasehold, and Edward Bellamy's utopian novel called *Looking Backwards*, and writers like Walt Whitman, Thoreau, Ralph Waldo Emerson—the whole brigade of visionary thinkers who were cited in the parliamentary discussion of the 1890's and beyond.

It is this part of the story of Canberra that people like Bill Bryson and many others, including other Australians have no clue about: Canberra based on a wonderful set of ideas, hidden narratives which we hope will bubble to the surface in the centenary years between now and 2013. So watch this space and perhaps keep your eye out for those booklets.

Strengthening Australia's Senate: Some Modest Proposals for Change

Dr Stanley Bach

Introduction

I believe in Australia's Senate. To be more precise, I believe that a vigorous and assertive Senate is necessary for the continuing health of Australian democracy. However, I also believe that the Senate today is not as vigorous or assertive as it can and should be. My purpose here is to explain these two statements and then to offer some proposals for enabling the Senate to live up to its responsibilities and its potential.

Before going any further, I should admit that I'm not an Australian. I'm an American who has spent almost of his professional life working for the US Congress in Washington, DC. So you may wonder if I'm going to be guilty of taking criteria that are suitable to the American Senate and applying them to the Australian Senate, which is a very different institution. The US has a President and two houses of Congress, each of which is elected independently of the others, and none of which is responsible to either of the others. By contrast, it's common knowledge that Australia has a parliamentary system ... except that's not entirely true.

It is true that Australia has a prime minister and a cabinet, all of whom are members of the House of Representatives or the Senate. And it's also true that the prime minister and the cabinet—the government—are responsible to the House of Representatives in the sense that the House could, by a majority vote of its members, force the government to resign (even though that hasn't happened in decades and is almost inconceivable in Australia

today). In these respects, the Australian constitution certainly does draw on the Nineteenth Century British model of parliamentary government.

On the other hand, the Australian Constitution also drew from the American constitution when it established a Senate that, like the House of Representatives, is directly elected by the people and that has almost the same legislative powers as the House of Representatives. During the century since Federation, some observers have argued that creating a second chamber of this kind was a mistake. Others have been certain that the authors of Australia's constitution certainly couldn't have intended for the Senate actually to use all the powers they gave it. In this view, the only good Senate, in Australia at least, is one that doesn't interfere in the business of government, no matter what formal powers the Senate was given more than a century ago.

In this view also, a vigorous and assertive Senate is incompatible with responsible parliamentary government, in which power flows from the people to the elected members of the House of Representatives, and then from the House of Representatives to the government that it creates and that it can destroy if and when the House decides that the government is not exercising its power in a way that's satisfactory to the Australian people. At election time, political power flows back from the government to the people when, by voting on candidates for election to the House, they pass judgment on the government's record and its promises for the future, and decide whether to keep it or replace it. Any other institution, like the Senate, that can interfere in this relationship among the people, the House of Representatives, and the government is at best superfluous and at worst a danger to the simplicity and purity of responsible parliamentary government.

I disagree. I believe that this appealing picture doesn't fairly describe the reality of government and politics in Australia today. In fact, within fairly broad constitutional limits, the government in Canberra can do more or less what it likes between one election and the next, but only if the Senate allows it.

The reason lies in the internal strength of the Labor Party and the Liberal-National Party coalition. In the House of Representatives, the members of each party always vote together, except on those rare votes of conscience—on issues such as abortion and embryonic stem cell research—on which party leaders don't try to impose a party position. On all other votes, ALP Representatives march to vote in lockstep, as do Representatives of the Liberal and National parties, and the situation is not much different in the Senate. The government decides on its legislative program. It then may have to negotiate some of the details of its bills in private discussions with Representatives and senators of its own party, but only its party. Members of the other parties aren't invited to participate in these discussions, nor are they informed about what's being decided until the government has reached agreement with its MPs and senators. Then the government can shepherd its bills through the House of Representatives as quickly as it wants and with only the changes (if any) that the government wants to make. The Opposition in the House can criticize and complain, but it cannot hope to change the outcome.

The government will remain in office until the next election unless the members of its own party in Parliament decide to change their leaders, including the prime minister. If there is such an internal party revolt, a decision is made behind closed doors, after which the Opposition and the Australian people may be told that they have a new prime

minister. This is not a decision made by Parliament; it is one made by the majority group of members within Parliament. Formally, the government is responsible to the House of Representatives; in practice, it is responsible only to the members of its own party in Parliament.

It might not matter so much that the government really isn't *responsible* to Parliament, but only to the MPs of its own party, if the government actually was *accountable* to the people through Parliament for its actions and inactions. If there's one thing we've learned during the past twenty years or so, as we've seen many countries hope to become—or claim to have become—democracies, it's that what often are called 'free and fair' elections aren't enough. Democracies require more than periodic elections to retain or replace the people in power; such elections are necessary but they're not sufficient for democracy. Democracy also requires that there be effective ways for the government to be held accountable *between* elections for what it does and doesn't do. That's why it's so important, for example, that a democratic government should be 'transparent'—that we should be able to learn not only what our government decides, but also how it makes its decisions, so we can understand who may have influenced those decisions, and why.

In a parliamentary democracy, the government is supposed to be both responsible and accountable to Parliament. To take a phrase from detective stories, Parliament should have the means, the motive, and the opportunity to know what the government—the government that it created—is doing with the power that Parliament gave it. Only if Parliament can make the government account to it can Parliament decide if it should continue to have confidence in its government or if it should replace it. And only if the people know what Parliament learns can they decide if the members they've elected to Parliament are acting wisely or unwisely in keeping the power of government in the same hands or entrusting it to others instead.

This is an attractive theory, but one that's hard to reconcile with strong political parties. Australian MPs know that their re-election to the House of Representatives, their influence as members of the governing party, and any hopes they may have for ministerial appointments, all depend on the success of their party, and especially its public reputation and prospects for victory at the next election. Knowing this, MPs of the governing party generally have little or no political incentive to do anything as members of the House of Representatives that would make their party look bad. Whatever the theory of responsible government may be, government MPs have little to gain politically from questioning or criticizing their government's decisions, supporting searching inquiries into their government's actions or inactions, or, generally, holding their government accountable before the Australian people. Instead, they have far stronger reasons to defend their government and to protect it against criticism, as long as they can do so without doing irreversible damage to their own credibility.¹

In short, Australia's government is not responsible or accountable to the House of Representatives in any effective way. The House will not force the government to resign, except if there is an internal party revolt that replaces the prime minister without affecting party control of the government and without any meaningful participation by MPs of the

¹ As a reader of an earlier version of this essay reminded me, not all politicians are motivated all the time by concerns for partisan advantage and personal advancement. There also can be intra-party differences that cannot always be contained within the party rooms.

other parties. Responsibility has been moved from the chamber of the House of Representatives to the party room of the majority party. Furthermore, holding government accountable through searching public inquiries into what the government has done and what it plans to do has little appeal to the majority of MPs who want to protect their own political futures and the electoral prospects of their party.

This is why I began by saying that a vigorous and assertive Senate is necessary for the continuing health of Australian democracy. A political system is not healthy when the government is responsible only to its own supporters who have little reason to hold it accountable for what it does. And this is why, whatever the original intentions and expectations of the Constitution's authors may have been, it is so fortunate that they established a Senate with the power to hold the government accountable, though not responsible, to it.

We need to recall two important dates. One was 1948, when Parliament decided that future Senate elections should be decided using a system of proportional representation. At Senate elections now, therefore, senators are elected from each state on a statewide basis, with most voters choosing a party's list of candidates (by voting 'above the line') and with each party winning the number of seats that corresponds most closely to the percentage of votes it received. This system makes it much more likely that minor party and independent candidates will be elected to the Senate than to the House of Representatives in which one candidate is elected from each constituency.

The result has been that, for much of the last half-century, the party with a majority of seats in the House of Representatives—and, therefore, the party forming the government—has not also had a majority of seats in the Senate. Instead, there usually has been a non-government majority in the Senate: not an Opposition majority, but a majority that can be formed by the Opposition joining in temporary coalitions with minor party senators, independent senators, or both. Because of the 2004 election results, there was a surprising break in this pattern between July 2005 and June 2008. However, I think most observers who are foolish enough to make predictions about such things expect that the pattern of non-government majorities in the Senate is likely to persist unless there are significant changes either in the parliamentary election laws or in the balance of popular support between Labor and the Coalition.

The other date to recall is 1975, when a non-government majority refused to vote supply in an attempt to force the government to resign, even though it still had majority support in the House of Representatives. The Coalition, led by Malcolm Fraser, effectively succeeded with the help of the Governor-General who dismissed the Labor government of Prime Minister Whitlam. At the time, some argued that the Senate was trying to make governments responsible to both the House of Representatives and the Senate, when the two chambers were controlled by different majorities and even though this would violate the essential basis of responsible parliamentary government. The events of 1975 continue to evoke strong opinions today, but I suspect there now is widespread agreement on this point: that however the Senate uses its constitutional powers, it should not use them to make or un-make the government of the day, even if it might be able to do so by using tactics similar to those used in 1975.

At this point, though, we have to return to the distinction between responsibility and accountability. Even though the Senate should not try to make the government responsible

to it, it certainly should make the government accountable to it. If the House of Representatives, and not just its majority party members meeting in private, can't be expected to do more than criticize and complain about the government's legislative plans and priorities, the Senate can and should be prepared to do so. If the House of Representatives doesn't regularly and carefully monitor and, when necessary, investigate how the government implements the laws already on the books, the Senate can and should do so. If the Senate doesn't engage in careful scrutiny of government legislation and administration, there is no one else with the official authority to do so, and the government will be beyond effective control between one election and the next.²

Because the Senate exists, Australia cannot rightly be called a parliamentary system of government, as it was known in London through much of the Nineteenth and Twentieth centuries. On the other hand, because the Senate exists, Australia can have an effectively accountable government, but only if the Senate is up to the job.

I don't mean that the Australian Senate should become an antipodean version of the US Senate; my purpose really is not to lead Australia down a path toward abandoning its Westminster heritage in favor of imitating Washington instead.³ What I do mean is that the Australian Senate should not be satisfied with congratulating itself that it is so much more vital than the upper chambers in the political systems with which Australia has in decades past been most likely to compare itself: the UK's House of Lords (which has proven easier to tear down than to rebuild), Canada's appointive Senate (which may continue to survive only because of a lack of agreement on an alternative to it), and New Zealand's Legislative Council (which was abolished in 1951).

Australia's Senate should have greater ambitions; it should be more vigorous and assertive, and more willing to exercise the powers the Constitution gives it, than it usually has been. Ultimately, what will matter most is the Senate's determination, its appreciation of its responsibilities, and its self-confidence in its own constitutional legitimacy and public support. Nonetheless, there are various organizational and procedural reforms that deserve serious consideration. For example, the Clerk of the Senate, Harry Evans, has devised his own lucid and comprehensive reform agenda for Parliament as a whole.⁴ Here, however, I shall discuss only a handful of reforms under the headings of:

1. Question time
2. Committee review of legislation
3. Senate committees and House ministers, and
4. Frequency of Senate sittings

I've described these reforms as 'modest' because I've deliberately chosen to focus on only a few of them, and then only on reforms that don't require new legislation or, what would be worse, constitutional amendments. Almost any reform that strengthens the Senate is likely to be perceived as threatening by the government and, therefore, it's likely to be opposed by the House of Representatives that is controlled by the government's

² Except for whatever scrutiny the media choose to provide.

³ I readily acknowledge, however, that my thinking about reforming the Senate certainly reflects my familiarity with the US Congress.

⁴ Harry Evans, 'Parliament,' in Robert Manne (ed.). *Dear Mr. Rudd: Ideas for a Better Australia*. Melbourne, Black Inc. Agenda, 2008, pp. 59–71.

majority. So it would be an uphill battle to try strengthening the Senate in ways that require new laws or changes in existing laws. By the same token, Australians have been noticeably reluctant to approve constitutional amendments, so amending the Constitution in ways that strengthen the Senate is likely to be an exercise in futility or one that requires great patience.

Instead, the reforms that I'll propose here are ones that the Senate can adopt by itself or ones that the Senate can compel the government and the House of Representatives to accept if the Senate has the determination to do so. Standing alone, the effect of each reform will be relatively modest, but I make no secret of my hope that their collective effect will be to begin subverting the governmental status quo in Canberra.

Question Time

If the Senate as a whole is to become more effective in holding governments accountable for how they implement the laws, it should change how it conducts its daily Question Time.⁵ Although there are other opportunities for non-government senators to make speeches and shorter statements in the chamber that challenge government policies and actions, only Question Time allows them to pose sharp, pointed questions to government ministers in the Senate. In its present form, however, the Senate's daily Question Time leaves much to be desired as an accountability device.

Question Time begins at about 2:00 p.m. and runs for about an hour on every day that the Senate sits. The President of the Senate calls on an Opposition senator to ask the first question and then calls on the appropriate Senate minister to respond. After this exchange: '[t]he chair calls senators alternately from the government and non-government sides of the chamber to ask questions, and ensures that the allocation among senators is as wide as possible.'⁶ Unlike the House of Representatives, the Senate limits the length of questions and answers. A senator is not supposed to take more than one minute to ask a question and the minister should not use more than four minutes to answer it. If this exchange is followed by a supplementary question and answer, neither should exceed one minute. So if senators use all the time allotted to them and there are no supplementary questions, there is time to ask and answer roughly twelve questions each day. In practice, an average of about 22 questions actually have been asked daily in recent years.

One problem, however, is that half (or almost half) of these questions are asked by senators who support the government, and their questions usually contribute nothing to government accountability. These senators have very little reason to criticize or challenge, much less embarrass, their own government, so most of their questions are designed and planned in advance to give Senate ministers opportunities to explain what a fine job their government has been doing or what a catastrophe it would be if the Opposition were to come to power. Questions coming from government senators are known disparagingly as 'Dorothy Dixers' in honor of a newspaper advice columnist who was reputed to write the questions she then answered in her column.

⁵ Formally, 'questions without notice' to distinguish them from 'questions on notice' to which replies are supposed to be received in writing.

⁶ Department of the Senate, *Senate Brief No. 12: Questions*, p. 1. Available at www.aph.gov.au/Senate/pubs/briefs/brief12.htm.

The result is that half of Question Time each day is effectively wasted. There are more than enough other times during each sitting for Senate ministers to congratulate themselves and their colleagues and to make statements about their government's intentions. There is no good reason to use half of Question Time for this purpose, except to keep to a minimum the number of real questions that otherwise would be asked.⁷

A second problem is that Senate ministers are not required to answer the questions they're asked. 'While standing orders give senators the right to ask questions of ministers and certain other senators there is no corresponding obligation on those questioned to give an answer.'

President Baker ruled on 26 August 1902 that there was 'no obligation on a minister or other member to answer a question', and in 1905 he ruled: 'It is a matter of policy whether the Government will answer a question or not. There are no standing orders which can force a minister or other senator to answer a question.' Other presidents have stated that answers are 'optional' or 'discretionary' and that, 'There is no obligation on a minister to answer; he does so merely as a matter of courtesy.'⁸

Senate ministers are sure to respond to every question they are asked, but whether they actually answer them is another matter altogether.

Although this may seem strange at first blush, there actually is a good reason for not requiring Senate ministers to answer the questions put to them: someone would have to decide whether a minister's response actually answered the question, and this is a matter of judgment, not something that can be calculated or measured. The minister almost certainly would say that he or she did answer it; the non-government Senator who asked the question almost certainly would say that the minister did not. So who would have the final word? It would be impractical to expect the Senate to vote on whether to accept each answer as adequate or to reject it, and it would be unrealistic to expect the Senate's President to decide. With each decision the President made, he or she would alienate one side of the house or the other, and no President could retain the support of the Senate for long under those circumstances.

This situation in which senators can ask questions and ministers don't have to answer them is not unique to the Australian Senate. The same policy applies on the other side of Parliament House, in the House of Representatives,⁹ and it also applies in the Canadian House of Commons.¹⁰ Even in the British House of Commons, where all MPs accept that

⁷ Occasionally, to be sure, government senators ask questions that really are intended to obtain information or call a minister's attention to a problem in their state. However, they have ample other opportunities to communicate with ministers of their own party, and such questions aren't asked often enough to justify allotting half of all questions to government senators.

⁸ Harry Evans (ed.). *Odgers' Australian Senate Practice* (12th ed.). Canberra, Department of the Senate, 2008, p. 491. Available at www.aph.gov.au/senate/pubs/odgers/index.htm.

⁹ 'It is the established practice of the House, as it is in the House of Commons, that Ministers cannot be required to answer questions.' I.C. Harris (ed.). *House of Representatives Practice* (5th ed.). Canberra, Department of the House of Representatives, 2005, p. 550. Available at www.aph.gov.au/house/pubs/PRACTICE/index.htm.

¹⁰ '[I]n response to a question Ministers may answer, defer an answer, take the question as notice, explain briefly why they cannot make an answer at that time, or say nothing.' Canada, House of Commons.

the Speaker presides in a fair and impartial manner, he or she has no power to rule on whether the answer to a question is relevant or adequate:

Although there are many rules regarding the content of Questions, there are no rules—other than those relating to debate and parliamentary language—that govern ministerial answers. In particular, a Minister cannot be compelled to answer a Question and, although a complete refusal to answer is rare ... a Member who is not satisfied with the answer he has received has no redress except to try to ask more Questions on another occasion or to raise the matter in some other way. The Speaker has no powers to intervene¹¹

In Canberra, however, there is an additional reason why Senate ministers may not answer parliamentary questions: they may not know the answers. In mid-2008, of the 30 Labor ministers, seven were senators; the same was true in mid-2007, during the last year of John Howard's Coalition government. These seven Senate ministers are supposed to answer questions every day not only about the work of their own departments but also about the work of all the other government departments, because the 23 ministers who are Representatives do not appear in the Senate to answer questions concerning the work of their departments.

In mid-2008, for example, Senator Faulkner, with the titles of Special Minister of State and Cabinet Secretary (as well as Vice-President of the Executive Council), also represented during Question Time the Minister for Trade, the Minister for Foreign Affairs, the Minister for Defence, the Minister for Veterans' Affairs, and the Minister for Defence Science and Personnel, all of whom were members of the House of Representatives and so could not respond personally to questions relating to their exercise of executive powers. In other words, in addition to Senator Faulkner's other responsibilities, he was expected to respond every day the Senate sat to questions concerning virtually any aspect of Australia's international and national security policies and activities. Similarly, Senator Wong, the Minister for Climate Change and Water, also was the one person charged with responding to questions on behalf of the Representatives serving as the Minister for Employment and Workplace Relations, the Minister for Social Inclusion, the Minister for the Environment, Heritage and the Arts, the Minister for the Status of Women, the Minister for Employment Participation, and the Minister for Youth. Under these circumstances, is it any wonder that Senate ministers sometimes can't answer questions very well, or not at all, even if they might want to?

Senate ministers don't have to answer the questions asked of them and they may not know the answers; these are at least two of the reasons why Professor John Uhr concluded a decade ago that Question Time 'is not well designed to perform as an accountability

Précis of Procedure (2nd ed.). Ottawa, Table Research Branch, 1987, p. 26. 'The speaker's role in question period is to ensure that the rules of order and procedure are respected. He is not responsible for ensuring that topics are adequately covered, or that ministers give useful answers ... ' C.E.S. Franks. *The Parliament of Canada*. Toronto, University of Toronto Press, 1987, p. 146.

¹¹ J.A.G. Griffith and Michael Ryle. *Parliament: Functions, Practice and Procedures*. London, Sweet & Maxwell, 1989, p. 254.

forum.’¹² The situation in the Senate chamber feeds on itself, to the detriment of government accountability. Senate ministers often respond to questions not by answering them, but by making complimentary little speeches about their government or by attacking the party of the senator who asked the question. Anticipating that their questions won't be answered, non-government senators often transform their questions into attacks on the government's competence, motives, or integrity. Any serious interest in using Question Time to probe into the efficacy of government policies and the efficiency of government administration too often gets lost in the melee. Although Question Time in the Senate usually is more restrained than it is in the House of Representatives, it hardly conveys an image of Parliament in which Australians can take pride—unless, that is, they have trouble distinguishing between democratic governance and Aussie Rules football.

The defenders of Question Time will explain that it is an arena of the never-ending electoral campaign and a forum in which the mettle of ministers and their prospective replacements are tested. Skill at dueling with words is an essential talent for a parliamentary politician who hopes to rise to a senior ministerial position when his or her party is in government. And nowhere is that skill put to the test better than during the daily gladiatorial contests that constitute Question Time in both houses of Parliament. That may well be so, but it is a high price to pay—too high a price in my opinion—for sacrificing Question Time as one important way that the Senate can hold the government accountable to the Australian people.

To improve the current situation, the Senate should make two basic reforms in its procedures for Question Time.¹³ One of them is sure to infuriate the government; the other is equally certain to infuriate the non-government side of the Senate.

First, the entire daily period for Question Time should be devoted to questions (and what passes for answers) from non-government senators. Dorothy Dix, who passed away many years ago, finally should be allowed to rest in peace. The gentle questions, which aren't really questions at all, from government senators rarely serve any purpose other than to waste time and protect Senate ministers from answering (or not answering) twice as many questions from non-government senators than they now have time to ask.¹⁴

¹² Uhr was speaking of the House of Representatives but his conclusion applies with almost equal force to the Senate. John Uhr, *Deliberative Democracy in Australia*. Cambridge, Cambridge University Press, 1998, p. 199.

¹³ In the British House of Commons, a lottery determines which of the many oral questions that are submitted actually may be asked. Therefore, there is no assurance that questions will be allocated equally between the government and Opposition or among all the parties represented in the House. UK House of Commons Information Office, *Parliamentary Questions* (Fact Sheet P1), March 2007, p. 8. In Canada, the Speaker recognizes the Leader of the Opposition or another member of that party to ask the first question, which may be followed by two supplementaries. Then:

[e]ach of the lead questioners of the other officially-recognized parties is permitted an initial question and one supplementary question. *Throughout the rest of Question Period, other Members representing parties in opposition to the Government continue the questioning.* Members representing the governing party, Members of political parties not officially recognized in the House and independent Members are also recognized to ask questions, *though not as often as Members of officially-recognized opposition parties.* (Emphasis added.) www.parl.gc.ca/compendium/web-content/c_g_questions-e.htm.

See also Robert Marleau and Camille Montpetit, *House of Commons Procedure and Practice*. (2000 edition), Chapter 11, 'Questions', p. 7 of online text available at www.parl.gc.ca/MarleauMontpetit.

¹⁴ One knowledgeable reader of an earlier draft of this essay disagreed, writing to me that:

The President should turn to the Leader of the Opposition in the Senate to ask the first question. Then the President should call on a minor party senator or an independent senator to ask the second question.¹⁵ Thereafter, the Leader of the Opposition in the Senate should be allowed to call on his or her fellow members (unless the Leader chooses to give time for a question to another minor party or independent senator). Also, there would be no need for supplemental questions as such because the Opposition would decide for itself whether it wished to follow up one question with another on the same subject. Naturally, the Senate's President should remain responsible for maintaining order, enforcing the time limits on questions and responses, and ensuring that all questions meet the requirements that the Senate has established.¹⁶

Senate ministers undoubtedly would strongly resist these changes that would subject them to twice as many challenging, even hostile, questions as they now face. Fortunately, though, there is a second reform in Question Time that should be adopted and that would greatly ease the burden on Senate ministers.

It simply is unrealistic to expect seven Senate ministers to be well prepared—every day—to give useful and substantive answers to questions about the policies and actions of their own departments and all the other departments whose ministers are members of the House of Representatives. It is hard to imagine how Senate ministers possibly can prepare themselves adequately every day unless they simply ignore their other responsibilities as senators, ministers, members of their party, and representatives of their state constituencies.

To ease the burden on them, and to make it at least possible for them to be prepared to respond to questions with meaningful and reasonably well-informed answers, most Senate ministers should be relieved of the burden of answering questions every day. As the stand-in for the prime minister, the Leader of the Government in the Senate should be

Confining question time to non-government senators would simply reinforce the unfortunate perception that accountability is something imposed by opposition on governments. We should not give up the hope that government backbenchers will pursue accountability issues with appropriate questions. A better solution would be simply to enforce the existing rules about question time, which would confine questions to questions and answers to answers.

My friend's optimism is laudable, but I find little basis for it in the Senate's history and practices. Of course, the new system I'm proposing always can be revised if there is clear and compelling evidence that government backbenchers are, in fact, thirsting to ask 'appropriate questions'. I also am sceptical about a reliance on enforcing the existing rules about question time, and for two reasons. First, as I've noted, while Senate ministers may be required to *respond* to questions, they are not required to *answer* them. Second, I doubt that any President of the Senate could be expected to make defensible rulings as to whether a question is a question or an answer is an answer without an opportunity to study them in advance.

¹⁵ Which of these senators is to ask questions on which days is something that the minor party and independent senators should negotiate with the Leader of the Opposition in the Senate or the Opposition Whip. The President should ensure that none of these senators is called upon a second time until each minor party and independent senator has been called upon the first time. If the number of minor party and independent senators increases substantially beyond their current numbers, this procedure might have to be adjusted in the interests of fairness to them.

¹⁶ See *Australian Senate Practice*, 12th ed., op. cit., pp. 497–501.

present and ready to answer questions each day the Senate sits. For the other Senate ministers, however, a rotation system should be established, by negotiation between the government and Opposition parties in the Senate, which requires each of the other Senate ministers to answer questions on only one day each week. This rotation scheme would continue from week to week, so that each Senate minister would know on what day he or she would answer questions and would have a week to prepare. Because unexpected developments may require immediate answers to questions, the weekly rotation should be subject to adjustment by the Leader of the Opposition in the Senate on twenty-four hours notice, but only to permit questions on one or more specific subjects, or without formal notice by agreement between the two major parties in the Senate.¹⁷

This kind of arrangement is not unprecedented. In fact, it would demand more of Senate ministers than the system used in the British House of Commons:

Ministers take it in turns to answer Questions, the rota of Ministers being decided by the Government, after consultation with the Opposition parties. In practice each of the major departments comes top of the Question rota, which is the essentially relevant position, on one day every three or four weeks, and always on the same day of each week. Some Ministers answering for smaller departments, for instance, the Minister for the Arts or the Attorney General, have a short fixed time after other Ministers on Mondays.¹⁸

What's more, the Australian House of Representatives employed a rotation system during 1994–1996:

[I]n 1994 the Keating government introduced a roster system loosely modeled on British practice which limited the prime minister's appearance to two days each sitting week. Many junior ministers were rostered to appear much less frequently. The Howard government restored the forms of earlier Question Time practice, so that all House ministers were liable to be questioned each sitting day.¹⁹

A key difference between Keating's innovation and the plan I propose is that the Leader of the Government in the Senate would be present every day to answer questions that, in the House of Representatives, would be put to the prime minister.

¹⁷ In London, the Speaker may decide to allow an MP to ask an 'Urgent Question' to a Minister, the rota notwithstanding. The Senate could opt for this approach instead of the alternative that I propose. It needs to be remembered, however, that the British Speaker, once elected to that office, removes himself or herself from partisan politics, whereas the President of the Senate remains an active and respected member of a parliamentary party. Giving the President the authority—and responsibility—to decide whether a proposed question is urgent, which inescapably involves the exercise of discretion, would inevitably leave him or her open to charges, whether justified or not, that this discretion has been exercised with partisan advantage in mind.

¹⁸ Griffith and Ryle, *op. cit.*, p. 259. On question time in the House of Commons generally, see UK House of Commons Information Office, *Parliamentary Questions*.

¹⁹ Uhr, *Deliberative Democracy in Australia*, *op. cit.*, p. 198. Perhaps Howard would not have abandoned Keating's plan if it weren't for the daily platform that 'Dorothy Dixers' give the Government in both chambers.

Eliminating questions from government senators should be anathema to the government, just as radically reducing opportunities to question most Senate ministers from four days to only once each week should be anathema to the Opposition—which suggests to me that, taken together, the two reforms may strike a fair balance. But would implementing these reforms transform the Senate’s Question Time, immediately and fundamentally?

Perhaps not. Senators evidently have become accustomed to Question Time as it currently works, and to think of it not as a forum for government accountability, but as an arena in which to promote themselves and their party with their career prospects and the next election in mind. In fact, some senators probably relish the verbal combat that now takes place during a Question Time that is a forum for ‘questions without answers’, as John Uhr has put it, ‘as each side pursues opportunities to raise questions about the capacity of their opponents to govern the country, and to try to win the battle for a greater share of public opinion.’²⁰ And perhaps senators are right in thinking that many Australians are more interested and entertained by the fireworks that Question Time, even in the Senate, sometimes provide than by less explosive exchanges about what the government is doing and how well it’s working. I believe, however, that government accountability is too important to be brushed aside in the interests of providing entertainment and promoting senators’ careers.

In fact, the reformed Question Time that I propose should result not only in more substantive questions but also in a more focused inquiry each day. With fewer Senate ministers (other than the Leader of the Government in the Senate) in the chamber to answer questions each day, non-government senators would be encouraged to concentrate their questions on only one or a very few subjects. A minister still would be free to avoid giving a substantive answer to a question, but there would be a much greater chance than there now is for one or more follow-up questions to prevent the minister from using evasion or counter-attack to avoid the initial question. Senate ministers really would have a chance to demonstrate their knowledge and prove their mettle in debate. Also, if the media knew that questions on the next day would concentrate on immigration policy, for example, or on health care and other services for the aging, or on the impact of the Australian-US free trade agreement, they might pay more attention to, and report more thoroughly on, the questions and answers than they often do now.

What I propose here evidently has one of the same goals in mind as the recent proposal made by Senator Alan Ferguson, until August 2008 the President of the Senate and now its Deputy President and Chair of Committees, and the chair of the Senate’s Committee on Procedure. In a September 2008 report made by that committee, it presented (without endorsement) Senator Ferguson’s proposal that there be some notice given of questions that senators wish to ask each day, and that each question that is asked may be followed by as many as six supplementary questions.²¹ The result would be to limit the number of subjects that could be raised each day during question time, but permit each subject to be

²⁰ Ibid. p. 198; and John Uhr, *Questions Without Answers: An Analysis of Question Time in the Australian House of Representatives*. Canberra, APSA/Parliamentary Fellow Monograph No. 4., 1982.

²¹ Senate Procedure Committee on Procedure. *First Report of 2008*. September 2008, p. 1. This report is available at www.aph.gov.au/senate/committee/proc_ctte/reports/index.htm. Also included is a proposal that answers are to be directly relevant to each question, though there is no discussion of how relevance would be determined and how this requirement might be enforced effectively. Related articles appeared in the *Canberra Times* on 25–28 August 2008 and are available at www.camberrattimes.com.au.

explored, through supplementary questions, in greater depth than now is the Senate's practice.

In a discussion paper attached to the Procedure Committee's report, Senator Ferguson comments on the considerable time and effort that the public service invests every day in preparing for questions that, under the current system, aren't asked:

A significant amount of time and resources in government departments and agencies are put into preparation for question time in areas that may not be required on that day. Public servants from many departments and agencies expend a significant amount of time preparing briefing material for their ministers on a wide range of subjects within their areas of responsibility. Because it is not known which minister will be subject to questions on a particular day, or which specific area within their portfolio, the briefs try to cover every possible area of questioning. The briefs are often quite broad in their approach, providing the minister only enough to satisfy one or two questions. This time and effort used to provide briefing covering such a wide range of possible parliamentary questions could be spent more productively and efficiently in other areas if it was known that question time would focus in detail on a few specific subjects.²²

It's not clear to me how much Senator Ferguson's proposal would alleviate this problem. Under his plan, there would be only three hours' advance notice of each question to be asked each day, and I assume—and hope—that public servants now begin preparing for possible questions well before that time.²³ So it's quite possible that public servants would still have to invest a great deal of time in preparing a Senator to reply to questions that won't be asked. And every Senate minister would have to reserve much or all of the time between 11:00 a.m. and 2:00 p.m. on each sitting day in anticipation of learning at 11:00 a.m. that he or she would have to respond to at least one primary question and as many as six supplemental questions in just a few hours' time.

Under my scheme, the public servants in each department would know in advance on what day of each week, barring emergencies, their minister or the Senator representing their minister would be required to answer questions. They would have as much time as they need to prepare their briefing materials. In addition, Senate ministers also would be able to allocate their own time more efficiently because, again barring emergencies, they would know on what days they would have to be present to answer questions, so they could allocate ample time to digest the briefing materials that public servants had prepared for them.

As I've explained, it would be necessary under my proposal for the Senate to be able to re-arrange the weekly rotation pattern when there are pressing questions relating to some

²² Ibid. p. 7. The discussion paper, dated August 2008, is entitled 'An opportunity for revitalization,' and includes a comparative summary of question time in the UK, New Zealand, and Canada.

²³ In New Zealand, Standing Order 372 requires that oral questions be submitted in writing during the morning of the day on which they are to be asked. In England, the texts of oral questions must be submitted at least three days in advance. See UK House of Commons Information Office, *Parliamentary Questions*, p. 7. There is no such requirement in the Canadian House of Commons.

unexpected development. It is possible that the value of the rotation pattern could be undermined if senators routinely insisted on re-arranging it. Whether that actually would happen remains to be seen. In fact, it might be advisable for the Senate to implement Senator Ferguson's plan for six months on an experimental basis, and then to experiment with my plan for a similar period of time. Then the Senate would be able to make a more informed decision about the plans' respective advantages and disadvantages, and how the Senate's preferred plan might need to be refined before being adopted on a permanent basis.²⁴ What's most important is that the Senate agree on the need to make Question Time a more productive part of each day's proceedings and a more effective procedure for holding the government to account.

One final point needs to be made on this subject. We need to bear in mind the truth behind the statement that then-Treasurer Paul Keating made in the House of Representatives in 1988: that Question Time 'is a courtesy extended to the House by the Executive branch of Government.'²⁵ As it now stands, if Question Time in the Senate became too demanding or threatening to Senate ministers, they could systematically decline to reply to questions in any meaningful way (and notwithstanding any possible requirement for 'directly relevant' answers), and there is nothing that the Senate could do about it. What's more, there is no requirement that the daily Question Time continue for an hour or for any other length of time. 'It is a long-established practice for question time to be terminated by the Leader of the Government in the Senate asking that further questions be placed on notice.'²⁶

Experienced observers tell me that no government is likely to begin abbreviating Question Time to protect itself against criticism. It is just possible, however, that this might not remain true once all questions begin coming from non-government senators. So it would do no harm for the Senate to amend its standing orders to require, first, that there be a one-hour Question Time on every day that the Senate sits, unless the Senate votes otherwise or unless the Leader of the Opposition in the Senate ends it in less time, and, second, that Senate ministers must respond to each question, even if no rule can ensure that each of their responses actually is an answer to the question asked.

Before moving on, I should at least mention that, in other parliaments, ministers who are members of the lower house appear in person in their 'senate' to explain their bills and to participate in Question Time. Writing about how efforts to reform the House of Lords could benefit from the examples of other parliaments, Meg Russell wrote recently that:

²⁴ In fact, since this was first written, the Senate conducted a two-week test, in late 2008, of 'a more limited change to question time' than Senator Ferguson originally had proposed. See Senate Procedure Committee, *Restructuring Question Time: Third report of 2008*, November 2008. This report is available at www.aph.gov.au/Senate/committee/proc_ctte/reports/2008/report3/index.htm. 'The main features of the scheme are that answers to questions will be limited to two minutes, two supplementary questions will be allowed to each questioner, and there will be an explicit requirement for answers to be 'directly relevant' to the questions.' Department of the Senate, *Procedural Information Bulletin* No. 226, 14 November 2008, p. 4. During this trial period, there were 'minor difficulties mainly related to the requirement for answers to be 'directly relevant' to the questions.' The Senate subsequently decided to continue the trial during 2009. Department of the Senate, *Procedural Information Bulletin* No. 227, 5 December 2008, p. 4.

²⁵ Quoted in John Uhr, *Deliberative Democracy in Australia*, op. cit., p. 198.

²⁶ Department of the Senate. *Senate Brief No. 12: Questions*, pp. 4–5. Available at www.aph.gov.au/Senate/pubs/briefs/brief12.htm.

It is obviously important that ministers should retain access to the upper house, particularly for the presentation of government bills and statements. It also seems desirable that ministers should continue to answer questions in the upper house. However, all of these activities take place in other second chambers, irrespective of whether the ministers concerned are members of the chamber. This is because the convention barring House of Commons ministers from the House of Lords is highly unusual. In most countries ministers may speak in either chamber, irrespective of whether they are a member of that chamber. If this convention were adopted in the UK [or Australia] it would enable members of the upper house to question and debate with senior cabinet ministers, including possibly the Prime Minister. This could in fact improve the accountability of government to the upper house, ending the practice whereby questions are frequently answered by junior House of Lords ministers who are expected to cover an extremely wide brief.²⁷

Reasonable as this may be, I fear that if I were to propose that House ministers actually should appear in the Senate chamber to answer questions about the policies and practices of their departments, I would be dismissed, along with my more modest proposals, as being revolutionary and out of touch with reality. So, on second thought, please forget that I even mentioned the idea.

Committee review of legislation

The Senate is proud of its committee system, and justifiably so. It has created an unusually elaborate and active collection of committees, especially for an upper house in a political system that looks to Britain for its antecedents.

The importance of these committees can't be over-stated. In fact, it may not be an exaggeration to say that no parliamentary body can be taken seriously unless it has a functioning committee system that's well-designed for the constitutional and political context in which the committees operate. I've found no better summary of why committees are so important than the one offered by an Israeli political scientist, Reuven Hazan, in his book on comparative parliamentary committees and committee reform:

The main advantage of committees is that more work can be accomplished. Committees can subject government bills to more detailed scrutiny than the entire legislature can, thereby raising the level of expertise and the number of bills examined. Committees can assess the implications of proposed bills, ensuring that unwanted consequences are avoided through proper amendments. They provide a more informal setting for deliberations than the plenary, shunning the demagoguery of

²⁷ Meg Russell, *Reforming the House of Lords: Lessons from Overseas*. Oxford, Oxford University Press, 2000, p. 274. In India, '[e]very minister has the right to speak in and take part in the proceedings of either House ...' R.C. Tripathi, 'Rajya Sabha: the Upper House of Indian Parliament,' in R.C. Tripathi, *Second Chambers: Bicameralism Today*. New Delhi, Rajya Sabha Secretariat, 2002, p. 126.

debates in the legislature in exchange for less rhetoric and more frank, responsible discussion; they reduce the degree of partisan divisions, which are more pronounced in the plenary, allowing compromises to be worked out; they expand the opportunities for members to participate in the work of the legislature, particularly members of the opposition parties, interest groups, and concerned individual citizens. Committees provide the government with much-needed feedback, which the executive is more likely to perceive as constructive committee criticism and thus is more likely to take into account than it would have in open plenary debate. They are the educational arena for newly elected parliamentary members, and the specialization forum for prospective government appointees, and they provide democratic endorsement for executive actions, thereby enhancing the stability of the democratic regime. Committees today are essential for the efficient dispatch of parliamentary business, their contribution is of incalculable value, and no parliament would be able to operate without them.²⁸

Some of Australia's Senate committees deal with what are essentially internal and often house-keeping (sometimes called 'domestic') matters, such as the Committee on Procedure and the Committee of Privileges. Others are select committees that are created temporarily to address a complex matter of immediate concern, such as the Select Committee on Mental Health, the Select Committee on Housing Affordability in Australia, and a committee that shall interest us later, the Select Committee on a Certain Maritime Incident, established early in 2002 to inquire into what had become known as the 'children overboard' incident. Still other committees are joint committees that bring Representatives and senators together to consider matters of importance to both houses, such as the Joint Committees on Electoral Matters, on Treaties, on Intelligence and Security, and on Public Accounts and Audit.

In addition, two Senate committees have government-wide responsibilities. The Committee on Scrutiny of Bills reviews all new proposed legislation to make sure that these bills satisfy certain standards—for example, that they do not 'trespass unduly on personal rights and liberties.' The Committee on Regulations and Ordinances is charged with applying similar standards as it reviews all proposed new 'delegated legislation'—that is, regulations, ordinances, and other binding rules that laws have authorized departments and other agencies to issue. For example, these committees will look at a new bill or a new regulation affecting the work of the Department of Education, Employment and Workplace Relations, and ask whether the bill or regulation meets the committee's standards, not whether it would be wise or effective public policy.

The committees that will concern us here, however, are the Senate committees that have responsibility for public policy on different subjects. As of 2008, there were eight of these committees, the Committees on:

Community Affairs

²⁸ Reuven Hazan, *Reforming Parliamentary Committees*. Columbus, Ohio, the Ohio State University Press, 2001, p. 3.

Economics
Education, Employment and Workplace Relations
Environment, Communications and the Arts
Finance and Public Administration
Foreign Affairs, Defence and Trade
Legal and Constitutional Affairs, and
Rural and Regional Affairs and Transport

Seven of these committees were first created in 1970, with the eighth being added in 1977, and they became known as 'legislative and general purpose standing committees', although I'll refer to them more simply as 'policy committees.' Each committee had eight members, with four coming from government ranks and with one of the government senators serving as the chairman. Furthermore, even if the other four members joined to create a tie vote with the government in a committee, the government would win because the chairman was given a 'casting' vote. This meant that the chairman could vote for himself or herself and then, when necessary, cast a second vote to break a tie. So in a Senate that usually had non-government majorities, the government actually had majorities on each of the Senate's policy committees.

In part because of this situation, the Senate decided in 1994 to divide each of its eight policy committees into two: a legislation committee, to which bills usually were referred, and a references committee that usually was charged with inquiring into issues that the Senate assigned to it. Each pair of committees had overlapping memberships and a shared secretariat, but different majorities. The government had the chairs and majorities on the legislation committees while the non-government parties had the chairs and majorities on references committees.

Because of this arrangement, the government could control what happened to bills that were referred to any of the Senate's legislation committees. However, it lacked the same control over the work of the references committees.²⁹ Not surprisingly, therefore, after the Coalition government gained control of the Senate in 2005, it re-combined the legislation and references committees in favor of the pre-1994 arrangement. Once again, the Senate had eight policy committees with the government again in control of each of them thanks to the fact that it held four of the eight seats on each, including the chairman with his or her casting vote to break ties. And so the situation remains under the current Labor government, which now faces its own non-government majority in the Senate.

This is an unusual situation. In some parliaments, the party or coalition of parties that controls a majority of seats in the whole chamber also has a majority of seats on each of its committees, and one of its members chairs each committee. In other parliaments, the same basic principle applies, except that the Opposition party chooses a majority of the members, and the chair, of at least one committee (often the Public Accounts Committee) with a government-wide mandate for reviewing how government funds are spent. And in still other parliaments, committee seats and chairmanships are allocated among all parliamentary parties in proportion to the share of seats they occupy in the chamber as a

²⁹ And for the same reason, non-government majorities in the Senate referred a few bills to reference committees where the government lacked a majority.

whole. But in Australia's Senate, strangely enough, the government once again has effective control over all the Senate's policy committees, even when it has only a minority of seats in the Senate as a whole. Whichever party or parties controls the Senate, the government party controls its committees.

Although US legislatures follow the first practice of giving the majority party a majority of seats, including the chairmanship, on all committees, I don't recommend that the Australian Senate do the same. That probably would be too drastic a departure from current practice and it would fail to take account of the parliamentary elements of Australia's political system. Instead, I propose that the committees should remain equally divided, with four government and four non-government senators serving on each, but that the chairmanships also should be equally divided. A government senator would serve as chair (and have a casting vote to break ties) on four of the committees, and a non-government senator would chair each of the other four. The government and Opposition parties, in consultation with minor parties and independent senators, would have to agree among themselves how the chairmanships are allocated, but perhaps with a stipulation that a committee chairman from one side of the Senate must be succeeded by a chairman from the other side.

The now-abolished division of each of the Senate's policy committees into a pair of legislation and references committees pointed clearly to the two primary kinds of work that such parliamentary committees can do. First, they can review bills that propose new laws; and second, they can review the ways in which existing laws have been interpreted and administered. The eight current committees have been active on both fronts. During 2006, for instance, each of them met for an average of 142.25 hours over an average of 41.38 days. But whether that's a lot or a little depends on how you look at it. The same numbers tell us that each of the committees met on an average of less than three hours on one day each week in 2006 and for an average of about three and a half weeks during that year (assuming a 40-hour work week). There also was considerable variation from one committee to the next. In 2006, for example, the Committee on Community Affairs met for 241 hours on 62 days while the committee on Finance and Public Administration met for only 77 hours on only 19 days. That comparison by itself suggests that it may be time for the Senate to think about how to even out the workload among some of its committees.

Committees are valuable institutions in the Senate, or any other parliamentary body with heavy responsibilities, because they create a system of division of labor. Instead of all the senators having to meet together to do everything, they have created a collection of workgroups that can take up different tasks at the same time. Also, each committee has specialized responsibilities, so its members can become the Senate's own experts on foreign affairs or education policy or whatever other issue the Senate has assigned to a committee. It is in the Senate's interests to allow its committees to do more work for it and to enable them to do that work better than they now can.

In the rest of this section, I'll present several proposals for increasing the role of the Senate's policy committees in the legislative process. In the next section, we'll turn to a problem that has hampered the committees in their efforts to review how the government of the day has been administering the laws that already have been passed.

Table 1

Bills Referred to Committees in the Senate, 1990–2007

	Bills introduced in the Senate and received from the House	Bills referred through Selection of Bills Committee	Total number of bills referred	Percentage of bills referred
1990	197	21	27	13.7
1991	221	37	42	19.0
1992	264	42	56	21.2
1993	201	41	48	23.9
1994	199	56	58	29.1
1995	194	33	42	21.6
1996	163	30	46	28.2
1997	252	71	76	30.2
1998	218	60	84	38.5
1999	233	54	74	31.8
2000	189	63	78	41.3
2001	188	36	45	23.9
2002	218		65	29.8
2003	190		71	37.4
2004	153		60	39.2
2005	195	50	62	31.8
2006	218	93	102	46.8
2007	207	66	72	34.8
Totals	3700		1108	29.9

Notes: The data for 1990–2001 and for 2002–2007 are taken from different sources—see the note on sources below—and so may not be precisely comparable. The data for the more recent period include instances in which provisions of a bill or an exposure draft of a bill were referred to a committee. *Work of Committees* for 2004 indicates for the first time that some bills were referred through the Selection of Bills Committee, but only for the period from 16 November to 31 December. The editions for 2002 and 2003 do not identify which bills, if any, were referred through the Committee.

Sources: For 1990–2001: Tables 1 and 2 (pp. 52–53) of John Vander Wyk and Angie Lilley. *Reference of Bills to Australian Senate Committees. Papers on Parliament* No. 43, June 2005. For 2002–2007: Data on numbers of bills introduced compiled from annual editions of *Business of the Senate*, a publication of the Table Office of the Department of the Senate. Data on numbers of bills referred compiled from ‘New references’ to each committee, as listed in the semi-annual and annual editions of *Work of Committees*, a publication of the Committee Office of the Department of the Senate.

With the establishment of its policy committees in 1970, it became possible for the Senate to send a bill—usually a government bill that the Senate has received from the House of Representatives—to one of these committees for it to study, and perhaps even to make recommendations for changing the bill in some respects, before the Senate as a whole

begins to consider it in detail during plenary sessions.³⁰ We know, however, that for the next 20 years, the Senate rarely took advantage of this opportunity. As part of their invaluable research, two Senate officials, John Vander Wyk (now retired) and Angie Lilley, calculated that of the 4,085 bills that the Senate received from the House or that senators introduced in the Senate between 1970 and 1989, only 29 or 0.7 per cent of them were referred to one of the Senate's policy committees for study.³¹

This situation began to change in 1990 when the Senate created its Selection of Bills Committee to recommend to the Senate which bills should be referred to which of the Senate's committees, and when the committees should review each bill and for how long.³² Table 1 shows that, during the following 18 years, through 2007, 1.3 per cent jumped to almost 30 per cent for the entire period. This is one of those cases where it's not obvious just what is the cause and what is the effect. Did the Senate send more bills to committees because it now had a Selection of Bills Committee to recommend that it do so, or did it establish this committee because it wanted to send more bills to committees? Whichever the case—and there's probably truth in both speculations—Table 1 documents that, since 1990, the Senate usually has made its referral decisions at the recommendation of its Selection of Bills Committee, but not in every case.

According to the Senate's website, the committee's membership 'consists of the Government Whip and 2 other senators nominated by the Leader of the Government in the Senate, the Opposition Whip and 2 other senators nominated by the Leader of the Opposition in the Senate, and the whips of any minority groups.'³³ Vander Wyk and Lilley explain how proposals for referrals come to the committee:

³⁰ Review of proposed legislation by Senate committees is the subject of chapter 7 of John Halligan, Robin Miller and John Power, *Parliament in the Twenty-first Century*. Melbourne, Melbourne University Press, 2007.

³¹ John Vander Wyk and Angie Lilley, *Reference of Bills to Australian Senate Committees*. *Papers on Parliament* No. 43, June 2005, Table 1 at p. 52; available at www.aph.gov.au/senate/pubs/pops/index.htm. An additional 26 bills were referred to joint or select committees, making for a total of 55 bills, or 1.3 per cent of the total, that the Senate referred to some committee. See also Kelly Paxman, 'Referral of Bills to Senate Committees: An Evaluation.' in *Papers on Parliament* No. 31, June 1998. Available at www.aph.gov.au/senate/pubs/pops/index.htm.

³² www.aph.gov.au/Senate/committee/selectionbills_ctte/index.htm.

³³ The effect is to give an extra vote to the Coalition parties. During 2006, with a Coalition government in power, the committee had nine members: three from the Liberals and 3 from Labor, plus the whips of the Nationals, the Australian Democrats, and the Greens. In other words, the committee included both the 'Government Whip' and the Nationals' whip, even though the Nationals were part of the government. So the government had four members and the Opposition (Labor) had three. Neither had a majority of the nine members. For a majority, the Coalition needed the vote of one of the two minor parties, whereas the Labor Opposition needed the votes of both. In 2008, with a newly-formed Labor government in power, there were three government members, four from the Liberal-National Coalition, and one each from the Greens and the Family First party. Now the government needed the votes of both minor parties to win in the committee, whereas the Opposition needed the vote of only one of them. However, Vander Wyk and Lilley imply that this hasn't mattered very much in practice because 'it was acknowledged that whatever the majority on the committee might recommend, in the end the numbers in the Senate would decide. The practice in later years when the committee could not reach agreement was for it simply to report its disagreement and leave it to the Senate to determine an outcome, rather than the majority on the committee making a recommendation which might then be overturned in the Senate.' Vander Wyk and Lilley, *Reference of Bills to Australian Senate Committees*, p. 20.

Most proposals for references are conveyed by the whips from party spokespersons in the subject areas of the bills under consideration or, occasionally, as the result of a request by an independent senator. Most proposals come from the non-government parties, but the government will seek to refer bills on occasion, particularly some controversial bills, sometimes to pre-empt a non-government reference for political reasons but more often to ensure, in the realisation that a reference will be inevitable (in a non-government majority chamber), that a bill or the provisions of a bill are referred as early as possible so that the government's legislative program is not unduly delayed.³⁴

Table 1 shows how much more often the Senate has been referring bills to its committees since 1990 than during the two preceding decades. The fact remains, however, that more than two-thirds of the bills on which the Senate was asked to act were never reviewed by a Senate committee at all. In five of the eight years since 2000, the percentage of bills referred did exceed one-third, but it has never reached half. Even today, the Senate usually legislates without the benefit of what should be the expert opinion and advice of one of its committees. That situation apparently satisfies the Senate, but I think the Senate is denying itself the opportunity to be a more effective and independent legislative body.

Vander Wyk and Lilley point to some of the key advantages of committee review of legislation:

At a minimum, the benefits of committee review include the identification of technical deficiencies and unintended ... consequences. The possibility that a bill will undergo committee scrutiny may in itself cause the initial drafting to be done more carefully and with more thought to issues which could be raised in committee consideration. In the broad, review may result in a re-examination of the policy of parts or all of a bill, or the way in which particular policy matters are to be implemented.

Committee review of a bill is usually done with greater transparency than the processes of government leading up to the production of the bill. Committee processes are nearly always open; most committees will invite submissions and hold public hearings. Representations to government in respect of proposed legislation are often made behind closed doors. Public proceedings promote contestability of views.

Perhaps the single most important benefit of the committee examination of bills is that participation is not limited to the legislators: a committee can seek input from any source it wishes, whether it be the minister, departmental advisers, academic and other experts, state governments, interest groups, and members of the public ... Committee inquiries enable legislators to directly test the various views on a bill in a way not possible in a plenary session.³⁵

³⁴ Vander Wyk and Lilley, *op. cit.*, p. 16.

³⁵ *Ibid.* pp. 2–3.

Yet, until now, the presumption has been that a bill will not be the subject of study by a committee unless the Senate decides otherwise. I propose to reverse this situation: the Senate should give each of its policy committees the authority to review and report to the Senate on any proposed legislation or prospective subjects of legislation on matters for which the committee has responsibility. This would mean that each bill that a Senator proposes or that the Senate receives from the House of Representatives would be referred to the appropriate committee immediately after its first reading.³⁶ This also would mean that there would be no need for the Senate to refer provisions of bills or exposure drafts of bills to its committees because the committees already would have the continuing authority to review and report on them.³⁷ And finally, this would mean that the committees also would be free to review and report on the need for legislation that the government has not yet undertaken to draft, but only, of course, if the committees have the time to do so.

In the September 2008 report to which I referred in discussing Question Time, the Senate's Committee on Procedure expressed its belief 'that it is important to maintain the principle that only the Senate may decide whether bills should be referred to committees, and it would not be desirable to adopt any procedure whereby bills may be referred without explicit authorization by the Senate.'³⁸ Presumptuous though it may be for me to disagree with such a distinguished committee, I do disagree, at least until the committee offers a persuasive argument why the 'principle' it enunciated is so important and desirable.

The only principle the committee could have in mind is that the Senate's committees are and should remain creatures of the Senate as a whole and subject to its direction. No one should disagree with that principle, nor would my proposals affect it. The Senate would

³⁶ This would be consistent with the Senate's current practice of referring bills to committee after first reading, not after second reading, which minimizes the impact of committee review on the government's legislative timetable. Reference decisions would be made by the President of the Senate, or by the Clerk acting on the President's behalf, and on the basis of how earlier bills on the same subject had been referred. Of course, the Senate would retain the ability to change a referral decision or to refer a bill to more than one committee. It might be objected that many bills do not require committee review, and that is the reason they are not recommended for referral by the Selection of Bills Committee. That may be, but it seems to me that committee members as subject experts should be best qualified to make that judgment. Furthermore, Holland has found that half the committee reports on the bills he examined that were referred to Senate policy committees during 2003–2006 failed to recommend any amendments to them, suggesting that the Selection of Bills Committee often was misguided in deciding which bills needed to be referred. Ian Holland. 'Senate committees and the legislative process.' Working Paper, Strengthening Parliamentary Institutions Project, Australian National University Canberra, 2008, p. 12.

³⁷ As it now stands, if the House of Representatives hasn't passed a government bill, the Selection of Bills Committee can't yet propose that the Senate refer the bill to one of its committees because the Senate hasn't yet received it. However, it can and sometimes does refer *provisions* of that bill to one of its committees. This allows the Senate committee to begin work even before the bill of which those provisions are a part arrives from the House of Representatives. Similarly, the Senate can refer to one of its committees an *exposure draft* of a bill that the government has not yet formally proposed to the Parliament. The government will release an exposure draft when it wants to solicit comments and recommendations that it can incorporate into its bill before submitting it formally for parliamentary action. These constructive developments have prevented avoidable delays and given Senate committees more time to review legislation. I simply propose to give the Senate's policy committees the standing authority to do what the Senate now authorizes them to do on a case-by-case basis.

³⁸ Senate Procedure Committee, *First Report of 2008*, p. 2.

continue to have authority to instruct any committee as to how, when, or whether it should act on any bill, any provisions of a bill, or any exposure draft of a bill. In addition, though, my proposals would advance another, equally important, principle: that the Senate should have the benefit of the most thorough and informed consideration of a bill that time permits before debating it in detail and approving it.

The key premise the Senate should accept is that the Senate's policy committees, or at least their respective chairs and deputy chairs, should be deeply involved in decisions controlling how the Senate reviews and evaluates legislation within the subject matter competence of each committee.

It will be said that many and perhaps even most bills are too insignificant to require committee review, and that requiring committees to review all bills will distract them and reduce the time they have available to review the bills that really do require their attention. I agree, but I also believe that the committees themselves should have something to say about which bills require their attention and which do not. As committee members become even more knowledgeable and expert than they are now, they should be the senators best able to recognize potentially important issues that a seemingly inconsequential bill may raise.

It is easy to imagine ways in which all bills can be referred to the appropriate policy committees without having inconsequential bills consume their time. For example, there might be a procedure by which each policy committee chair and deputy chair would present a joint statement to the Senate on the first day it meets during each sitting week. The statement might read something like this:

During the week just ended, five bills were referred to our committee.

The committee has determined that the following four bills do not require separate committee inquiries:

The Parliamentary Catering (Insignificant but Necessary Amendments) Bill 2009

The Parliamentary Catering (Even Less Significant but Necessary Amendments) Bill 2009

The Parliamentary Catering (Truly Insignificant but Necessary Amendments) Bill 2009

The Parliamentary Catering (Positively Trivial but Necessary Amendments) Bill 2009

The Committee also has determined that the fifth bill, The Parliamentary Catering Bill 2009, does merit a committee inquiry. At present, and barring unexpected developments, the committee anticipates completing this review in no more than 30 calendar days.

The Committee will report to the Senate if and when it becomes necessary to change the schedule for this inquiry.

With this report in hand, it then will be possible for the new Legislative Planning Committee (discussed below) or any senator to propose to change a committee's plans. Control over the Senate's policy committees—what they do and when they do it—will continue to rest with the Senate, just as it should. But now the Senate will be able to exercise that control with the benefit of its committees' best judgments about how they should allocate the limited time available to them for both legislative and other inquiries.

An alternative would be to retain the existing Selection of Bills Committee and the Senate's current procedures for deciding which bills should be referred to its policy committees, but with an added requirement that the Selection of Bills Committee consult with a policy committee's chair and deputy chair before deciding whether to recommend that the Senate refer a bill to that committee. I believe, though, that this arrangement would prove to be considerably more time-consuming than the procedure I propose. Again, what's most important is that the Senate's policy committees be involved more actively and more often in the process of appraising government legislation. With that goal accepted, the Senate certainly should ask itself if there are better ways to achieve it than the proposals I've made here.

I want to emphasize, however, that these proposals are neither new nor radical. In New Zealand, each bill normally is referred to a committee after the unicameral parliament agrees to it in principle, and the committee usually has six months to study and report on the bill. Then, any amendments that the committee recommends unanimously are included in the bill automatically before the parliament as a whole debates it in detail and considers other amendments to it. If the committee recommends other amendments, but not unanimously, the parliament votes on all of them by a single vote, and, again, this vote occurs before the stage at which any other amendments to the bill can be proposed.³⁹

Or take the example of the new unicameral Scottish Parliament that was established only in 1999. There, it is the normal practice for all government bills to be referred to a committee (and sometimes to more than one), and for the committee to consider the same bill twice. The committee considers and reports on a bill after it is introduced and before the parliament votes on agreeing to the principles of the bill. Then, after that vote, the same committee often considers the bill again, instead of the whole parliament considering it in detail in the chamber, and, at this stage, the committee actually can amend the bill instead of just recommending amendments for the parliament as a whole to consider. Finally, committees of the Scottish Parliament can even develop their own proposals for bills, in addition to the government bills that are referred to them.⁴⁰

³⁹ Standing Orders 285, 291, 294, 296, available at www.parliament.nz/NR/rdonlyres/078D6043-9E03-4D87-93BA-A6BB84ACC063/6619/standingorders20095.pdf. Also see *Parliament Brief: The legislative process*, available at www.parliament.nz/en-NZ/PubRes/About/FactSheets; and Ian Holland, 'Senate committees and the legislative process,' p. 7. Having a single vote on all these committee amendments, instead of separate votes on each of them, almost certainly increases the likelihood that all of them will be approved.

⁴⁰ Rules 9.6, 9.7, and 9.15 of the Standing Orders of the Scottish Parliament, available at www.scottish.parliament.uk/business/parliamentaryProcedure/index.htm. Also see *The Work of Committees in the Scottish Parliament* and *The Scottish Parliament Debating Chamber*. Edinburgh, The Scottish Parliament Public Information Service, 2008. Both are available at

In his study of parliamentary committee reform, Hazan indicates that the lower houses (the equivalents of Australia's House of Representatives) of Germany, Great Britain, Israel, Italy, and the Netherlands all routinely refer bills to committees.⁴¹ And the same practice also is reported by the authors of a collection of essays on the development of committee systems in the lower houses or unicameral parliaments of seven former Soviet republics or satellites—Hungary, Poland, the Czech Republic, Bulgaria, Estonia, Lithuania, and Moldova—that recently have had opportunities to design new parliamentary institutions.⁴² Another series of essays indicate that, as of 2001, bills were regularly or routinely referred to committees in the upper houses of Austria, Chile, Japan, Poland, and Switzerland.⁴³ Although these examples obviously don't constitute a survey of parliamentary practices around the world, they do suggest that it surely would be reasonable for the Senate to ask if there may be something that it can learn from their choices and experiences.

As I've said, the Selection of Bills Committee now does more than recommend to the Senate which bills should be referred to a committee. It also recommends how long a committee shall have to study each bill that is referred to it. The problem is that the committee's members, at least half of whom have other responsibilities as party whips, aren't necessarily experts on the complexity of each bill and the issues it raises, how much committee study it deserves and requires, and how long that process will take. These judgments can be made better by committees whose members, we should hope, develop years of experience in dealing with bills on the subjects for which their committees have responsibility. So the burden of proof should be on those who argue that there is no need or no time for a committee report on a bill, and that it's fine for the Senate to pass a bill without the considered judgment of the committee whose members are supposed to be the Senate's best experts on the subject it addresses.

The Senate often has had to revise the decisions it has made at the recommendation of the Selection of Bills Committee. According to the data that Vander Wyk and Lilley provide, in every year from 1990 to 2001, at least one-third of the time that the Senate referred a bill (or a package of related bills), the Senate then had to grant the committee additional time beyond the reporting deadline that the Selection of Bills Committee originally had recommended and the Senate had imposed. In four of the twelve years, 60 per cent or more of the bills (and fully 78 per cent of them in one year) were subject to extensions of time for the committees to report on them. About half of these extensions of time were for a week or less, but somewhat more were for periods of between one week and six months, and sometimes one extension was not enough for a committee to complete its work.⁴⁴

www.scottish.parliament.uk/vli/publicInfo/publications.htm; and Ian Holland, 'Senate committees and the legislative process,' p. 7.

⁴¹ Reuven Hazan, op. cit.

⁴² David M. Olson and William E. Crowther (eds.). *Committees in Post-Communist Democratic Parliaments; Comparative Institutionalization*. Columbus, Ohio, The Ohio State University, 2002.

⁴³ Tripathi, op. cit.

⁴⁴ Vander Wyk and Lilley, op. cit., Tables 8 and 9 at pp. 59–60.

As we shall see later on, the Senate doesn't meet all that often, so it still would need to be able to exercise some control over its policy committee's priorities and schedules. I also propose, therefore, that a committee report to the Senate within three working days after a bill is referred to it on when it expects to begin and then to complete its review of the bill. In the case of routine or inconsequential bills, a committee also would have the option of reporting that no committee review is necessary.⁴⁵ These committee planning reports then would be reviewed by a Legislative Planning Committee, with the same membership as the current Selection of Bills Committee. The Legislative Planning Committee should be able to recommend that the Senate require a committee to give a bill higher or lesser priority, and more or less time for reviewing it, than the committee proposed.⁴⁶ This would give the committee and its chairman an opportunity to explain the reasons behind the planning report on a bill, but it still would leave the Senate with final control over the legislative agendas and activities of its committees.

Implementing these proposals will make the legislative work of the Senate's policy committees more demanding and time-consuming for its members. I make no apology for that. Committee work may attract less public attention than debates in plenary sessions, but it can and should contribute more to perfecting sound legislation. However, if senators are to be convinced to devote more time and effort to their committees' legislative work, they must be satisfied that the Senate will give their recommendations the attention they deserve.

With this in mind, I also propose that the Senate revise its procedures to give priority to a committee's recommendations for making specific amendments to a bill when the Senate considers it in detail in what's known technically as a 'committee of the whole.' The Senate's standing orders now provide generally that when the Senate considers a bill in detail, it first considers each clause (or part) of the bill in order and then it considers any new clauses that senators may propose as amendments. Next it considers any schedules included in the bill and any new schedules that senators may propose. I propose that these procedures be changed only to provide that the first amendments on which the Senate acts during its consideration of each clause or schedule should be any specific amendments to it that the policy committee reporting the bill has proposed.⁴⁷ By giving priority to a committee's recommendations in this way (but without going as far as New Zealand's practice that I mentioned several pages earlier), the Senate would be acknowledging the expertise of its committee and assuring the committee's members that their recommendations will receive priority attention so that the time they devote to committee review of legislation will have been time well-spent.

⁴⁵ If it is not practical for the committee to meet within this deadline, its chair should be empowered to make its planning report on a bill on behalf of the committee after as much consultation with other committee members as possible, and subject to having the chair's recommendation reviewed and, if necessary, amended when the committee is next able to meet.

⁴⁶ In the case of emergency legislation, the Legislative Planning Committee also should be empowered to move at any time that a specific bill not be referred to a Senate policy committee at all.

⁴⁷ There now is a procedure by which the Senate can approve all of a committee's amendments to a bill at once, but it apparently is not used regularly: 'A fast method of processing bills returned from committee is provide ... by means of a motion for the adoption of a committee's report, thereby adopting any amendments recommended by the committee. This motion may not be moved if a senator has circulated other amendments.' *Odgers' Australian Senate Practice*, 12th ed., pp. 243–244. See also Vander Wyk and Lilley, *op. cit.*, pp. 44–45.

I hope that this set of proposals would promote four objectives. First, they would create the routine expectation that the Senate will not debate, amend, and pass a bill without the benefit of the opinions and recommendations of its committee that specializes in the bill's subject. Second, by giving each policy committee more legislative authority and responsibility, these proposals also should encourage the committees to develop even more expertise than they now have. One result could be to promote greater stability and continuity in committee membership. Another might be to encourage the Senate to expand the resources of its committee office, whose officers are highly competent and dedicated but often stretched too thin to do everything that needs to be done as well as everything they'd like to do.

Third, I admit to a hope that increasing the legislative importance of the Senate's policy committees also may increase their value as places where bridges can be built across the great partisan divide that so often seems to separate government and Opposition.⁴⁸ Vander Wyk and Lilley put it better than I could:

Senators do not come to a committee inquiry as disinterested parties: they will usually have some preconceptions and will be aware of their parties' policies on issues relevant to the bill under inquiry. But committees, unlike a plenary body, provide a forum in which there is more room for manoeuvre and more scope for influencing or changing a view. Committees, being smaller, tend not to be as party political and combative. In the main there tends to be less public posturing and greater attempt to address the issues and test alternative viewpoints. Senators are interacting not just with the other side of politics, as they would in a plenary body, but directly with acknowledged experts in the relevant field, or people and organisations likely to be affected by the legislation. Also, there is some tradition in Senate committees of seeking to arrive at a consensus view where practicable.⁴⁹

And fourth, as senators gradually develop a greater sense of collective identity as committee members, the committees could become a uniquely valuable forum in which to explore and familiarize the Australian people with emerging and long-term issues that otherwise might not reach the political front-burner until they already have become crises. As some recent Senate committee inquiries have demonstrated, committee members working together to understand developing issues on which the major parties have not yet locked themselves into hard and fast positions have a real opportunity to develop policy approaches that attract bipartisan, if not consensual, support.⁵⁰

⁴⁸ Avoiding what Ian Marsh has called 'fake adversarialism' masking 'tacit bipartisanship', because the two parties often agree on legislation while maintaining the façade of almost perpetual disagreement. Ian Marsh, 'Australia's representation gap: a role for parliamentary committees.' *Papers on Parliament*, No. 44, January 2006, pp. 1–10. Available at [/www.aph.gov.au/senate/pubs/pops/pop44/marsh.pdf](http://www.aph.gov.au/senate/pubs/pops/pop44/marsh.pdf).

⁴⁹ Vander Wyk and Lilley, *op. cit.*, p. 3.

⁵⁰ See, for example, Ian Marsh, 'Australia's representation gap', *op. cit.*

In Washington, I have seen some of the most intensely partisan Representatives and senators working together cooperatively to devise mutually acceptable legislative solutions to problems that they have studied together, sometimes over a period of years. They don't forget their partisan differences, of course, or the different kinds of national policies that their parties usually prefer. But what divides them becomes less important when they not only agree that there is a national problem that needs fixing, but when they also have reached some agreement about what's caused the problem in the first place and when they've participated in the same committee meetings to assess alternative legislative solutions.

Vander Wyk and Lilley conclude their study by stressing that the Senate can take full advantage of the contributions that its committees can make to legislation if changes in procedures and organization are accompanied by an essential change in 'attitude':

This would be for all parties, but particularly governments, to accord Senate committees greater recognition and a greater role in the process of finally shaping legislation, to acknowledge that governments and other parties do not have all the knowledge on a particular policy issue, and that desirable changes to proposed legislation do come out of the public inquiry process—even if they do not always accord entirely with the policies of the government or another party.⁵¹

It's just possible that making the Senate's policy committees more central to legislative decision-making may encourage the government and Opposition to reach agreement and enable them to do so with fewer delays and public recriminations. I offer no guarantees, of course, but it is just possible.

Senate committees and House ministers

The responsibilities of the Senate and its committees extend beyond reviewing proposals for new laws, however important that task is. The Senate has the equally important responsibility to review the interpretation, implementation, and administration of the laws that already have been enacted.⁵² To do this, however, the Senate—and its committees—obviously need access to the best possible information about government actions and inactions, and the reasons for them. There is truth to the old adage that 'knowledge is power. To the extent that the government is able to control what information Senate committees receive, it is able, to that same extent, to shape and limit what the committees and the Australian people can learn about government performance.

When a committee seeks information about a department's activities and their consequences, it can turn to private citizens and organizations affected by the department's policies and practices. If, however, the committee also wants to know—as it should—about the reasons underlying those policies and practices, it must seek that

⁵¹ Vander Wyk and Lilley, *op. cit.*, p. 49.

⁵² Others would distinguish between these two kinds of committee activities and the work committees also may do in policy development and investigations. See for example Halligan, Miller and Power, *Parliament in the Twenty-first Century*, *op. cit.*

information from inside the department itself. Specifically, it can turn to career public servants, it can turn to ministerial advisors whom ministers select to assist them, and, of course, it can turn to the ministers themselves. There have been problems affecting the kinds of information, if any, that Senate committees can expect to receive from each group of officials. In discussing these problems, it will be helpful from time to time to refer to the report of the Senate's Select Committee on a Certain Maritime Incident, to which I referred earlier, that was set up in 2002 to study and report on the 'children overboard' incident.⁵³

It has become accepted practice for senior public servants to appear before the Senate's policy committees when invited to do so (although there are exceptions, as we shall see). However, there are important limits on the kinds of questions to which they are expected to respond. The Senate itself has instructed its committees that '[a]n officer of a department of the Commonwealth or of a State shall not be asked to give opinions on matters of policy, and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a Minister.'⁵⁴

Consistent with this Senate directive to its own committees, a 1989 government document made available by the Department of Prime Minister and Cabinet begins by observing that:

the public and parliamentary advocacy and defence of government policies and administration has traditionally been, and should remain, the preserve of Ministers, not officials. The duty of the public servant is to assist ministers to fulfill their accountability obligations by providing full and accurate information to the Parliament about the factual and technical background to policies and their administration.⁵⁵

With this in mind, the written submissions and oral evidence provided to committees by public servants:

should not advocate, defend or canvass the merits of government policies (including policies of previous Commonwealth governments, or State or foreign governments);

may describe those policies and the administrative arrangements and procedures involved in implementing them;

should not identify considerations leading to government decisions or possible decisions, in areas of any sensitivity, unless those considerations have already been made public or the Minister authorises the department to identify them ...⁵⁶

⁵³ Senate Select Committee on a Certain Maritime Incident, *Report*. 2002.

⁵⁴ *Odgers' Australian Senate Practice*, 12th ed., op. cit., p. 599. This provision was included in resolutions on parliamentary privilege that the Senate approved in 1988. It remains in force today.

⁵⁵ Department of Prime Minister and Cabinet, *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters*, p. 3, available at www.pmc.gov.au/guidelines/index.cfm and www.aph.gov.au/senate/committee/wit_sub/index.htm

⁵⁶ *Ibid.* pp. 5–6.

The long and short of it, then, is that if a committee wants to inquire into the reasons for a government policy or decision, and if committee members want to challenge the government to defend that policy or decision, public servants can't tell them all they want to know. When a public servant is asked questions that call for him or her 'to give opinions on matters of policy', the committee can expect to be told that those questions need to be referred to a minister. That answer is perfectly appropriate—public servants should not be asked to defend policy decisions made by their political masters—but, as we shall see, it also is all too likely to lead nowhere.

If a committee can't ask public servants to defend the policies of their departments, perhaps it can ask ministerial advisors instead. In recent years, there has been a significant growth in the number of departmental staff, most of them not part of the career public service, who are selected by the minister to assist him or her with advice that can involve politics and public relations as well as policy. In principle, these advisors are not supposed to have managerial authority. So when an advisor tells public servants that their minister wants something done, the advisor is assumed to be speaking for the minister and acting at the minister's direction. In practice, however, some ministerial advisors have been given managerial responsibilities, and it can be very tempting for other advisors to give direction to public servants on the basis of what the advisor thinks the minister would want if he or she had been consulted or on the basis of what the advisor believes to be in the minister's best interests.⁵⁷

In any event, Senate committees have trouble learning what these ministerial advisors say or do because the government of the day typically has prohibited them from appearing and giving evidence.⁵⁸ There are two key arguments in support of this prohibition. First, it is the ministers themselves, not their staff, who are responsible to Parliament. And second, if committees could compel advisors to disclose the opinions and recommendations they offer their ministers, this would inevitably undermine the free flow of ideas between advisors and ministers. Both these arguments are powerful. Yet it certainly is easy to understand why a committee would become frustrated when it cannot question advisors who seem to be acting as government executives, and perhaps acting on their own initiative, not at the direction of their ministers. So it is equally easy to understand why the Select Committee concluded in 2002 that '[t]he time has come for a serious, formal re-evaluation of how ministerial staff might properly render accountability to the parliament and thereby to the public.'⁵⁹

This recommendation is a good one, but there is something much more fundamental that's needed. The time really has come for a serious (if not necessarily formal) re-evaluation of

⁵⁷ The Select Committee concluded in its report that 'departmental staff can no longer be sure that an instruction or request from a ministerial advisor has the blessing of the minister, or is consistent with the minister's view on how a matter is to be approached.' Select Committee on a Certain Maritime Incident, *Report*, p. 188. The Labor Government's July 2008 *Code of Conduct for Ministerial Staff* (available at www.smos.gov.au/media/code_of_conduct.html) addresses these concerns by emphasizing that ministerial staff 'do not have the power to direct APS [Australian Public Service] employees in their own right and that APS employees are not subject to their direction,' and that 'executive decisions are the preserve of Ministers and public servants and not ministerial staff acting in their own right.'

⁵⁸ The state of play in the US is discussed by Harold Relyea in *Presidential Advisors' Testimony Before Congressional Committees: an Overview*. Report for Congress of the Congressional Research Service, 2008. The current government's *Code of Conduct for Ministerial Staff* doesn't address this situation; in fact, it doesn't mention Parliament at all.

⁵⁹ Senate Select Committee on a Certain Maritime Incident, *Report*, p. 183.

how *ministers themselves* might properly render accountability to the parliament and thereby to the public. To be sure, Senate committees have encountered problems in being unable to get some of their questions answered by public servants and in not even being able to ask questions of ministerial advisors. But these problems are only symptomatic of an underlying problem that is far more serious: the fact that Senate committees have no assurance of being able to question the ministers themselves, except for the handful of ministers who also are members of the Senate.

To put it bluntly, there simply is no way that the Senate, through its committees, can hold the government accountable for its decisions and actions if it cannot question the people who make those decisions and direct those actions. This is the problem that the Senate needs to address, and if and when it finally does so, the problems that its committees have had with questioning public servants and ministerial advisors will become far less significant.

There have been instances in which ministers serving in the House of Representatives have accepted invitations to appear before Senate committees. It obviously is best for such appearances to continue to be arranged in a consensual and collegial manner. But what happens when this proves unsuccessful, when House ministers decline to appear, and doesn't a minister's refusal to appear voluntarily create at least a suspicion that there are questions the minister doesn't want to answer?

Let's review briefly the experience of the select committee that the Senate established to inquire into the 'children overboard' incident. To explore this subject, the Select Committee took testimony from numerous public servants, both military and civilian. However, the Minister for Defence, who was himself a Senator, directed certain officials not to appear before the committee.⁶⁰ The Select Committee requested ministerial advisors to make written submissions and to appear at hearings, but they didn't do so. And finally, the Select Committee made the same requests of the former Minister for Defence, but he also failed to comply.⁶¹ The former minister and his advisors were pivotal figures in the episode the Select Committee was charged with investigating. It is certainly fair to ask, therefore, if the Select Committee could have been expected to fulfill its responsibilities to the Senate—and ultimately to the Australian people—if it couldn't question people whose answers were absolutely essential to its inquiry. I think the question answers itself.

How did the Select Committee respond to the refusals it encountered? By and large, by doing nothing. The Select Committee could have attempted to compel their testimony and then recommended that they be found in contempt of the Senate when they refused. However, the committee concluded that it would not:

exercise its power to compel their attendance, and thereby expose the [public servants] and advisors to the risk of being in contempt of the Senate should they not respond to the summons. Part of the reason not to summon was based on the previously expressed view that 'it would be unjust for the Senate to impose a penalty on an officer who declines to provide evidence on the direction of a minister.'⁶²

⁶⁰ Ibid. p. 178.

⁶¹ Ibid. p. 180.

⁶² Ibid. pp. 182–183.

And with respect to the former minister's refusal to accept the Select Committee's invitation to testify, the committee chose not to contest the argument that it should not try to compel testimony from a *former* Representative who *had been* a minister because it could not compel testimony from a *sitting* Representative who *was* a minister.

I'm sure that the members of the Select Committee thought they were acting prudently and judiciously. But what were the lessons that the government then in office or any later government could take from this episode? That it can refuse to permit key witnesses, who either are or had been on the Commonwealth's payroll, from answering questions from Senate committees, and that it can do so with impunity.

Under these circumstances, the Senate cannot effectively hold the government to account. It's unrealistic, as a practical political matter, to expect the majority in the House of Representatives to ask and insist on answers from ministers of their own party to the hard and probing questions that accountability requires. Only the Senate with a non-government majority has both the power and the political incentive to compel the government to explain the choices it's made and the actions it's taken. I propose, therefore, that the Senate insist on its need to have members of the House of Representatives who are ministers appear before Senate committees and answer questions concerning their actions as ministers.

Why didn't the Senate do this long ago? The reason lies in an interpretation of a convention governing relations between the House of Representatives and the Senate that, when carried to an extreme, is detrimental to accountable government. Under that convention, neither house claims the right to question a member of the other house. To some, this convention is grounded in the constitution; to others, it is based on the need to preserve mutual respect and effective working relations between the two houses of Parliament.

I think we can agree that, as a general matter, one house should not interfere in the internal affairs of the other and each house should refrain from questioning the statements and activities of those serving in the other house. The argument underlying this convention is that whatever bicameral harmony there is in Parliament House would be seriously damaged if one house decided to interrogate members of the other house. The principle is sound and one that is respected in the US Congress as well as in the Australian Parliament.

This convention is recognized and defended in both houses, as the following quotations from *Odgers' Australian Senate Practice* and *House of Representatives Practice* document:

Although the question has not been adjudicated, there is probably an implicit limitation on the power of the Houses to summon witnesses in relation to members of the other House or of a house of a state or territory legislature. Standing order 178 provides that if the attendance of a member or officer of the House of Representatives is required by the Senate or a Senate committee a message shall be sent to the House requesting that the House give leave for the member or the officer to attend. This standing order reflects a rule of courtesy and comity

between the Houses ... It may be that these limitations on the power to summon witnesses in relation to other houses have the force of law ...⁶³

Standing orders of both Houses set down procedures to be followed if a member of the other House is to be called to give evidence before a committee. If a committee of the House wishes to call before it a Senator who has not volunteered to appear before it as a witness, a message is sent to the Senate by the House requesting the Senate to give leave to the Senator to attend for examination. Upon receiving such a request the Senate may authorize the Senate to attend.⁶⁴

Notice that there is no problem if a member of one house, including a minister, appears voluntarily before a committee of the other, especially when authorized to do so by the house of which he or she is a member. Senate committees typically *invite* persons to appear before them as witnesses. If a person declines the invitation, the committee can *summon* him or her to appear. If the prospective witness fails to comply with this summons, there can be consequences: 'A person failing to comply with a lawful order of a committee to this effect may be found to be in contempt of the Senate and ... subject to a penalty of up to six months' imprisonment or a fine not exceeding \$5 000 for a natural person [that is, you or me] or \$25 000 for a corporation.'⁶⁵

The problem arises when ministers hide behind this convention to avoid accounting to the Senate for their statements and activities as members of the government. Representatives who are ministers (call them MPs-as-ministers) wear two hats, so to speak. On the one hand, they are like every other member of the House of Representatives in that they each represent a specific geographically-defined constituency and its residents, and they have the responsibility to participate in all the decisions that the House makes. On the other hand, and unlike all other Representatives, they also have executive responsibilities for departments of the Commonwealth government. It is only in this latter capacity that the Senate, acting through its committees, should hold them accountable for what they've done.⁶⁶

The Select Committee's report contains page after page of learned analysis as to the immunity that members of one house enjoy that protects them against being summoned to testify before committees of the other, and then whether such immunity extends to ministerial advisors and to former ministers.⁶⁷ The one point on which these scholars

⁶³ *Odgers' Australian Senate Practice*, 12th ed., op. cit., p. 60.

⁶⁴ *House of Representatives Practice*, 5th ed., op. cit., pp. 657–658.

⁶⁵ *Odgers' Australian Senate Practice*, 12th ed., op. cit., p. 378.

⁶⁶ This is essentially the same point that, ironically, a UK House of Commons committee made about British peers who were advisors to the government, arguing that they should not be 'able to hide behind the convention, established long ago, for utterly different circumstances, that members of the other House cannot be summoned to appear before House of Commons committees.' Quoted in Ian Holland, 'Reforming the conventions regarding parliamentary scrutiny of ministerial actions', *Australian Journal of Public Administration*, v. 63, n. 2, June 2004, p. 13.

⁶⁷ These documents, which don't have page numbers, appear following the text of the report of the majority of the Select Committee's members and precede the report of its government members. But also see Holland's excellent historical analysis in 'Reforming the conventions regarding parliamentary scrutiny of ministerial actions', op. cit. This article received the Senate's own Richard Baker Senate Prize in 2005.

evidently agree is that neither the House of Representatives nor the Senate will try to compel testimony before their committees by members of the other house. I don't propose that Senate committees should abandon this well-established policy and try to compel MPs-as-ministers to appear and testify. But, you may ask, if Senate committees continue simply to request, not summon, MPs-as-ministers to testify, won't they simply continue to decline—or refuse, depending on how polite they choose to be—to do so?

Probably so. As an American, I'm more than familiar with struggles for information between congressional committees, on the one hand, and cabinet secretaries (the US equivalent of ministers) and other political appointees in the executive branch, on the other. Sometimes these disputes have ended up in court, but more often they have been resolved, to no one's entire satisfaction, through a process of political negotiation. This process usually has succeeded because the president and other executive branch officials came to understand (1) that a committee really was determined to receive the testimony or documents that it sought, (2) that the committee had the support of its parent body (either the House of Representatives or the Senate), (3) that continuing resistance by the president or a cabinet secretary would result in damaging media accusations of 'stonewalling' and 'cover-up', and (4) that there are penalties—usually political, not legal, penalties—that Congress can impose on a recalcitrant executive branch.

This experience suggests that, although it may take time and although it may be painful, the Australian Senate has the wherewithal to convince governments that their MPs-as-ministers should accept invitations to testify before Senate committees because the costs of declining to do so will be too great for a government to pay. To borrow a line from Mario Puzo's *The Godfather*, the Senate must make the government an offer it can't refuse. In doing so, the Senate must demonstrate that it truly is determined to prevail and that it really is prepared to impose sanctions that governments will find too costly to endure. In other words, the Senate must convince the government of the day that it is willing and able to flex its constitutional muscles.⁶⁸

Let me offer one example of what the Senate can do. The first key vote that the Senate takes on a government bill is on a motion for the second reading of the bill. This is supposed to be a vote on 'the principle of the bill and whether it ought to be passed by the Senate.'⁶⁹ Usually the Senate passes this motion; then it can begin debating the bill, and amendments to it, in detail. But if the Senate defeats a second reading motion, the bill is in a kind of procedural limbo unless and until the Senate changes its mind.⁷⁰

Imagine, then, that an MP-as-Minister has refused a Senate committee invitation to testify on a matter of grave concern to the committee. The committee can advise the minister that

⁶⁸ Holland (Ibid. p. 13), argues for 'a negotiated consensus about circumstances in which ministers will appear [before Senate committees]. My reservation is that the Senate first should strengthen its negotiating position by demonstrating its will and its ability to prevail.

⁶⁹ *Odgers' Australian Senate Practice*, 12th ed., op. cit., p. 237.

⁷⁰ 'The motion for the second reading is that this bill be *now* read a second time. The rejection of that motion is an indication that the Senate does not wish the bill to proceed at that particular time. Procedurally, therefore, the rejection of that motion is not an absolute rejection of the bill and does not prevent the Senate being asked subsequently to grant the bill a second reading.' *Odgers' Australian Senate Practice*, 12th ed., op. cit., p. 237 (emphasis in original).

the non-government majority in the Senate is prepared to reject the motion for the second reading of the next bill, or any bill, that the minister wants to see passed unless and until the minister appears before the committee and answers questions to its satisfaction. The Senate would be saying, in effect, that it is not willing to give the department in question any additions to, or changes in, its legal authority until the minister has accounted for how that department has exercised the authority it already has.

This use of this approach can be calibrated to suit the gravity and urgency of the committee's need for a minister's testimony. If the issue is less than earth-shaking, the Senate's non-government majority might defer second reading on one bill that rises to roughly the same level of importance, but no higher.⁷¹ If the issue is one of great importance, on the other hand, the Senate could vote to defer second reading on any or all bills, except those that address genuine emergencies or that provide funds to continue the existing operations of the Commonwealth government.⁷²

The first time this happens, the government and its senators certainly would cry 'foul'. I'd expect to hear predictions from the government side of both houses that the sky is about to fall or the world is about to come to an end. And at first, the government probably would expect that its cries of outrage would induce the non-government Senate majority to give way and withdraw from confrontation. If the Senate is adamant, however, and especially if it is willing to up the ante by deferring action on more important bills, sooner or later the government will begin to worry that it is paying too high a price to protect its MP-as-minister from the questions of a Senate committee.⁷³ At that point, we should expect serious negotiations to begin, resulting in an arrangement that gives the committee less than everything it wanted but far more than it otherwise would have gotten. In time, as governments become convinced that the Senate really will carry out threats to defer passage of government bills, the threat of such action should be enough to bring MPs-as-ministers to committee meeting rooms on the Senate side of Parliament House.

But would the Senate ever do such a thing? Its history does give us reason to doubt it, but there is a precedent that offers hope.

The Parliament meets each year for several 'sitting periods', each lasting several months. In the 1980s, senators became increasingly concerned about the concentration of government bills that the House was sending the Senate near the end of sitting periods, which didn't leave the Senate enough time to consider them carefully. To make a longer story short, the Senate ultimately adopted a new rule stating that, unless the Senate votes to exempt it from the rule, a government bill 'is deferred to the next period of sittings

⁷¹ In other words, the Senate could reject the motion for second reading, while making it clear that it would pass another motion for that purpose after the dispute between the committee and the MP-as-minister has been resolved.

⁷² I am *not* suggesting that the Senate threaten to withhold supply from the government. In Washington, Congress certainly would consider delaying or reducing the annual appropriation of funds for a recalcitrant secretary's (minister's) department until he or she agreed to testify before a congressional committee, but Canberra is a different place with a different history that includes still-vivid memories of what happened in 1975.

⁷³ The Senate's success will depend, to a considerable degree, on how successful it is in convincing the media and the public that its committee's need for ministerial testimony is real and compelling.

unless it was first introduced in a previous period of sittings and is received by the Senate in the first two-thirds of the current period ...⁷⁴ Predictably enough, the government ‘strongly resisted’ the new requirement,⁷⁵ and equally predictably, the world didn’t come to an end.

The Senate can convince the government to change its ways if the Senate has the will to do so. It did so with regard to the timing of legislation coming over from the House, and it can do so with regard to MPs-as-ministers testifying before Senate committees. If it does, it won’t be too many years before new editions of the two parliamentary reference books that I’ve been quoting, *Odgers’ Australian Senate Practice* and *House of Representatives Practice*, will be reporting that Senate committees have no need to summon ministers who are members of the other house because those ministers accept committee invitations to testify and respond to questions that concern their ministerial responsibilities.

There are several dangers that will have to be avoided. First, Senate committees will have to refrain from asking MPs-as-ministers questions that concern their actions or positions as members of the House of Representatives and as representatives of their electorates, not as ministers. As I wrote some years ago:

[s]urely there will be instances in which committees and ministers will disagree as to whether a particular line of inquiry crosses this border. In those cases, let the public (and the media) decide whether the Senate is intruding into matters that are none of its business or whether the minister is stonewalling.⁷⁶

Second, there is a danger that committee inquiries into a government’s policies and its implementation of the laws will degenerate into investigations in search of headlines for partisan advantage. And third, there is a danger that MPs-as-ministers will appear before Senate committees but then decline to answer important questions, citing an easily-abused doctrine called ‘public interest immunity’ that justifies a refusal to disclose information if doing so, in the minister’s judgment, would not be in ‘the public interest’.⁷⁷

⁷⁴ *Odgers’ Australian Senate Practice*, 12th ed., op. cit., p. 232.

⁷⁵ *Ibid.* p. 234.

⁷⁶ Stanley Bach, *Platypus and Parliament*. Canberra, Department of the Senate, 2003, p. 309.

⁷⁷ For more information, see *Odgers’ Australian Senate Practice*, 12th ed., op. cit., pp. 468–490, and Department of Prime Minister and Cabinet, *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters*, pp. 8–9.

The Senate accepts that public interest immunity may be claimed by Ministers (and officials can refuse to answer questions pending an opportunity for a Minister to make such a claim). However it does not accept that such claims by the Executive are a conclusive answer. The position adopted by the Senate has been that the claim may be determined by the Senate and, if determined against the Executive, that the Senate has the legal right to the information. In contrast, the Executive has adopted the view that a statement that disclosure is contrary to the public interest made by a Minister in response to a summons from a House or committee is conclusive. In the absence of any exercise of the penal powers of the Senate, the practical effect of this approach to date has been that conflicts are resolved in the political arena rather than in the courts. In recent times, the predominant view, both in the Executive and the Senate, has been that the courts should not have jurisdiction to determine such claims of public interest immunity. It seems a consensus may be developing that the resolution of these

These latter two dangers are too real to be ignored and I have no simple ways to protect against them. One danger would involve Senate committees abusing their authority for partisan purposes; the other would involve ministers abusing their authority for partisan protection. Perhaps the best that can be hoped is that the two will balance each other—that committee members will learn to restrain their partisan instincts in order to encourage ministers to be forthcoming in their testimony, and that ministers will learn that invoking ‘public interest immunity’ without obvious justification will only arouse senators’ partisan suspicions and provoke unwelcome committee interrogations and skeptical media commentary.

More than anything else I’m proposing here, this recommendation is likely to evoke the loudest cries of outrage and the most media reports of a ‘crisis’ on Capital Hill. Is it really important enough to justify the furor that it’s almost certain to inspire? I can best answer this question by asking another one: Is it really important for the Australian people to know what their government is doing, and not just what the government wants them to know?

Frequency of Senate sittings

The proposals I’ve already made generally envision a Senate that does more than it has been doing. So it’s only fair to ask if we can reasonably expect the Senate to do more or if it already is working at full capacity.

One way to approach this question is to ask how often the Senate meets (or, in parliamentary terms, how often it ‘sits’). So let’s first look at some numbers.

Table 2 presents the average number of sitting days per year for each decade since Federation and for both the Senate and the House of Representatives. If we put aside the first decade, when there was so much to do to get the new Commonwealth up and running, we find several clear and interesting patterns in the data. First, there hasn’t been much variation from decade to decade in how often the House of Representatives has met; the averages for all but that first decade range only from a low of 58.4 days to a high of 70.8 days. So it seems that the House has gone about its business at a fairly steady pace. Second, there’s been more variation in the frequency of Senate meetings. During the decades between 1911 and 1970, the Senate never met on as many as 60 days per year, on average, and it met for less than an average of 50 days per year during the 1930s, 1940s, and 1950s. Then the average number of sitting days per year jumped to 70 or more during the 1970s, 1980s, and 1990s. And third, the data in Table 2 show that the House met more often than the Senate for each of the decades from 1911 through 1970, but then the Senate met more often than the House during each of the next three decades, from 1971 through 2000.

disputes is essentially a matter of political judgment, not a question of legal rights and obligations. Australian Government Solicitor, *Appearing Before Parliamentary Committees*. Legal Practice Briefing Number 29, 1996. Available at <http://www.ag.gov.au/publications/agspubs/legalpubs/legalbriefings/index.htm>.

Table 2

Average Number of Sitting Days Per Year, 1901–2007

	Senate	House of Representatives
1901–1910	71.2	94.9
1911–1920	51.4	70.8
1921–1930	50.8	67.4
1931–1940	42.6	58.4
1941–1950	42.1	70.0
1951–1960	47.8	62.6
1961–1970	58.9	62.3
1971–1980	70.5	68.7
1981–1990	75.5	59.7
1991–2000	73.0	63.2
2001–2007	54.4	63.4

Source: 'Number of sitting days by year,' at www.aph.gov.au/senate/work/statistics/days_hours/year.htm.

These patterns aren't very surprising. The responsibilities of the House of Representatives and its relations with government didn't change in any profound way after the Commonwealth had become established. The Senate, on the other hand, was not the same place in the final decades of the Twentieth Century that it had been earlier in the century. Until senators were elected by proportional representation, beginning in 1949, governments sometimes enjoyed such huge majorities in the Senate that some dismissed it as an irrelevancy. And it wasn't until the 1970s that non-government majorities in the Senate posed regular challenges to governments of the day.

The data in Table 2 are consistent with these developments. The Senate met relatively infrequently, compared with the House of Representatives, during the decades from 1911 through 1970, but then more often, and more often than the House, during the three decades that followed. I would guess that the Senate was more active during the closing decades of the century because its non-government majorities enabled it to make more of a difference, if and when it chose to do so, in enacting laws and monitoring the activities of government.

But notice the last line of the table, with the annual averages for 2001 through the end of 2007. The frequency of House sittings has continued unchanged, with the average of 63.4 sitting days per year falling in the middle of the averages for the preceding nine decades.

Not so in the Senate, however. During the current decade, the Senate has been meeting on an average of 54.4 days per year, less than the House for the first time since the 1960s and almost 20 days per year less often than the Senate met during the previous two decades.

Of course the numbers can't explain why this has happened, but they certainly do show that the Senate hasn't been meeting as often in recent years as it met on average during the three prior decades. Unless the Senate suddenly has discovered how to dramatically increase its efficiency and productivity, or unless there has been less that the Senate could usefully have been doing, one conclusion we might draw is that the Senate isn't working as hard as it did even ten years ago.⁷⁸

A second way to examine the same question is to ask how often the Australian Senate has been meeting in comparison with other 'senates'. Table 3 provides some answers by presenting the number of sitting days per year, for each of the last twenty years, for the Australian Senate, the Canadian Senate, the US Senate, and the British House of Lords. Following the year-by-year data are two averages, first for the entire twenty-year period of 1988–2007 and then for the most recent ten-year period, 1998–2007.⁷⁹

What do we learn from this table?

First, although there are year-to-year variations, Australia's Senate has been meeting less than the Canadian Senate whose members all are appointed, not elected, and which frequently has been the subject of criticism and ridicule and even demands for its abolition. Between 1988 and 1997, the Australian Senate met more often than its Canadian counterpart in eight of ten years. During the next ten years, however, the situation was reversed, with the Canadian Senate meeting more often in eight of those years. And second, and more dramatically, the Australian Senate has been meeting less than half as often, on average, as either the US Senate in Washington or the House of Lords in London.

It certainly can be argued that the US Senate is quite a different thing than the Australian Senate. In fact, their legislative powers are almost the same, but they exercise them in very different constitutional contexts. Still, if US Senators, some of whom have to travel even further to Washington than the distance between Perth and Canberra, can manage to meet on more than 150 days each year, is there some compelling reason why Australian senators have met less than 40 per cent as often since 1998? As for the House of Lords, none of whose members are elected of course, their Lordships met more often than the Australian Senate in every year but one between 1988 and 2005.⁸⁰

⁷⁸ As recently as 1999 and 2000, the Senate met on 79 and 71 days respectively.

⁷⁹ The data for the House of Lords are for only 18 years, through 2005.

⁸⁰ Most hereditary peers lost their seats under the terms of the *House of Lords Act 1999*.

Table 3

Number of Sitting Days for Selected Upper Chambers, 1988–2007

	Australian Senate	Canadian Senate	United States Senate	United Kingdom House of Lords
1988	89	90	137	153
1989	92	48	136	147
1990	59	107	138	137
1991	83	69	158	74
1992	76	71	129	194
1993	53	47	153	142
1994	80	62	138	142
1995	78	69	211	136
1996	71	67	132	79
1997	82	66	153	228
1998	57	69	143	154
1999	79	77	162	177
2000	71	61	141	76
2001	52	85	173	200
2002	60	69	149	174
2003	64	67	167	157
2004	49	70	133	63
2005	57	73	159	206
2006	58	62	138	
2007	41	76	190	
Averages:				
1988-2007	67.55	70.25	152.00	146.61
1998-2007	58.80	70.90	155.50	150.88

Note: The data for Australia, Canada, and the United States are for calendar years. The data for the United Kingdom are not exactly comparable because they are for sessions, and extend only to 2005:

A session of Parliament runs from the State Opening of Parliament—usually in October/November—through to the following October/November. However, if there is an election, the session begins after the election and runs to the autumn of the following year, eg May 1997 through to November 1998.
www.parliament.uk/faq/lords_calendar.cfm#cal1.

Sources:

For Australia, ‘Number of sitting days by year’ at www.aph.gov.au/senate/work/statistics/days_hours/year.htm;

For Canada, ‘Sitting Days of the Senate by Calendar Year’ at www2.parl.gc.ca/Parlinfo/AboutParliamentIndex.aspx.

For the United States, ‘Resume of Congressional Activity’ at www.senate.gov/pagelayout/reference/two_column_table/Resumes.htm.

For the United Kingdom, ‘House of Lords FAQ: sitting day figures’ at www.parliament.uk/faq/lords_sittings.cfm.

Table 4

Number of Sitting Days for Selected Upper Chambers, 2000–2007

	Australian Senate	French Senat	Brazilian Senado	Indian Rajya Sabha	Irish Seanad	Japanese House of Councillors	Dutch Eerste Kamer	Belgian Senat
2000	71	107	175	85	74	223		48
2001	52	95	177	81	79	226	40	46
2002	60	80	146	82	49	249	36	49
2003	64	125	186	73	83	214	32	36
2004	49	127	202	51	88	211	40	53
2005	57	110	225	84	82	242	34	35
2006	58	128	252	77	81	235	38	38
2007	41	93	243	65	64	280	39	29
Average	56.50	108.13	200.75	74.75	75.00	235.00	37.00	41.75

Note: The data for Brazil, Ireland, India, and Japan are for calendar years. The data for France, the Netherlands, and Belgium are not exactly comparable because they are for sessions which do not now coincide with calendar years. For France and Belgium, therefore, the data for 2000 actually are for 1999–2000, the data for 2001 actually are for 2000–2001, and so on. Similarly for the Netherlands, the data for 2001 actually are for 2000–2001, and so on.

Sources:

For Australia, see Table 2.

For France, ‘Nombre et Duree des Seances du Senat Depuis 1959’ at www.Senat.fr/plateau/tableaux_bord/48ans5.html#toc16. Thanks to Nicolas Simonet of the Senat du France.

For Brazil, ‘Relatorio da Presidencia,’ at www.senado.gov.br/sf/atividade/RelPresi/. Thanks to Walderez Maria Duarte Dias of the Biblioteca Academico Luiz Viana Filho of the Senado Federal. For Ireland, thanks for providing the data to Rachel Breen of the Seanad Office.

Table 4 extends this comparison beyond Canada, the US and the UK to seven other well-established upper houses for which data were available for the current decade and that I chose without any pre-conceived notion of what we would find.⁸¹ During the current

⁸¹ It would be misleading to include the German upper house, the Bundesrat, in these comparisons because it is composed of state government officials who meet infrequently in plenary sessions:

The Bundesrat membership usually comprises states’ prime ministers, their federal affairs ministers ... finance ministers, and as many others as are required to match the number of votes to which the state is entitled ... its members also have to fulfill their demanding state government obligations. The number of plenary sessions is therefore kept as low as possible, about fifteen per year ... All the chamber’s important work is done by its committees ... The central role of committees in the legislative process means that plenary sessions mostly involve the taking of votes and the issuance for the record of political declarations. Werner Patzelt, ‘The Very Federal House: The German Bundesrat’, in Samuel Patterson and Anthony Mughan (eds.). *Senates: Bicameralism in the Contemporary World*. Columbus,

decade, the Australian Senate has been meeting roughly half as often as the French Senat, less than one-third as often as the Senado of Brazil, and almost 20 days per year less often than either the Indian Rajya Sabha or the Irish Seanad.⁸² The Japanese House of Councillors has met four times as often on average as the Australian Senate.

It's true that Australia's Senate has been meeting more often than its Dutch and Belgian counterparts. However, neither of these upper houses has the same powers and responsibilities as the Australian Senate. In the Netherlands, the 75 members of the Eerste Kamer are elected by the twelve provincial councils and they are not expected to serve on a full-time basis:

Members of the House of Representatives are full-time politicians, whereas members of the Senate are part-timers who often hold other positions as well. They receive an allowance which is about a quarter of the salary of the members of the House of Representatives.⁸³

In Belgium, where only 40 of 71 senators are directly elected by the people, the two chambers of the parliament have the same legislative powers with respect to bills that might affect the delicate relations between the country's French- and Dutch-speaking communities. On all other matters, however, the Chamber of Representatives dominates the legislative process.⁸⁴ To say, then, that the Senate in Canberra meets more often than these two bodies is not to say very much.

Do Australia's senators have other responsibilities that prevent them from spending more time in Canberra? If so, those responsibilities are not found in the Constitution, nor is it obviously true that senators have a compelling political need to spend most of the year at home. It's the members of the House of Representatives who are elected from individual constituencies and whose re-selection can depend on keeping in regular touch with the party faithful at home. Senators, on the other hand, are elected from party lists in each state. With more than nine of every ten Australians voting 'above the line' in Senate elections, senators' prospects for re-election depend largely on how popular their national party is and how high their names appear on their party's list of candidates. In other words, Representatives usually have far better reason than senators to spend time at home, yet the House of Representatives has met more often than the Senate in every year since 2000.⁸⁵

Ohio, Ohio State University Press, 1999, pp. 68, 71, 73. Thanks to Dr. Albrecht Walsleben of the Bundesrat's information office for the information and data he provided.

⁸² There was one year, 2002, in which the Seanad met on 11 fewer days than the Australian Senate, but that was a year in which elections to the Seanad took place.

⁸³ www.eerstekamer.nl.

⁸⁴ www.senate.be/english/SenateCompetencesEN.html and www.senate.be/english/SenateCompoEn.html.

⁸⁵ To be fair, one observer reports that the parties have begun encouraging their senators to take on constituency work:

The Labor Party, for example, now has a well-developed system for sharing constituency work among Senators. Members of the upper house will be encouraged to site their state office in a constituency which Labor aspires to gain in the House of Representatives. The Senator will then act as a proxy Labor MP—taking up cases on behalf of constituents, circulating information about his or her parliamentary achievements and appearing regularly in the local press ... The Liberal party operates a similar system Meg Russell. *Reforming the House of Lords: Lessons from Overseas*, p. 190.

Furthermore, US senators who, like Australian senators, serve six-year terms, have to run for re-election as individuals. Their personal reputations at home frequently matter more than their party label in determining whether or not they will return to Washington for another six years. Yet the US Senate manages to sit more than twice as many days each year as the Australian Senate—more than four times as often in 2007, 190 days compared with 41 days—and their attendance record is quite good.⁸⁶

An alternate explanation for how infrequently the Senate has been meeting, especially in our new century, might be that service in the Australian Senate, like service in the Dutch second chamber, is not be expected to be a full-time job. After all, if Australian senators are expected to serve only on a part-time basis, it would be unfair to ask more of them. However, the Parliamentary Library in Canberra has published three reports that demonstrate the implausibility of this possible explanation.⁸⁷ Senators certainly aren't paid only for part-time work. In fact if being a Senator is supposed to be part-time employment, every Australian should want the job.

To summarize what these reports tell us, every senator received a basic annual salary (sometimes called an 'annual allowance'), as of mid-2007, of \$127 060. Since 2000, this salary amount has been adjusted upward each year, so it may very well be higher by the time you read this. The salary, and annual changes in it, are set by a Remuneration Tribunal and are linked to senior public service salaries. However, Parliament can disapprove, change, or postpone the Tribunal's annual recommendations. Between 1999 and 2007, annual senatorial salaries increased by 48.6 per cent in current dollars or by 16.4 per cent in real terms (in other words, adjusting the annual increases to reflect inflation during the same period). A serious argument can be made that a senator's salary is not as much as the responsibilities of the office would justify, and perhaps not as much as some or most of them could make in other occupations. Still, no one would seriously argue that \$127 060 per year is not a living wage.⁸⁸

But that's not all. In addition, senators each receive an annual 'electorate allowance' of \$27 300, to reimburse them for 'costs necessarily incurred in providing services to their

Even so, and however old-fashioned and even naïve it may sound, the principal responsibility of a senator or any other legislator is to serve as a senator, not to increase their chances of being re-elected (or the chances that a fellow partisan will be elected). On how different election systems can affect constituent-representative relations, see Pippa Norris. 'Are Australian MPs in touch with constituents?' A paper prepared in 2004 for the Democratic Audit of Australia and available at <http://arts.anu.edu.au/democraticaudit/categories/auditpapersfrm.htm>.

⁸⁶ Unless, of course, they're running for president.

⁸⁷ All were written by Leanne Manthorpe of the Library's Politics and Public Administration Section. They are: 'The annual allowance for senators and members', 'Superannuation Benefits for Senators and Members', and 'Parliamentary allowances, benefits and salaries of office'. Ms Manthorpe is in no way responsible for how I've used her scholarship here. Senators' allowances, benefits, and other perquisites also are summarized in *Senators' Handbook: a guide to services, entitlements and facilities for senators*, published periodically by the Senate for the use of senators.

⁸⁸ Backbenchers in the House of Representatives receive the same annual salary, but ministers and some parliamentary office-holders receive more. As of late 2007, the prime minister received 260 per cent of the annual allowance of senators and members. In the Senate, the Leader of the Government received 187.5 per cent of the regular salary, the President of the Senate received 175 per cent, and the Leader of the Opposition received 157.5 per cent.

constituents, 'and either the use of a 'private-plated vehicle', to be used for parliamentary, electorate, or official business, or an additional annual allowance of \$19 500 instead. Senators also are entitled to certain benefits for telephone service, official stationery and printing, offices and supplies, staff, and various kinds of domestic and international travel. For example, one of the Parliamentary Library reports explains that, for overseas study trips, 'expenditure is capped at the equivalent cost of one first-class around-the-world airfare for a parliamentarian and spouse in the life of each Parliament.' This limit apparently does not apply to additional overseas travel by senators as members of parliamentary delegations, or to represent the Government with the prime minister's approval.

But that's still not all. Senators who were first elected before the October 2004 election pay into a retirement system and then receive a 'defined benefit' pension that isn't affected by changes in markets and returns on investments.⁸⁹ This can get quite complicated, but let's say that a senator who was first elected before 2004 served in the Senate for eight years—which usually means that he or she was re-elected once—and then either retired voluntarily at age 60 or left involuntarily because the senator lost at the next election or was denied the chance to run at that election by his or her party. That senator is rewarded with an annual pension, known as a 'retiring allowance', of one-half of the senator's final annual salary (or 'annual allowance'). As of mid-2007, that would amount to more than \$60 000 per year for life, and for only eight years of Senate service. Senators who have served 18 years or more receive an annual pension equal to 75 per cent of their final salary, and these allowances increase in line with increases in the salaries of sitting senators.

Elected politicians in democracies always are being criticized for earning too much and for spending too much. Too often citizens believe, mistakenly, that they can enjoy representative democracy on the cheap. Nonetheless, this brief summary of senators' salaries, benefits, and pensions eliminates any doubt that they are paid for full-time service, and so it also disposes of any suggestion that the Senate doesn't meet more often than it does because it's only a part-time place.

More difficult to dismiss are arguments that the number of sitting days really doesn't reflect how hard most senators work. Just because the Senate is sitting, that doesn't mean that all senators are present in the chamber or that they need to be there. On the other hand, the fact that a senator is not in the chamber doesn't mean that he or she isn't working. Formal committee meetings and plenary sittings account for only a fraction of a senator's actual workload. Also, the number of meeting days may be less important and revealing than the number of meeting hours, both in plenary sessions and in committee and other meetings. On the other hand, the same certainly can be said for the US Senate and its members, and probably for the other upper chambers, and their members, that are represented in Tables 3 and 4. Are the demands on Australia's senators systematically greater than the demands on the members of these other assemblies? During every year between 2002 and 2006, the Australian Senate met on fewer days than national assemblies

⁸⁹ A 'defined benefit' pension typically is based on the number of years of service and a percentage of salary. This is in contrast to the increasingly popular 'defined contribution' plans in which the employer promises only to make a certain contribution each year to an employee's retirement fund, which then typically is invested in some combination of stocks, bonds, and cash equivalents. Senators first elected at or after the 2004 election have their retirements funded under a different scheme.

in Botswana, the Cook Islands, Ghana, Kenya, New Zealand, and Zambia, and that's just among the nations that are members of the Commonwealth Parliamentary Association.⁹⁰

Let's take stock, then, by doing some simple arithmetic. One thing on which we all can agree is that there usually are 365 days in the year. To get a realistic sense of how many work days there are in a typical year, let's first deduct 104 days to account for 52 two-day weekends. Then let's deduct an additional 20 days, which is a generous deduction for national holidays. Next let's recognize that senators are people too, and they need personal holiday time like everyone else. So let's give them four weeks, or 20 days of paid holiday time. That leaves us with 221 potential working days available for senators during the year:

$$\begin{array}{r} \mathbf{365 \text{ days less}} \\ 104 \text{ days for weekends} \\ 20 \text{ days for national holidays} \\ 20 \text{ days for personal holidays} \\ \mathbf{= 221 \text{ days remaining}} \end{array}$$

Now we saw in an earlier chapter that, in 2006, the Senate's eight policy committees met on an average of less than 42 days. We've also seen in Table 2 that so far during this decade (2001–2007), the Senate has held plenary meetings on an average of not quite 55 days per year. So if we add together 42 days for committee meetings and 55 days for plenary meetings—and if we make the unrealistically generous assumption that committee and plenary meetings never occurred on the same day—we can account for 97 of the 221 potential working days.⁹¹ And our arithmetic still leaves us with 124 weekdays, or well over five months each year, for which we can't account.

I've already been told that this calculation under-estimates the number of days that senators devote to committee work. In one respect, my calculation actually is an over-estimate because, as I've just said, I assume that committee meetings never occur on the same day as Senate plenary meetings, and this assumption is simply wrong.

On the other hand, it certainly is true that some committees meet more often than the average (also meaning, of course, that others meet less often), and most senators serve on more than one committee. Furthermore, a senator who isn't a full member of a committee may choose to become a 'participating member', who can participate fully in the committee's meetings but may not vote. However, the fact that a senator is a participating member of a committee tells us absolutely nothing about how often that senator actually does attend and participate.

More important, senators aren't required to attend all the meetings of their committees, and they don't. Recall that eight senators serve on each policy committee. According to the Senate's Standing Order 29, however, each committee can meet and conduct its

⁹⁰ These are the only years for which I have data. Thanks to Shem Baldeosingh of the CPA for providing these data, and to Ian Harris, Clerk of the Australian House of Representatives, for putting me in touch with him. Mr Harris is in no way responsible for the use to which I've put his kind introduction.

⁹¹ This assumes no overlap between committee and plenary days—that is, that there never were both committee and plenary meetings on the same day.

business if as few as two of its eight members are present, so long as one of the two is a government senator and the other is from the Opposition.

Attendance records documenting which senators actually attended which meetings are not readily available. I'm told, however, that it's rather unusual for a committee meeting to be attended by more than half its members, and it's not at all unusual for no more than two or three of a committee's eight members to attend a meeting. Attendance will vary, of course, depending on the purpose of the meeting and when it's being held. I'm sure it can be argued that, in many cases, it really doesn't matter how many senators are present because the committee can do what it needs to do so long as one government and one Opposition senator are there. For our purposes, though, what's important is just because a committee had a meeting, we can't assume that all its members were there.

So some upward adjustment in our calculation in the number of committee meeting days clearly is necessary, but how much should our current figure of 42 be increased? Any answer is essentially an informed guess, unless some brave soul has the stamina to calculate how many times there were meetings of all the committees on which each senator served, and how many of those meetings the senator actually attended. Until then, I think it would be fair and generous to guess that, although the Senate's policy committees met on an average of 42 days in 2006, the average senator attended one or more committee meetings on 100 days during that year.

If so, we now can calculate that, of the 221 available work days during 2006, 155 of them were devoted to Senate plenary and committee meetings. And that still leaves us with 56 weekdays, or just about 2 ½ months, for which we still can't account.

So finally, I propose that the Senate meet more often—in plenary sessions, in committee meetings, or, most likely, in both. Furthermore, senators who are interested in strengthening their institution should see to it that there is at least one division on something the government or the Opposition cares about on every day the Senate meets. That practice will tend to ensure that party leaders will insist that their senators are present. Senators should not have to resist the temptation to be absent on sitting days if they think no one will notice. Meeting more often will not guarantee a more vigorous and assertive Senate, but it will make it possible for the Senate to do more and do it better, and I think the burden of proof must rest with anyone who would argue against more sitting days on the ground that it just can't be done. As I hope I've made clear, there's more than enough for the Senate to do.

What's the problem?

To summarize, I propose these modest but constructive reforms for the Senate:

First, that Question Time each day be devoted solely to questions from non-government senators and responses from government ministers;

Second, that each government minister in the Senate be required to respond to questions on only one day each week, except for the Leader of the Government in the Senate as the spokesman for the prime minister;

Third, that the length of Question Time be fixed at one hour each day, unless the Senate votes otherwise or the Opposition abbreviates it;

Fourth, that the chairmanships of the eight policy committees be divided equally among government and non-government senators;

Fifth, that the Senate's policy committees be empowered to set their own priorities and agendas as they routinely review all bills and legislative proposals affecting the subjects for which they have responsibility, subject to ultimate direction by the Senate.

Sixth, that to this end, the Selection of Bills Committee be replaced by a Legislative Planning Committee to review how and when the policy committees plan to act on the bills referred to them after their first reading and, when necessary, to make alternate recommendations to the Senate.

Seventh, that the Senate give priority to its policy committees' recommendations for amending bills when the Senate considers those bills in detail during plenary sessions.

Eighth, that the Senate insist on having House ministers agree to requests that they testify before the Senate's committees about their work as ministers;

And ninth, that the Senate meet more often.

These are not revolutionary proposals. For example, even the committees of the Canadian Senate—which, recall, is wholly appointed, not elected—have, for decades, received all bills and testimony from ministers. In these committees:

Ministers and their officials can and do appear and may give evidence and answer questions. Over the past thirty years it has become standard practice to refer all public bills to one or other of the standing committees and to hear evidence both from Ministers and officials concerned and from unofficial interests who may wish to appear. Indeed, on a good many public bills, appearance before a Senate standing committee is the only opportunity unofficial interests have to be heard. Advantage is often taken by Ministers or officials concerned to propose amendments to their own legislation while it is before a Senate committee. There can be no doubt that this practice of referring public bills to standing committees has greatly improved liaison between the Senate and the administration as well as giving the interested public further, if not the only, opportunities to be heard.⁹²

Nothing that I've proposed would fundamentally change the nature of the Senate or the way it works. My proposals won't require any major changes in the Senate's organization or procedures. None of them will require a constitutional amendment; in fact, none of them even will require any change in law. The Senate's non-government majority can

⁹² Robert A. Mackay, *The Unreformed Senate of Canada*. rev. ed., Toronto, McClelland and Stewart Limited, 1963, pp. 69–70. And recall the practices of the New Zealand and Scottish parliaments that I described earlier.

adopt all but one of them unilaterally. Only the appearance of House ministers before Senate committees will require the acquiescence of the House of Representatives and the government in what will amount to a modification of an existing convention governing relations between the two halves of Parliament. Taken individually and collectively, however, these changes in the Senate should make it a more active and effective institution—one that does a better job at reviewing the government’s program for enacting new laws and its track record in implementing existing laws. That’s why I call them reforms.

Reform, however, always is in the eye of the beholder. In 2003, Prime Minister Howard released a report that purported to ‘reform’ the Senate, but in ways that would have significantly weakened its position in relation to the government.⁹³ Fortunately, his proposals were dead on arrival. In this essay, I trust I’ve left no doubt that my intention is the opposite: it is to strengthen the Senate. Doing so may make life more complicated and difficult for the government and the House of Representatives, but so be it, because that’s the price required to enable the Senate to make government more accountable to the Australian people. That should be the goal of Senate reform, not to make life more comfortable for the Government, whatever its political persuasion.

At the same time, I want to reiterate that what I’ve proposed here by no means exhausts what could be done to strengthen the Senate. My ambitions have been limited to proposing only a handful of reforms that the Senate can adopt and implement without the need to change the laws or amend the Constitution. That doesn’t mean that these reforms will be easy to implement. First, to those who lack imagination or for whom the status quo is comfortable and convenient, even these modest reforms may seem revolutionary and unthinkable. Second, the devil always is in the details, so careful thought will be required as to how best to incorporate these reforms into the Senate’s standing orders and to anticipate any related or compensatory changes that may be required. And third, implementing these proposals will require a degree of determination and institutional self-regard that the Senate doesn’t always demonstrate.

Why didn’t the Senate act years ago to adopt reforms such as these? If I could think of them, surely these reforms and others like them must have occurred to senators over the years. I think the answer becomes clear if we look at the political interests of the various groups within the Senate.

We have to expect that the current government or any future government will oppose any reforms that would strengthen the Senate in any significant way, at least so long as the Senate is expected to continue having non-government majorities most of the time. After all, the whole point of strengthening the Senate is to enable it to be a more effective participant in the legislative process and to empower the Senate to do a better job at holding the government accountable for its actions and decisions. Lurking behind any specific criticisms the government may make of these or similar reform proposals always will be the calculation that anything making the Senate stronger will make the government weaker. We’re as likely to see snow in Cairns at Christmas as we are to see an Australian government championing the kinds of reforms that I’ve proposed here.

⁹³ Department of Prime Minister and Cabinet, *Resolving Deadlocks: a Discussion Paper on Section 57 of the Australian Constitution*. Canberra, Commonwealth of Australia, 2003.

On the other hand, independent and minor party Senators should be natural supporters of a stronger Senate. These senators have little realistic prospect of becoming government ministers. For them, serving in the Senate almost certainly is the pinnacle of their political careers, so they should accept that strengthening the Senate is in their own interests. The Senate is the one place where their views can make a real difference and where they have their only realistic chance to affect the nation's policies. As the Senate becomes stronger, so will their influence grow, as long as their votes can continue to decide who wins and who loses in Senate divisions.

That leaves the Opposition. As long as the Senate has non-government majorities, the future of the Senate will continue to lie in the hands of the Opposition, whether that's a Labor or a Coalition Opposition. By joining forces with independent and minor party senators, the Opposition should have ample opportunities in coming years, as it does today, to build the majorities needed to change the Senate's organization and procedures, and to convince government that resisting reform (such as by refusing to permit its House ministers to testify before Senate committees) would come at too high a price.

However, there have been such opportunities for most of the past several decades, and we'd be hard-pressed to find evidence that, during that time, the Opposition in the Senate truly has championed the cause of Senate reform. Why? I suspect that there are at least two reasons.

First, I suspect that many senators of all parties don't share my understanding of Australia's political system, as I summarized it in the introduction. They may think that Australia has, should have, and always was intended to have a parliamentary system of government, a system in which the Senate's role should remain very much a subsidiary one. If so, strengthening the Senate would not be such a good idea because doing so would enable and encourage it to pose more of a challenge than it does today to their understanding of responsible party government.

Second, I also suspect that Opposition senators, whether Labor or Coalition, try to convince themselves that the defeat of their party at the last election for the House of Representatives was a regrettable mistake that the voters are sure to correct at the next election. They expect, therefore, to be back in government in less than three years. If so, the Opposition's attitude toward strengthening the Senate may not be much different from that of the government. If government senators oppose a stronger Senate because it would complicate their party's ability to govern today, Opposition senators may fear that the same reforms would complicate their party's ability to govern in a foreseeably short time.

These are reasons why I'm skeptical that the impetus for significant changes in the Senate's organization, procedures, and practices will originate from within Parliament House. And that's why I've written this not for senators nor for political scientists, but for interested and informed Australians who appreciate why, as I said at the very beginning, a vigorous and assertive Senate is necessary for the continuing health of Australian democracy.

One final thought: what you've just read has benefited from the reactions and advice of quite a few people, most of them in or near to the Senate. Normally, a polite and appreciative author thanks all of them by name. In this case, however, I'll allow them to

preserve their anonymity, just in case anyone might assume that any of them agree with anything in particular that I've written here. In fact, each of them probably disagrees with some of my ideas, and it's quite possible that some of them disagree with all of my ideas.

Like most other people, I'd prefer that everyone agree with me all the time. In this case, however, I can live with their disagreement comfortably if not happily. What's most important is to change the direction of the debate: from how to 'reform' the Senate by weakening it, to how to reform the Senate by strengthening it. Once we're asking the right question, healthy disagreements over how to reach our shared goal are well and good. If there are better answers than mine to the problems I've identified, so much the better.

The Senate: Blessing or Bane?*

Senator John Faulkner

In the view of John Adams, one of America's founding fathers:

Reliance on a single legislature was a certain road to disaster, for the same reason reliance on a single executive—king, potentate, president—was bound to bring ruin and despotism [T]here must, in a just and enduring government, be a balance of forces. Balance, counterpoise and equilibrium were the ideals [America] turned to repeatedly.¹

Bicameralism tends to be the norm for parliamentary democracies. It is the result of historical evolution, but that history also reveals why upper houses can be difficult.

In Australia we have two major sources for our constitutional arrangements, the United Kingdom and the United States.

The bicameral system has its genesis in England. The upper house in England is the House of Lords, which represented the power and protection of the landed aristocracy. The title 'upper' house suggests that it was a superior house in what was an aristocratic system of government. In the beginning, there was only one parliamentary chamber and it sought to protect the interests of the aristocracy against the power of

* This paper was presented as an address to the Bicameralism Conference at Parliament House, Canberra on 9 October 2008.

¹ David McCullough, *John Adams*. New York, Simon and Schuster, 2001, p. 376.

the king. The second chamber, the Commons, emerged in the 14th Century—a recognition of the separate and different interests of the burghers and knights.

The Parliament of the United Kingdom remains the model for parliaments and the mother of all parliaments.

Australia, however, took many of the constitutional arrangements for its upper house from the United States, another federal system of government, created in a more democratic time. In the framing of their constitution, the Americans relied on checks and balances in the distribution of power. But even the US Senate was structured so as to protect property and to be a conservative brake on the democratic house. The founding fathers of the United States sought, through the Senate, to ‘contain the majority tyranny’² of the House of Representatives. Alexander Hamilton, one of the framers of the US constitution argued:

All communities divide themselves into the few and the many. The first are the rich and the well born, then the mass of the people. The people are turbulent and changing. Give therefore to the first class a distinct and permanent share in the government. They will check the unsteadiness of the second.³

The US Senate was, and is, a powerful institution: it has power over budgets, legislation, treaties and appointments; its members sit for longer periods—six years—than the members of the House—two years. However, the US Senate was not directly elected until 1913, well after the directly elected Australian Senate came into being.

So these are the threads of continuity which anchor us to a conservative tradition of bicameralism.

In Australia, while the US model was influential, there are differences particular to our circumstances and time. The Australian Senate was always elected. However, like the US Senate, the Australian Senate was conceived as a conservative brake on the rule of the people. And the Senate here too was meant to protect the power of the states. Giving the states equal representation was intended to protect the smaller states against the more populous states, which would inevitably dominate the representative chamber.

The debates about the formation of the Australian constitution were characterised by the reluctant ceding of as little state power as possible. Procedures for constitutional amendment—a majority of people in a majority of states - were calculated to make change as difficult as possible and to make any change reliant on the power of the states.

² Gore Vidal, *Inventing a Nation: Washington, Adams, Jefferson*. Carlton, Vic., Melbourne University Press, 2004, p. 24.

³ Ibid. p. 51.

Our constitution was, early in the history of the Commonwealth, described as ‘a feeble compromise between contending ideals’ and ‘an iron instrument with none of the elasticity of the unwritten British constitution’.⁴

As Manning Clark saw it, the constitution itself was the product of conservatism—the founders of the constitution were men of ‘sound, sober and reliable control’.⁵ They were not rash; they were men of pragmatic compromise. As Greg Craven wrote, while:

America’s constitutional architects were dashing men in tight breeches ... [with] a romantic, faintly raffish appeal. ... our founders ... were large men—bulky, stodgy, profusely hairy ... Appallingly, they were regularly photographed in all their Victorian horror, peering awkwardly at us like a herd of walruses washed into a parliamentary chamber.

Our pragmatic, stodgy founding fathers bequeathed to us a Senate with power equal to the House of Representatives except for money bills. In order to preserve the pre-eminence of the democratic house, the Senate is set at half the House’s size and government is formed in the House of Representatives. However, Senators have a longer tenure (six years) than members of the House (three years).

In the beginning there were six senators per state; it increased after 1949 to 10 and in 1983 rose from 10 to 12. Two senators per territory were introduced in 1975. The Senate now comprises 76 senators.

From the beginning the Senate divided on party lines, and became a second house reflecting party interests. But it was, nevertheless, one that disproportionately favoured the representation of the small states. The smallest state, Tasmania, with a population of 477 000 has the same Senate representation as the largest state, NSW, with a population of 6.77 million. The ACT, with a population of 325 000, is represented by only two Senators, whereas Tasmania, with only a slightly larger population, has 12.

Therefore the Senate does not reflect that fundamental, democratic, Chartist principle of one vote, one value. Nor does the Senate protect the rights of States, as was originally intended. It is a States House that never was.

Is there then any justification for the Senate at all?

⁴ A.N. Smith, *Thirty Years: the Commonwealth of Australia 1901–1931*. Melbourne, Brown, Prior, 1933, p. 22. This is an early perspective made in 1931 when only one amendment referendum had been passed—on the guaranteeing of State debts. Alteration has taken a different path—through High Court rulings on the taxation powers or the treaty powers of the Commonwealth or through the changes to the electoral systems which have changed the composition of the Senate and subsequently its role. It should also be noted that even if the constitutional arrangements were conservative and some policies such as immigration restriction notably so, not all policies of the early parliaments were. Early female suffrage, social security arrangements and compulsory education are indicative of an experimental bent.

⁵ C.H. Manning Clark, *A History of Australia, Volume V: The People Make Laws, 1888–1915*. Carlton, Vic., Melbourne University Press, 1962–1999, p. 185.

Early last century, many Australians might have answered no. Winner-take-all voting systems made the Senate irrelevant to the legislative process and a political backwater where party members could dwell unperturbed by the conflicts of the day. It evoked little public support; in polls in the 1950s, a majority of Australians wanted to abolish the Senate.

However, the Senate has changed and evolved.

The voting system has changed over time. Voting was first-past-the-post to 1919, then preferential voting to 1949. This meant that either of the major parties could dominate the Senate. They were winner take all systems. Senate results exaggerated the swings in the electorate. In 1919, the ALP got 42 per cent of the vote but only returned one senator; the Nationalists got 45 per cent of the vote but won 17 of the 18 seats. Naturally, Labor believed this system of voting for the Senate was fundamentally flawed and sought the Senate's abolition. Throughout the 1920s and 30s the non-labor parties continued to hold the Senate by large margins; Labor was in a similar position after the 1943 and 1946 elections.⁶

Because these systems favoured the government party so heavily, deadlocks were rare. There was only one double dissolution in the first half of the Twentieth Century, when these winner-take-all voting systems prevailed. There have been five⁷ since Chifley changed the voting system from preferential voting to proportional representation in 1949.⁸ These changes, made in the interest of fairer representation, have not favoured the ALP and Labor has never since had control of the Senate. Although since federation, Labor has controlled the Senate after only six elections, and, by contrast, non-Labor Governments have controlled the Senate after 25 elections, it must be said that since 1949, both major parties have found control of the Senate a rare experience.

Of greater significance for the nature of the modern Senate, Chifley's move to proportional representation made it easier for minor parties to be elected. The first was the DLP, two of whose senators were elected in 1955. The DLP reached its maximum electoral success in 1970 with five senators and then it disappeared.

Since 1983, a variety of independents, Australian Democrats, Greens, and nuclear disarmament candidates have held the balance of power. This has worked to the extent that outcomes have been able to be negotiated with the minor parties, although it is notable that governments have sought double dissolutions on two occasions, in 1983 and 1987.

Many Labor figures have, from time to time, expressed a less than favourable view of the Senate. For a long time, from 1919 to 1979, Labor argued for the abolition of the Senate. More recently, it has been described as 'unrepresentative swill', an 'anarchic swamp'. Some of the Labor Party's opposition to the Senate reflected the usual government frustration with a program blocked or severely amended by the upper

⁶ Labor had 22 and 33 of the 36 senators.

⁷ 1951, 1974, 1975, 1983 and 1987.

⁸ It came into effect in 1951 with the double dissolution election of that year.

house. Much of it was, I prefer to believe, a genuine adherence on the part of Labor to democratic principles.

The blocking of Supply in 1975 and the sacking of the Whitlam Government created for the ALP another order of disillusionment with the Senate. The actions of the Liberal Opposition during the Whitlam Government were the actions of a party that had ruled Australia for 23 years, had developed a belief in its entitlement to govern and could not accept the result of the 1972 election. In three years, between 1972 and 1975, 93 bills were rejected—25 more than had been rejected for the 71 years of the Senate's history.

This was Labor's lowest point and our most negative view of the role of the Senate. With some justification, at that time we saw the actions of the Coalition opposition in the Senate as obstructive, undemocratic and procedurally dubious.

I don't believe that the Coalition has ever faced up to what it did in 1975. Mr Howard, who was part of that Opposition, has since said that the blocking of Supply was wrong, but only because it made the government of Malcolm Fraser too tentative when it was in power.⁹

For all the frustrations of governments facing hostile or obstructive Senates, the experience of the Howard government in its last three years would also suggest that the control of the Senate by a government is not an unqualified good. Some have argued that, if the Coalition had controlled the Senate in the period before 2004 and if legislation such as the GST, industrial relations changes, and anti-terrorism bills had not been made more palatable by Senate amendment, the Howard government might have fallen earlier than it did.

The changes that Chifley made created a more representative Senate. This has given the Senate more legitimacy in the eyes of the public and it has given minor parties a permanent place in the federal political landscape. A poll in 1997 reported that 72 per cent of voters were opposed to any electoral change that would make it easier for major parties to control the Senate. Voters are becoming used to having minor parties in the Senate—and used to them holding the balance of power.

Two other changes stemming from the 'new' Senate have meant that, since 1970, the Senate has begun to assume a more positive role within and despite its constitutional restrictions. The Senate has transformed itself into a more active and more effective house of review and scrutiny. These reforms did not require constitutional change. The most significant was the establishment of the Senate Committee system. However, procedural changes have also played a part.

Senate procedures have developed which favour scrutiny: time limits for ministers' answers and supplementary questions in question time, orders for the production of documents, publication of an extensive range of government documents, and generous debating rights for individual senators on both bills and other general matters.

⁹ Gerard Henderson, *Menzies' Child: the Liberal Party of Australia*. rev ed., Pymble, NSW, Harper Collins, 1998, pp. 258–259.

With votes on measures invariably close, debates in the Senate can be dramatic at times—more drama than will be found in the House of Representatives outside of Question Time. I can recall a variety of serious matters where the outcome of the vote in the Senate was uncertain until very late in proceedings. Speeches made by senators have been passionate efforts to persuade the Senate of their point of view.

Bills may be debated clause by clause. The legislative process is taken very seriously in the Senate.

Two examples suffice:

- The Native Title Amendment Bill of 1997 was debated for the longest time of any Bill before the Senate—over 105 hours of debate. In the light of the further pronouncements of the High Court, known as the Wik decision, the Bill sought to amend the legislation, which had implemented the Mabo decision.

The outcome of the debate was not to the liking of the Labor Party, the Democrats or the Greens, but it represented the most concentrated focus of the Senate on a piece of legislation. The government successfully negotiated with the independent Senator, Brian Harradine in order for the Bill to pass the Parliament. Three hundred and fourteen amendments were made to the government's Bill, greatly softening it.

It was an intense debate conducted in the aftermath of the rise of Pauline Hanson. Senator Harradine's stated reason for negotiating his position was to 'avoid [in the coming election] a divisive double dissolution election which would have torn the fabric of our society and set race relations back 40 or 50 years.'¹⁰ It was, I think, a view sincerely held.

- The ASIO Amendment (Anti-terrorism) Bill 2002 involved another prolonged debate on an essential issue of competing rights. In two stages¹¹ the Parliament, and particularly the Senate, defined and refined, argued and compromised over a period of thirty-four and a half hours. The Chair of the Parliament's intelligence committee stated that 'the Bill in its original form would undermine the key legal rights and erode the civil liberties that make Australia a leading democracy.'¹²

The Senate, after recommendations from two parliamentary committees, limited the time during which a person might be detained, provided for legal representation for people being questioned or detained, raised the age of detention from 10 to 16 years and provided for a sunset clause and review

¹⁰ *Commonwealth Parliamentary Debates* (Senate) 8 July 1998, p. 5195.

¹¹ The first bill was set aside on 12 Dec 2002. A second bill was reintroduced in 2003 and passed at the end of June 2003.

¹² Joint Parliamentary Committee on ASIO, ASIS and DSD, *A Review of the ASIO Legislation Amendment (Terrorism) Bill 2002*, p. vii.

mechanism. The final outcome ameliorated the worst excesses of the original bill.

But it is in the committee system, established in 1970, that the Senate has developed the most effective accountability mechanism in the Australian Parliament.

In 1970, Senator Lionel Murphy proposed the establishment of general purpose standing committees. Senator Kenneth Anderson, a liberal senator, put a counter proposal for the establishment of estimates committees. Both proposals, initially not widely supported by their respective parties, passed with the support of minor parties and independents.

The committee system of the Senate is now well established and comprehensive. It has made the Senate a genuine house of scrutiny. Senate committees review legislation, consider government policies and administration, and thoroughly examine government expenditure.

In my experience, it is in Estimates Committees, where there is time to question government officials in detail and at length (sometimes at great length) that the greatest accountability occurs. It was in Estimates Committees that the truth of whether children were thrown overboard was revealed, and the state of Australian knowledge about Abu Grahib was explored.

In Estimates, senators regularly test the detail and the worth of expenditure. Answers to questions on notice are publicly posted on web sites. Estimates can teach a conscientious senator how government works, or does not work. Carefully framed, probing and methodical questioning keeps a government on its toes. While not all such attempts are successful, the estimates process can provide a scalpel for those able to use one. Senate Estimates Committees are the best accountability mechanism we have in any parliament in this country.

I believe the Senate could be better still, but fundamental changes require constitutional amendment. This is one of many areas where our constitution creaks.

The ALP has always been the party of reform in a way that our opponents have never been. We have a strong record of promoting democratic principles in our electoral system and in our parliament. This is part of our 'light on the hill'.

I still believe the Senate's power to block Supply needs to be resolved. This is not just a matter of sour grapes; it is a fundamental principle that the government formed in the lower house must not be forced from office by another, less democratically elected house. New deadlock provisions should be canvassed.

Fixed, simultaneous four year terms for both the members of the House and the Senate, would also enhance our democracy. The Joint Standing Committee on Electoral Matters in 2001 recommended four-year terms on the ground they would

‘facilitate better long-term planning for government and ensure consistency with state jurisdictions and cost savings.’¹³ I agree.

Australia has three-year parliamentary terms in name only. According to a Parliamentary Library Paper, the Australian Parliament in the quarter century before 2004 lasted on average only 28.5 months,¹⁴ in contrast to six year terms for senators.

House and Senate terms of equal length would make the Senate more reflective of the will of the electorate at the most recent election. In addition, such a reform would eliminate the long-standing anomaly whereby senators elected six years earlier, who have chosen not to recontest their seat or who lost their seat, continue to sit, to vote on and to determine the fate of legislation until the following July.

I also strongly believe that election dates should be fixed. Such a reform would address some of the uncertainties and limitations of our current political system. Enabling the government to choose the most advantageous moment to go to the polls does not enhance governance or government decision-making. It is simply an advantage of incumbency.

It may be that fixed, simultaneous, four year terms may be too much, too soon, to receive the level of broad bipartisan support that is a prerequisite for any referendum to be successful. Any step along the way would be beneficial. Simultaneous terms for both senators and members of the House of Representatives would be a significant step forward. New senators taking their seat straight after an election would be a significant step forward. Four year terms for both senators and members of the House of Representatives would be a significant step forward. A fixed election date would be a significant step forward.

The Labor Party has often expressed disdain for the role of the Senate, for the inherent flaws in a chamber that lacks a truly democratic basis. But there is now broad acceptance of the Senate’s permanence and strong support for its transformation into a powerful force for review and scrutiny. To return to John Adams: it [the Senate] can be ‘a security against ambition and corruption’.¹⁵ The Australian Senate today is more respected and more powerful than at any time since Federation. The challenge, perhaps, not only for governments, but also for the Senate itself, is to ensure that it exercises that power constructively and for the national good.

¹³ Joint Standing Committee on Electoral Matters, *The 1998 Federal Election, June 2000*, p. 152; *The 2001 Federal Election, June 2003*, p.xlviii.

¹⁴ Scott Bennett, *Four-year Terms for the House of Representatives*, Canberra, Department of the Parliamentary Library, Research Paper 2, 2003–04, p. 10.

¹⁵ The Founders Constitution/Bicameralism/John Adams, Vol 1, Chapter 12, Document 14. <http://press-pubs.uchicago.edu/founders/documents/v1ch12s14.html>

Constitutionalism, Bicameralism, and the Control of Power

Harry Evans

The Nature of Bicameralism

Bicameralism is only a subset of the constitutional principle of division of power. According to that principle unlimited power vested in an individual or group will be abused; it will be used to retain power, to reward supporters and punish opponents and to divert public purposes to private ends. So power must be limited. The only satisfactory method of limitation is to divide power between different bodies with some sort of veto over each other's actions. Only respect for another power can restrain power. To make the system last, the division is made between institutions, not people.

The thesis that power corrupts its possessor may be as good a 'law' as any that we have in political science

Whether exercised by a monarch or by a small group, persons who regard themselves as especially wise and virtuous are probably the worst custodians of power.

Historical experience, however, is not an unrelieved record of failure to deal with the problem of power. A number of societies have succeeded in constructing political systems in which the power of the state is constrained. The key to their success lies in recognising the fact that *power can only be controlled by power*. This proposition leads directly to the theory of

constitutional design founded upon the principle most commonly known as ‘checks and balances’.¹

Inherent in this view is that it is a delusion to seek good government by ensuring the choice of wise rulers; no-one is fit to be trusted with undivided power. As was famously said, systems of government should be designed for people, not angels.²

Also inherent in this principle is that democracy, the popular election of the rulers, is a useful safeguard, as distinct from a supposed mechanism for giving effect to the will (which will?) of the people. As a safeguard it is not sufficient. Electors will vote for tyrants who give them prosperity, peace and/or glory, or the illusion thereof. Democratic electorates are also careless of corruption and malfeasance in government unless and until it begins to affect their personal circumstances.³ They expect the political class to solve such problems, but the political class cannot do so without the appropriate institutions to enable remedies to be implemented.

So the possessors of power must be forced to take note of others also with power, working through institutions with some measure of independence. Bicameralism is only one way of establishing a division of power. Another is the entrenchment of an independent judicial power exercised by appointed judges with tenure, a system unquestioned except recently by American right-wing fundamentalists, and in itself basically undemocratic. Another is federalism, the division of power between levels of government, which, as economic fundamentalists occasionally point out, is likely to be “inefficient” in superficial ways. Safeguards often are.

No safeguard is infallible. The division of power can be defeated simply by the capture of supposedly independent institutions by a person or the same group of persons bent on some common purpose. It matters little whether such a group aims at ‘schemes of usurpation or perfidy’⁴ or Great and Necessary Reforms; abuse as defined will be the result.

In devising institutions for the division of power, the hope is that the personnel in an institution (whether elected office-holders or wretched parliamentary clerks) will develop a loyalty to the institution and its purposes and therefore support its role. It is hoped that the rights of the place will become the interests of the person.⁵ This hope may also be defeated.

Australia

Australia may be regarded as one of those fortunate societies which has managed to deal with the problem of power by constructing a political system in which the power

¹ S. Gordon, *Controlling the State: Constitutionalism from Ancient Athens to Today*. (Cambridge, Harvard University Press, 1999, pp. 2, 14–15.

² *The Federalist*, No. 51.

³ cf ‘Anyone know of a scandal?’, ‘Voters don’t believe Coalition on AWB’, *Sydney Morning Herald*, 28 February 2006, pp. 4, 10.

⁴ *The Federalist*, No. 62.

⁵ *Ibid.* No. 51.

of the state is constrained by power controlling power. The Australian Constitution has many of those safeguards which arise from that construction:

- a practically irremovable constitutional monarch, operating through a prestigious representative
- federalism: an entrenched division of power between the centre and the provinces
- the cabinet system, which ensures collective decision-making by a politically responsible group rather than one person
- responsible government, whereby the holders of the executive power can be removed at any time when the legislature loses confidence in them
- an independent judiciary with a powerful constitutional court at its head.

In practice, this structure of safeguards has been seriously degraded:

- the real head of state (as the monarchists insist on designating the Governor-General) is hired and fired by the prime minister, who has also largely taken over the celebratory/social role of the office⁶
- the central government can interfere with any of the responsibilities of the states, and does⁷
- the cabinet is largely a formal registering body for the decisions of the prime minister and his inner circle;⁸ this seems to be accepted as normal by all concerned
- government is not responsible, or even accountable, to parliament; government controls parliament (or at least lower houses) through a built-in, iron-clad, rusted-on party majority⁹

⁶ The 'disappearing' or 'invisible' Governor-General has become something of a theme of political commentary: K. Walsh, 'Lost: one G-G, rarely driven', *Sun-Herald*, 23 November 2003, p. 31; A. Henry, 'The disappearing Governor-General', Perspective, Radio National, 27 February 2004; D. Marr, 'And to crown it all', *Sydney Morning Herald*, 5 November 2005, p. 29; I. McPhedran and L. Dowidat, 'G-G fades from sight', *Courier Mail*, 24 August 2006, p. 32. According to the last report, the prime minister's press secretary told the Governor-General's staff to 'keep the viceroy off TV'.

⁷ This was the situation well before Prime Minister Howard began his 2007 pre-election drive to take over numerous state functions. G. Craven, 'The new centralism and the collapse of the conservative constitution', *Papers on Parliament* no. 44, 2006, pp. 133–45. A. Twomey and G. Withers, *Federalist Paper 1, Australia's Federal Future*, A report for the Council of the Australian Federation, April 2007. P. Pandal, 'Beware Howard's lust for power', *West Australian*, 3 August 2007, p. 18; M. Fraser, 'We must stop this erosion of Australian democracy', *The Age*, 3 August 2007, p. 13.

⁸ Most government decisions are now described as personal decisions of the prime minister. The decision to participate in the Iraq war led to renewed calls for the war-making power to be subject to parliamentary approval, but the Prime Minister has repeatedly described the decision as his personally, eg: 'I am prepared to defend what I did ...' ABC Radio News, 7.45 am, 21 March 2006. His ten billion dollar National Water Plan was not even *endorsed* by cabinet: Senate Finance and Public Administration Committee, transcript of estimates hearings, 12 February 2007, p. 162.

⁹ A selection of less temperate descriptions by eminent authors of government control of the House of Representatives is in S. Bach, *Platypus and Parliament: the Australian Senate in Theory and Practice*. Canberra, Department of the Senate, 2003, pp. 240–2; M. Price, 'Joyce [Senator Barnaby Joyce] blasts cowards wrecking democracy', *The Australian*, 26 July 2006, p. 7.

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- the judiciary is appointed by the executive alone, and if power is held long enough can be stacked with ideological sympathisers.¹⁰

The case for bicameralism in Australia now is not the old case of one house checking another; it is not even the case of adding another division of power. It is the case of providing *something, anything*, which will limit the power of the state now held at best by a small group of persons, leading ministers, and often in practice by one person, the prime minister.

It is possible to make out a defence of the current system and a case for an upper house along the following lines. In order to retain power, the government, or usually the prime minister, has to keep their supporters on side. (So does even the most absolute monarch; there are always courtiers and barons to be consulted and placated.) An upper house increases the number of supporters who have to be kept on side, and may magnify the significance of any dissenters. Thereby government is more accountable. This is a feeble argument for such a historically significant institution. It is not sufficient to justify the expense of an upper house. Such a chamber must exercise a publicly-visible and substantial check on the power of government to justify its existence.

Australia might also be called a fortunate society regardless of the state of its governance (at least until recently: rising real estate values, low interest rates, etc, etc). So who cares that the carefully planned scheme of the ancient founders has been frustrated? Australia is well supplied, however, with abuses of power as defined; legislation has been devoted to retaining power, to rewarding supporters and punishing opponents, and public resources have been diverted. Examples will here be carefully selected and delicately described to avoid giving offence. Readers may recall their own selection.

Political and other safeguards

Bicameralism is a political safeguard; it operates by political processes through the political or elected branches of government. Other safeguards may be constitutionally entrenched or established by statute.

Constitutional safeguards are valuable, particularly if they are difficult to change, as in Australia. It is only necessary to think about what sort of system of government Australia would now have if the Constitution could have been changed by a parliamentary majority, as in some countries, rather than by referendum. Of course governments would have rearranged the system to suit themselves, and remove checks on their power. But, as has been noted, systems of government can be changed without formal changes to the constitution; written constitutions can be undermined.

Secondary or statutory safeguards are also valuable. Australia has quite a number of them, in which great trust is reposed: auditors-general, administrative appeals

¹⁰ A Coalition Deputy Prime Minister famously called for the appointment of 'capital C conservatives', and apparently soon achieved that aim: D. Solomon, 'Power grab by stealth', *The Courier Mail*, 21 June 2000, p. 17; C. Banham, 'Arise Justice Heydon: capital-C conservative elevated to High Court', *Sydney Morning Herald*, 18 December 2002, p. 3.

tribunals, ombudsmen, freedom of information statutes. All of these kinds of safeguards, however, are at the mercy of governments in control of the legislature and the treasury. They can be dismantled at any time. To choose an example which may now not give so much offence, we may remember the legislation by the Kennett government to disband the Victorian Audit Office.

Governments with parliamentary majorities have the electoral law, in particular, at their mercy. The temptation to rearrange it to perpetuate themselves is hard to resist.

Also, all non-political safeguards depend ultimately on the political processes for their establishment, maintenance and defence. Attempts to dismantle them are likely to be successful in the absence of political noise and obstruction generated in the political class. That noise and obstruction needs independent political institutions to be effective. Therefore the political safeguards, such as bicameralism, are the primary safeguards. This is a variation on the theme that power can only be controlled by power.

Conditions for bicameralism

As noted, safeguards can be defeated. Bicameralism, and other divisions of power, can be defeated by the capture of the institutions by the same person or group. Therefore, bicameralism has to be designed, as well as can be, to keep the parliamentary institutions in different hands.

In Australia that means devising upper houses which are not likely to be under the control of governments, and that means keeping upper houses as much as possible away from government party majorities. As recently as the 1980s it was a reasonable proposition that a government party majority did not necessarily mean government control. The Fraser government, with a party majority from 1976 to 1981, did not control the Senate; at various times there were up to twelve government senators ready to vote against the government, particularly on issues of accountability. Party discipline, or the compulsory loyalty of government backbenchers to their government, has greatly increased since then. “Crossing the floor” is now such a serious step that governments are mostly able to forget the possibility.

This means that in practice election by proportional representation is the only likely means of establishing an upper house with the means to exercise a division of power. If any other construction of the institution is feasible, news of it would be welcome.

The establishment of such an upper house in a jurisdiction which does not have one, or the reform of an ineffective one, may be regarded as a “big ask”, as the jargon has it. Governments which effectively control the rest of the system are not very enthusiastic about limiting their own power, particularly when in practice this involves handing power to their rivals and opponents. Such an occurrence, however, is not entirely impossible, as witness the decision of the Victorian government in 2003, effective in 2006, to implement proportional representation in the Victorian Legislative Council.

Discussion of bicameralism in Australia arouses the morbid dread, genuine or feigned, of a repetition of the events of 1975, of an upper house forcing a government to an early election. The remedy is readily available: a fixed term parliament, whereby the lower house can be dissolved early only if it is unable or unwilling to support a government. A bill for such a change to the Commonwealth Constitution was passed by the Senate in 1982, with some Coalition senators voting against their government to pass it. By removing the power of a prime minister or premier to call elections for political convenience, the fixed term is a useful reform in itself (which is why it was dropped by the incoming government in 1983).

On the subject of reform, the governance of Australia could be greatly improved by reform, not of the primary institutions, but of the political parties, to make them more internally democratic and less able to enforce total conformity on their members.

Its value

The value of an upper house not under government control is essentially that it establishes something of a legislature which may be capable of doing what legislatures were once supposed to do. Premier Bjelke-Petersen famously had difficulty in articulating the principle of separation of powers. He could be forgiven because separation of the legislative and executive powers has virtually been lost in Australia, apart from those upper houses. The executive government legislates through its ever-compliant lower house majority. Normally no rejection or amendment, and sometimes even no debate, is allowed on proposed laws as they emerge from the secret councils of the executive. The public largely think that this situation *is* normal; parliaments are seen as merely low-quality debating panels controlled by governments, which is what lower houses are. Only upper houses violate this system of “democracy”. And, apart from those upper houses, parliaments are not allowed to discover information which government is not willing to disclose.

In the old textbooks, legislatures were supposed primarily to legislate and to inquire. Legislating meant making the laws, even if only adjusting the proposals of the executive. Conducting inquiries was seen as feedback into legislating, but more importantly could be seen as disclosing information necessary to ensure capable and honest government. Sunlight, it was said, is the best disinfectant, and the legislature was supposed to let the sunlight in.

So far as legislating goes, rejecting or amending the proposals of the “democratically elected” government is now characterised as obstruction. Whether obstruction is a bad thing obviously depends on what is being obstructed. The great fallacy that obstruction is always undemocratic because the electors have approved everything that the executive government wants to do has been too much debunked to require any further refutation.¹¹ The “obstruction” of legislation by upper houses of the kind envisaged is likely to indicate that what is proposed lacks broader popular support than the forty-odd percent of votes sufficient for governments to win office. Also, such obstruction may be in the best interests of governments by relieving them of the

¹¹ A comprehensive refutation of the ‘mandate theory’ is in S. Bach, above note 9, pp. 276–97.

obligation to attempt to implement the more extreme measures of their ideological supporters.¹²

In relation to inquiries, throwing the sunlight is more important than making better laws. If abuse of power is the evil to be avoided, the ability of an independent legislature to expose abuse is highly significant.

The point is that governments use their parliamentary majorities to suppress both activities. Legislation notoriously is ‘rubber-stamped’, with no dissent by government backbenchers, much less contribution by members of other parties, permitted. Inquiries are not permitted if they might cause embarrassment to government. It is those inquiries that are the most needed, if abuses are to be avoided. Only upper houses not under government control actually perform legislative functions by exercising to a certain extent the legislative power and the inquiry power.

Actual performance

This may be demonstrated by an examination of the activities of two such upper houses, the Senate, before and after the Howard government gained a majority in that chamber, and the New South Wales Legislative Council.

The Senate: legislation

In relation to legislation, the Senate’s record of obstruction is exceedingly thin. Those who think that governments with a monopoly of power deserve greater obstruction would not be impressed by the performance.

In the first ten years of the Howard government, during which it lacked a majority in the Senate, an average of 154 bills were passed each year.¹³ There were only 17 deadlocked bills, that is, bills that could have developed into ‘triggers’, or actually became ‘triggers’, under section 57 of the Constitution, in the parliamentary term of 2001–04, including those reintroduced from previous terms. Only seven pieces of legislation remained as ‘triggers’ at the end of that term. It may be argued that they were important bills. The contrary consideration is that, lacking broader support, they did not deserve to pass. Many more that passed were also important. In the government’s previous terms only five bills qualified as ‘triggers’. Thus there was little obstruction.

Many bills were passed because the government compromised with other parties and accepted amendments. This can hardly be called obstruction; it is what legislatures are meant to do, according to the textbooks.

An average of 860 amendments were made by the Senate to government bills in each year over that period. Amendments moved by non-government parties are not distinguished from government amendments, because government amendments were

¹² cf J. Rauch, ‘Divided We Stand’, *The Atlantic Monthly*, October 2004, pp. 39–40: ‘Unified control pushes policy to unsustainable extremes ...’.

¹³ Figures and statistics cited here were compiled by the Senate Department from the *Journals* of the Senate.

frequently offered in an attempt to overcome perceived difficulties with legislation and to gain support in the Senate. This represents a modestly significant contribution to law-making. In order to assess whether the contribution was valuable, a judgment would have to be made about each piece of legislation and each amendment. Unless it is thought that legislation is perfect as promulgated by government, it would have to be conceded at least that some useful contribution may have been made.

In the first two years after the Howard government gained its majority in the Senate on 1 July 2005, only 20 non-government amendments, out of 1650 moved, were accepted. Even amendments supported by government senators in committees were rejected in some cases, with those senators voting for the rejection. The most notable instance of this was the Telecommunications Interception Bill 2006, passed in March 2006. Unless it is thought that government legislation has suddenly attained perfection, it would have to be conceded that at least some valuable contribution may have been lost.

The treatment of the Howard government's first round of anti-terrorism legislation was particularly instructive. The intensive scrutiny and extensive amendment of that legislation by the Senate was widely welcomed; it could hardly have been called obstruction. It also provided a specimen of bicameral legislative negotiation and compromise. Subsequent instalments of anti-terrorist legislation, after the government gained its majority, were passed as the government required.

The Senate: inquiries

It has been suggested that the inquiry function is more important than the legislating function.

Over its entire history the Senate has taken measures which had the effect of compelling governments to provide information and to explain themselves in ways that would otherwise not be required. These measures ranged from insisting in 1901 on details of proposed expenditure in appropriation bills, to requiring in 2001 the publication on the Internet of details of government contacts. All of these measures depended, directly or indirectly, on governments not having control of the Senate; none would have been taken if governments had had the level of control the Howard government had between 1 July 2005 and 24 November 2007. Of particular significance was the establishment in 1981 of the Scrutiny of Bills Committee, to scrutinise all legislation to detect any violations of civil rights or of legislative propriety. That measure was taken, in a period when the government had a majority in the Senate, only because several government senators promoted it and then voted against the government on the issue. Unless it is thought that all of those measures were totally useless or deleterious in effect, it would have to be conceded that at least some contribution was made to better government.

Another method whereby the Senate conducts inquiries is to direct its standing committees to hear evidence and report on matters of public interest. In the time of the Howard government's minority in the Senate, about 180 such inquiries were conducted. The subjects ranged from property management in the public service to the treatment of children in institutional care. It would be difficult to maintain that any of

those inquiries told the public nothing that was not already known, or that the public had no right to know about the additional information produced.

After 1 July 2005 the Howard government, through its majority in the chamber, controlled all references to committees. With only two or three exceptions, all inquiries were government-friendly; none likely to lead to embarrassment or political difficulty for the government were approved. Non-government initiatives to refer matters to committees were overwhelmingly rejected. In many instances inquiries were designed to disconcert state Labor governments, or to promote the government's agendas. In 2006 the government gave itself the majority and the chairs of all of the standing inquiry committees, thereby adding another level of control. The procedures for sending bills to committees for public input, established by the Senate in 1988, were retained, but only referrals approved by the government were allowed. Committees were placed under unreasonable deadlines for inquiries into bills; the average time for such inquiries declined from 40 to 30 days.

Another way in which the Senate has conducted inquiries in the past is by means of orders for the production of documents, usually requiring ministers to disclose information about matters of public concern. The Howard government, before gaining its majority, was building up a record of refusals to comply with orders for documents. There was also an increasing tendency simply to refuse rather than to make out some argument for non-disclosure on public interest grounds. In the Parliament of 1993-96, 53 such orders were made, all but 4 being complied with. In the Parliament of 1996-98, 48 orders were made and 5 were not complied with. In the Parliament of 1998-2001, there were 56 orders, and 15 not complied with, in that of 2002-04, 89 orders and 46 not complied with. During the Howard government's majority only one motion for production of documents was agreed to. All other motions for documents were rejected, usually with no reasons given, regardless of the nature of the documents concerned.

The refusal of the Howard government during its majority to allow any inquiries into politically difficult matters left the Senate estimates hearings as the last forum for asking questions about such matters, and they were under sufferance. This is shown by the instruction in 2006 to officers not to answer any questions about the AWB Iraq wheat bribery affair. It was explicitly stated that this was not a claim of public interest immunity, simply a flat refusal.¹⁴ The only reason given was that the Cole commission of inquiry was looking into the matter. It was not claimed, and could not be claimed, that there was any parliamentary/procedural or legal reason for not answering questions in the hearings. It was simply asserted that having two inquiries would be undesirable. The only disadvantage of different inquiries is the danger of contradictory answers. The refusal to answer some questions was repeated after the Cole commission reported.

The AWB affair is also instructive because the commission of inquiry came about only because of pressure from overseas, ironically starting with pressure from

¹⁴ Senate Finance and Public Administration Legislation Committee, transcript of estimates hearings, 13 February 2006, pp. 35, 139.

members of a legislature which is freer than ours, the US Congress. Without the element of overseas pressure, and without a free-range Senate, we would probably have remained in the dark. It is the AWB-type affairs we do not know about which are cause for worry.

In other committee hearings, it became common for ministers and officers to refuse to answer questions, often without giving any reasons. They did so secure in the knowledge that the government-controlled Senate would not take the kind of remedial action taken in the past, such as declining to pass legislation until relevant information is supplied.

It is unrealistic to expect an investigative media to perform the role of a hobbled Senate. Many people, especially public office-holders, will not talk except in a protected forum. Only the parliamentary forum can offer the protection of parliamentary privilege, if, of course, it is allowed by government to have something to protect.

Apart from the desirability of informing the public, it is in government's long-term interest not to conceal wrongs in the body politic. Governments never seem to learn this. It may be, as government senators asserted, that there were no systemic problems in the Regional Partnerships and Sustainable Regions Programs, under which large sums of public money were handed out to private bodies and persons for various "development" projects. But surely it was useful to have a Senate committee looking closely at instances where expenditure at least appeared dubious, to help ensure that things remained on track before a spectacular wreck occurred.¹⁵ Suppressing the legislative inquiry function only allows evils to multiply, and lengthens the time it takes for them to burst forth. The dominant ministerial principle of keeping the lid on things is not good government.

It is often said dismissively that Senate inquiries are based on party politics. Indeed they are. Free states work through party politics. Subjecting the rulers to the scrutiny of their rivals and opponents is what the safeguard is all about.

The record shows what would have been lost without the Senate, or with the Senate perpetually under government control. There would have been less information available to the public, and governments would have been freer to practise malfeasance and concealment. Perhaps the economy would have been in better shape without all that legislative interference, but abuse of power unchecked can ultimately defeat even the policies approved by economists. It is also apparent what was lost very soon after the government gained its majority.

The experience of the Howard government majority in the Senate may have reinforced in the minds of the electors the impression that a government Senate

¹⁵ Senate Finance and Public Administration References Committee, *Report on Regional Partnerships and Sustainable Regions Programs*, October 2005, Parliamentary Paper 226/2005. This program was subsequently the subject of a devastatingly critical report by the Australian National Audit Office, released just before the 2007 election (Report No. 14, 2007-08). Delaying exposure of the problem only increased the political damage.

majority is not healthy and should be avoided, and may have reinforced the tendency of some electors to split their votes in Senate and House of Representatives elections. It is not unrealistic to suggest that the Howard government's Senate majority was a significant factor contributing to its defeat in the 2007 general election. One former minister in that government thought so.¹⁶

New South Wales Legislative Council

In relation to this house, a single but telling example is offered: its ability to compel governments to disclose information they otherwise wish to keep secret for their own protection.

Like the Senate, the Council has used orders for production of documents to gain access to information held by government about matters of public concern. When met with refusals, however, the Council was bolder and more determined than the Senate. In 1996, when the Treasurer refused to disclose documents in response to an order, the Council ejected him from the chamber and from the building. He was sufficiently ill-advised to take the Council to court, and comprehensively lost the case. The Supreme Court upheld the power of the Council to impose a penalty for refusal of an order for documents. After a few more contests, the Council established a situation whereby it is able to obtain any government documents it requires, subject only to independent arbitration of any government claim that it would not be in the public interest to disclose particular information.¹⁷ Council orders for documents have now become so unremarkable that they go unreported, and the public is unaware that particular disclosures have been brought about by the Council. For example, the first disclosures of disturbing information about the financial entanglements of the cross-city tunnel was the result of a Council order.

A great volume of information that would otherwise have been concealed from the public has been disclosed through this legislative action. Government has been more accountable and less able to conceal any misdeeds as a result.

What do we want?

However cogent the argument, there will remain a hard core of the hard-nosed who only want governments to get on and govern, and who require only the ability at regular intervals to remove them if they do not. Such people will continue to scorn all safeguards as wasteful and inefficient, a drag on the market.

The real realists, however, are those who know that their pockets will not remain unpicked and their rights untrampled if their chosen representatives are given a free rein between elections indefinitely. Such people are properly sceptical of the claim

¹⁶ Mr Andrew Robb, who stated that control of the Senate was a 'poison chalice' for the government and lack of check and balance contributed to its defeat in 2007 (ABC Radio National, 13 December 2007).

¹⁷ *Egan v Willis and Cahill* [1996] 40 NSWLR 650; [1988] 158 ALR 527; *Egan v Chadwick and others* [1999] 46 NSWLR 563. Unfortunately, the Supreme Court held that documents revealing cabinet deliberations could not be compelled by the Council. This limitation would not apply to the federal Houses.

that ‘strong government’ equals economic growth.¹⁸ They will appreciate the difficulty of judging a government if it controls the information they receive. They will therefore welcome the timely installation of safeguards to curb malfeasance at an early stage. Australia is now undersupplied with safeguards, and oversupplied with public scandals, not counting the misdeeds we do not get to hear about. We should preserve the safeguards that exist and think very carefully about new ones.

¹⁸ Such scepticism has a firm empirical basis: A. Lijphart, ‘Australian democracy: modifying majoritarianism?’ in M. Sawyer & S. Miskin (eds), *Representation and Institutional Change: 50 Years of Proportional Representation in the Senate. Papers on Parliament* No. 34, December 1999, pp. 55–69.

The Senate's Power to Obtain Evidence

Harry Evans

The Senate Finance and Public Administration Committee at a hearing on 3 September 2003 asked for a brief paper on the relationship between the formal power of the Senate to obtain evidence and the limitations on that power which have gained some parliamentary recognition but not legal status. A paper was prepared accordingly and published by the committee.

This is an updated version of that paper.

The power

The Senate has a general power, not subject to any known legal limitations, to compel evidence, that is, to require the attendance of witnesses, the answering of questions and the production of documents, and to impose penalties for default.

There are two sources of this power:

- Section 49 of the Constitution confers on each House of the Parliament the powers of the United Kingdom House of Commons as at 1901. The power to compel evidence was one of the powers of the House of Commons, regularly and recently exercised before 1901, and is therefore one of the powers adhering to the Senate under this section.
- The power is inherent in the legislature of a self-governing body politic. This would not be mentioned here except for the very strong articulation of this inherent legislative power doctrine by the United States Supreme Court in respect of the Houses of Congress, notwithstanding the absence from the

United States Constitution of any explicit reference to the power.¹ Those judgments are important in establishing that the power is *legislative* in character. Also, Australian courts have shown some deference to United States Supreme Court judgments, and this doctrine may become important in Australia in the future.

Section 49, however, is the undoubted source of the power. The section allows the Parliament to change its powers by legislation, but no relevant legislative change has been made to this power, except for a limitation of the penalties which may be imposed.²

There are no known limitations in law to this power. There are no authoritative court judgments establishing any such limitations.

There may be limitations in law which might be found by the courts in Australia if relevant questions were ever tested. It must be emphasised, however, that such questions have not been tested, and therefore discussion of possible legal limitations does not go far beyond speculation.

There are three possible sources of such possible legal limitations:

- In the United Kingdom there are two presumed limitations which might be held to apply in Australia under section 49.
- The United States Supreme Court has found limitations on the congressional power of inquiry arising from the United States Constitution, and these findings could be persuasive to the Australian courts because of similarities in the Australian Constitution.
- There might be other limitations arising from the Australian Constitution.

There are also well-established limitations which are observed as a matter of parliamentary practice. They correspond to some possible legal limitations.

The limitations with some parliamentary recognition and the possible legal limitations may be summarised as follows.

The monarch

In the United Kingdom it is presumed that the House of Commons could not summon the monarch, and this might transfer to Australia as an immunity of the monarch's representative, the Governor-General. There is a parliamentary practice of making 'addresses' to the monarch and the representative in both jurisdictions,³ and the

¹ Most notably in *McGrain v Daugherty* 1927 273 US 135 at 174–5. An examination of the authorities on this point is contained in a judgment of a US District Court in *Committee on the Judiciary, US House of Representatives v Miers* 2008 (not reported).

² *Parliamentary Privileges Act 1987*, s.7. The act also provides greater scope than the previous law for the courts to review any imposition of penalties, but this does not make any more likely the discovery of any legal limitations on the inquiry power.

³ For the 'humble Address' for documents, see *Erskine May's Parliamentary Practice*, 23rd ed., 2004, pp. 711–12. Senate Standing Orders 165, 171 and 172 provide for addresses.

foundation of this practice might be taken to be a lack of power to make demands of them.

Members of other houses

In the United Kingdom it is well established that the House of Commons cannot summon members of the House of Lords.⁴ This rule in that jurisdiction probably has a great deal to do with the status of the lords as peers of the realm, and on this basis the limitation would not automatically transfer to Australia.

In the procedural rules of the Australian Houses, however, there is a well-established principle that each House does not seek to compel the members of the other House.⁵ This is based on a requirement for comity between branches of the legislature.

It is possible that the courts in Australia might find this rule to have a legal basis in the Constitution, but it is at least just as likely, on past performance, that the courts would say that it is a matter for the two Houses to resolve between themselves and not a legal question. In the Senate this rule of comity has been regarded as extending to members of state and territory legislatures, and the Senate and Senate committees have accepted and acted on advice to that effect.⁶

Legislative power

The power to compel evidence may be limited to subjects within the legislative competence of the Commonwealth.

There are old High Court judgments suggesting that the Commonwealth executive may not conduct compulsory inquiries into matters beyond the Commonwealth's legislative competence.⁷ The United States Supreme Court explicitly identified this limitation as applying to the Congress,⁸ and the American cases would probably be persuasive in Australia (but there is the difficulty that the Congress relies on inherent power and not prescription).

It would not be a significant limitation, given the ability of the Commonwealth to legislate on most subjects in one way or another, but it is observed in practice in Senate inquiries.

⁴ A restatement of this rule occurred in United Kingdom House of Commons, Fourth Report of the Transport, Local Government and the Regions Committee, House of Commons Paper No. 655, 2001–2.

⁵ Senate Standing Orders 178, 179.

⁶ Senate Select Committee on the Australian Loan Council, interim report, March 1993, Parliamentary Paper 78/1993; see *Odgers' Australian Senate Practice*, 12th ed., 2008, p. 60.

⁷ *Attorney-General for the Commonwealth v Colonial Sugar Refinery Co Ltd* 1912 15 CLR 182, 1913 17 CLR 644; *Lockwood v the Commonwealth* 1954 90 CLR 177 at 182–3.

⁸ The limitations applying to congressional inquiries were summarised as preventing inquiries into private affairs unrelated to a valid legislative purpose, or in areas in which Congress is forbidden to legislate, or for purposes properly belonging to law enforcement, or in violation of individual rights guaranteed by the Constitution: *Quinn v US* 1955 349 US 155 at 160–1. But an inquiry does not need to refer to specific legislation: *Eastland v US Servicemen's Fund* 1975 421 US 491.

Other Australian jurisdictions

There may be a legal basis to a limitation which is observed in practice by the Senate, namely, that Senate committees should not seek to summon the officers and documents of state or territory governments. As with the rule about members of other houses, this is a matter of comity between bodies which possess similar political powers and which ought to demonstrate mutual respect for each other.

No Senate committee has ever summoned a state office-holder; the practice is to ask the responsible state minister to provide relevant state public servants to give evidence and relevant documents, and to proceed by way of invitation with all other state office-holders.

There are High Court judgments to the effect that the Commonwealth may not act in such a way as to prevent the essential functioning of the states,⁹ and these could form the basis for a legal doctrine supporting the parliamentary practice as a matter of law. A Senate committee sought the advice of the Clerk and subsequently of a distinguished professor of law, and having received much the same message that it probably could not summon state officers, abandoned its inquiry.¹⁰

Surprisingly, perhaps, this question has not been litigated in the United States. The view of congressional advisers is that the federal Houses may summon state officers in pursuit of inquiries into matters within the legislative competence of the Congress, but the cited precedents are old and uncertain. In any event, the United States Constitution is, contrary to the usual perception, more centralised than its Australian counterpart in some respects, and Congress has powers over the states with no Australian equivalent which could support the inquiry power in this regard.¹¹

Other houses' proceedings

The various houses of parliaments generally follow the principle that one house cannot inquire into proceedings in another house.

A basis in law for this would be the immunity of parliamentary proceedings from impeachment or question in any other place, the Bill of Rights of 1689, article 9 immunity which adheres to all of the Australian parliaments, and which is interpreted as applying to each individual house.¹²

⁹ *Melbourne Corporation v the Commonwealth* 1947 74 CLR 31; *Queensland Electricity Commission v the Commonwealth* 1985 159 CLR 152; *Re Australian Education Union, Ex parte State of Victoria* 1995 128 ALR 609; *Austin v Commonwealth* 2003 195 ALR 321.

¹⁰ Senate Select Committee on the Victorian Casino Inquiry, Report, *Compelling Evidence*, December 1996, Parliamentary Paper 359/1996, pp. 24, 41–67; see *Odgers*, 12th ed., 2008, p. 60.

¹¹ The precedents were referred to in advices printed in the report mentioned in note 10. The Supreme Court of the Province of Prince Edward Island, in Canada, held that officers of a federal government agency had no immunity from a summons issued by a committee of the Legislative Assembly of the province in the course of an inquiry into a matter within the legislative power of the province. This decision was not appealed and the officers subsequently appeared before the committee. (*Attorney General (Canada) v MacPhee*, 2003 PESCTD O6).

¹² See *Odgers*, 12th ed., 2008, p. 49, for the related question of whether Commonwealth legislation could override state parliamentary privilege.

This does not affect political comment on events in other houses, but formal inquiries into other houses' proceedings are avoided. It would obviously be difficult properly to conduct bicameral relations within a jurisdiction, or federal relations between jurisdictions, in the absence of this rule, so it is a matter of comity apart from any question of law.

Unlike the other possible limitations considered here, this restriction applies regardless of whether witnesses and documents are summoned. Thus, a committee of one house does not hold an inquiry into events occurring in the course of proceedings in another house, and does not take evidence on such a matter from a member of the other house, even if the member appears and gives evidence voluntarily.

The judiciary

It is generally assumed that the Senate and its committees would not summon members of the judiciary, as a matter of mutual respect between the legislature and the judicial branch. There is, however, no basis for any legal immunity.

There is one circumstance in which judges might be summoned: in an inquiry by the Senate into whether a judge of a federal court should be removed from office by resolution of both Houses under section 72 of the Constitution.¹³

'Executive privilege'

Executive governments in Australia and comparable jurisdictions have frequently claimed that they have a right to withhold information from the legislature if the disclosure of the information would not be in the public interest. No legislature worthy of the name has conceded that there is any such right or privilege adhering to the executive government.¹⁴

Nor have courts in any of those jurisdictions found that the claim has any legal basis in relation to the *legislature*, as distinct from proceedings in the courts. Discussion of this matter has not been helped by identifying the law relating to proceedings in the courts with any practice which might apply to proceedings in the legislature or its committees. The courts have expounded the law relating to what was called 'crown privilege' and which, via 'executive privilege', came to be called 'public interest immunity'. Basically, the law now is that the courts will consider and determine whether any information should not be produced in legal proceedings because it would be contrary to the public interest to do so. The term 'public interest immunity' has been adopted in the parliamentary sphere, partly in the hope on the part of parliamentarians that the same rule would apply there, namely, that the legislature will determine any claim of immunity by the executive government. The relevant law, however, does not apply to the legislature.

The Senate has asserted, by resolution, the principle that it is for the Senate to determine any claims by the executive government that information should not be produced.¹⁵ The executive government has not accepted this and has persisted in refusing information to the Senate. Such disputes have been regarded as matters for

¹³ See *Odgers*, 12th ed., 2008, pp. 519–20.

¹⁴ This matter is discussed at some length in *Odgers*, 12th ed., 2008, pp. 468–90.

¹⁵ *Odgers*, 12th ed., 2008, p. 468.

political resolution. The Senate has adopted various remedies in relation to government refusals of information, including declining to pass legislation until relevant information is produced.¹⁶

In other jurisdictions a similar situation prevails. The houses of the United States Congress have not conceded that there is any such thing as executive privilege in relation to the legislature. The US Houses possess inherent powers to require the attendance of witnesses, the giving of evidence and the production of documents, and to punish contempts. They have enacted a statutory criminal offence of refusal to give evidence. They may also seek to have their requirements enforced through the courts by civil process. In serious cases of conflict between the Houses and the administration over the production of documents, administration officers are 'cited' for contempt, but these matters usually end in some compromise and with documents handed over. In some cases, presidents have successfully withheld documents from the Houses. The courts, while suggesting some constitutional basis for executive privilege, and accepting jurisdiction in particular cases, have not become involved in determining specific claims of executive privilege.¹⁷

The recognised immunities of other houses' proceedings and of their members may have the effect of shielding the activities and the ministers of governments, in so far as those activities occur in the course of parliamentary proceedings or are carried on by members of another house, respectively. It is not possible to extrapolate from this that government activities as such, or ministers as such, have any kind of immunity. Nor can one extrapolate from the non-existent immunity of government activities or ministers an immunity possessed by *former* ministers. There is therefore no basis for the suggestion, made in the context of the Select Committee on a Certain Maritime Incident, that former ministers of the House of Representatives may not be summoned by a Senate committee. The immunities having parliamentary recognition, of proceedings and serving members, simply do not add together to make an immunity of former ministers. Even if a court were to find a legal basis for those recognised immunities, it would be highly unlikely to make the leap to a new, unrecognised one, and in doing so impose a new limitation on parliamentary processes and a new escape route for governments to avoid accountability. In any event, former House of Representatives ministers have appeared under summons before a Senate committee.¹⁸

¹⁶ *Odgers*, 12th ed., 2008, pp. 488–9.

¹⁷ *Senate Select Committee v Nixon* 1974 498 F 2d 725; *US v Nixon* 1974 418 US 683; *US v AT&T* 1977 567 F 2d 121; *US v House of Representatives* 1983 556 F Supp. 150; *In re Sealed Case* 1997 121 F 3d 729; *Committee on the Judiciary, US House of Representatives v Miers* 2008 (not reported).

¹⁸ The claim was made by the Clerk of the House of Representatives in support of ex-minister Peter Reith's unwillingness to appear before the Senate Select Committee on a Certain Maritime Incident. Contrary advice was provided by the Clerk of the Senate and Mr Bret Walker, SC (counsel for the New South Wales Legislative Council in the cases referred to in note 24). Subsequently, equivocal support was given to Mr Reith's position by Professor G. Lindell and a Mr A. Robertson, SC. The various advices were published by that committee. (Report of the committee, 23/10/2002, PP 498/2002; SD, 23/10/2002, pp. 5756–7). The claim was not accepted by any member of the committee or by the Senate. Former Prime Minister Hawke and former Treasurer Kerin appeared under summons before the Senate Select Committee on Certain Aspects of Foreign Ownership Decisions in relation to the Print Media in 1994, having earlier declined invitations to appear.

From time to time the claim has been made that it is not appropriate for the personal staff and advisers of ministers to appear before parliamentary committees, or it is not appropriate for them to be summoned, depending on which of two versions of the claim is made. This notion has particular appeal to ministers. The suggestion is frequently elevated into a supposed 'convention', but that would mean that it must be a frequently-breached convention. Presumably the rationale of the alleged convention is that personal staff and advisers are not action-takers or decision-makers in the system of government, but merely extensions of their ministers, who are entirely responsible for what occurs in their offices. This rationale has been punctured by numerous examples of ministerial staff taking actions and making decisions, and by ministers declining to accept responsibility for the actions and decisions of their personal staff. It was usually stated to be a matter of appropriateness, not law: ministerial staff, it was said, should not be called, even though the power to do so is there. In the context of the Select Committee on a Certain Maritime Incident, however, it was suggested that they have some kind of immunity arising from the supposed immunity of their ministers.¹⁹

There is no basis for any such immunity, either in parliamentary practice or in law. Ministerial staff have appeared before Senate committees to explain their roles and actions, voluntarily several times and once under summons (the latter occasion accompanied by the usual protestations that it would not set a precedent, etc., which only serve to demonstrate that the power is there).²⁰

There has never been any question of ministerial staff having any immunity in the United Kingdom.²¹ In the United States various administrations have claimed that it is not appropriate for presidential staff and advisers to give evidence to congressional committees, but many such persons have appeared, both voluntarily and under summons.²²

As a matter of practice, Senate committees do not normally summon Commonwealth public servants, but ask the relevant ministers to send the relevant officers. There is no doubt, however, that the Senate and its committees may summon public servants. From time to time Senate committees have issued subpoenas to public servants in particular circumstances. On several occasions the Senate has directed that particular officers appear in particular inquiries.²³

The claimed 'executive privilege' is often seen as a matter of content of information: particular categories of information, such as cabinet documents or departmental advice, should not be summoned. Neither in law nor in parliamentary practice is there any substantive basis for such an immunity of particular information from legislative inquiries.

¹⁹ See the material referred to in note 18.

²⁰ See *Odgers*, 12th ed., 2008, p. 430.

²¹ This is also made clear in the report referred to in note 4.

²² H. Relyea & T. Tatelman, *Presidential Advisers' Testimony before Congressional Committees: an overview*, CRS Report for Congress, 10 April 2007. The District Court judgment in *Committee on the Judiciary, US House of Representatives v Mier*, 2008 (not reported) included a finding that such persons have no immunity.

²³ See the precedents listed in *Odgers*, 12th ed., 2008, p. 425.

In this connection it is necessary to caution against being misled by certain court judgments in the state of New South Wales. The Court of Appeal in that state examined the power of the Legislative Council to require the production of government documents and to impose a penalty on a minister for non-compliance. While upholding that power, the court delineated at least one limitation arising from the constitutional position of the cabinet and the special status of its deliberations.²⁴ The powers of the New South Wales Houses, however, rest on a common law doctrine that they are such as are necessary for the Houses to perform their legislative functions. This doctrine was originally expounded in the context of, and still has as a substratum, the status of those Houses as creations of the British Parliament, in some sense subordinate legislatures. The law as explicated in those cases cannot readily be ascribed to those jurisdictions where the houses possess House of Commons powers by prescription. In particular, it cannot be assumed that the apparent immunity from production on the order of a house of documents recording cabinet deliberations applies in the other Australian jurisdictions. Nor is there any support for it in the comparable overseas jurisdictions.

Imposing penalties

It would be easy for the Senate to impose penalties on private persons for non-compliance with Senate inquiries. Such persons, however, usually readily cooperate with inquiries, without the need for subpoenas. It is executive governments which are most likely to refuse information to the Senate and its committees. It is executive governments which usually seek to conceal information from the legislature and the public. It is executive governments, with their vast resources, which can most readily resist the requirements of the legislature.

The Senate declared by resolution in 1994 that it would not impose penalties on public servants who resist Senate inquiries on the instructions of a minister.²⁵ While this self-denying ordinance limited the scope for any coercive action, it placed the responsibility for executive concealment where it ought to be, on the political arm of the executive, the ministry.

Coercing ministers has been seen as a matter for political action rather than the imposition of the limited penalties which could be imposed on them personally. This was implicit in the Senate's resolution. It is also a matter of political will.

Third party assessment

One method of resolving disputes between the Senate and the executive government about the production of government information is to have a neutral third party assess the disputed information and determine any question of non-disclosure for public interest reasons. The Senate Privileges Committee recommended this procedure, and it has been used by the Senate in some cases. The Auditor-General has been asked to make reports on matters involving government expenditure.²⁶ is process, however, depends on the executive cooperating by agreeing to the third party, to the production of the information to be

²⁴ *Egan v Willis and Cahill*, 1996 40 NSWLR 650, 1998 158 ALR 527; *Egan v Chadwick and others*, 1999 46 NSWLR 563.

²⁵ *Odgers*, 12th ed., 2008, pp. 481–2

²⁶ *Odgers*, 12th ed., 2008, p. 483.

examined, and to the consequent assessment of the information. If the ministry refuses to cooperate, this may be taken as a further sign that it has much to hide, but the dispute remains unresolved.

Self-imposed limitations

Any limitations on the Senate's inquiry powers, therefore, are essentially self-imposed.

If the Senate were to seek to impose penalties on a minister, this could lead to a court case in which the postulated legal limitations on the inquiry power might be tested. As has been suggested, however, the courts might well find the existence of any such limitations to be a political question incapable of judicial resolution. As in the United States,²⁷ the courts may well prefer to stay out of disputes between the legislature and the executive.

If legislative and political remedies are resorted to in such cases, there can be no question of judicial intervention. Any restraint in the use of such remedies is completely self-imposed.

²⁷ In, for example, *US v House of Representatives* 1983 556 F Supp. 150. Dismissing a suit brought by the administration to declare lawful its resistance to a House demand for documents, the court urged the parties to reach a political compromise (which they eventually did, victory going to the House), while conceding that a criminal contempt prosecution might force the court's hand. In *Committee on the Judiciary, US House of Representatives v Miers* 2008 (not reported) the District Court upheld the lawfulness of the committee's subpoenas, but declined to adjudicate on specific claims of immunity from producing particular information. There is no provision for a prosecution in Australia. The imposition of a penalty for contempt here might force a court's hand, but an Australian court would also have ample scope to remove itself from a legislative/executive conflict.



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