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Elections as Rituals: Private, Communal and Public*

Graeme Orr

Introduction—ritual and aesthetics

The area that we will traverse today falls within the law of politics. As a fairly new field, the law of politics hoovers up not just electoral law, but the rules governing parliaments, parties and money in politics. It mixes constitutional law, administrative issues and political science concerns, in equal parts. For the best part of two decades, I have been exploring the law of politics. It has been fun helping found a new sub-discipline.

Ten years ago I paused from the labour of wading through statutes and case law, and wrote an essay called ‘The Ritual and Aesthetic in Electoral Law’.¹ The essay was an attempt at a sociological understanding of elections *as events*, events we experience. Ten years later I turned the little tunes in that paper into a book titled *Ritual and Rhythm in Electoral Systems*.² Its title prompted one wag to ask whether I was Catholic. (I am not. As we will see, the ‘ritual’ is secular and the ‘rhythm’ has nothing to do with the Billings method and everything to do with the way elections set up the seasons of politics).

Today’s talk will distil some of the flavour of that book. Beyond thinking about elections, my overall theme is the importance of thinking about public institutions and practices in terms of how we experience them, and what meanings might be embedded in their forms and patterns.

On the way to this forum I was reflecting on the charms of Canberra. Non-Canberrans are meant either to embrace, with awe, Canberra’s great public buildings and national symbols. Or we are meant to malign its sprawling suburbs and lack of dynamism. But what strikes me most is that Canberra is a gracious and spacious city. It is quintessentially Australian in its natural environment. Yet in one key aesthetic aspect Canberra seems more European than English-speaking. It is the only city in Australia

* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra, on 5 February 2016.

¹ Graeme Orr, ‘The ritual and aesthetic in electoral law’, *Federal Law Review*, vol. 32, no. 3, 2004, pp. 425–50; see also ‘Ritual in the law of electoral politics’ in Glenn Patmore and Kim Rubenstein (eds), *Law and Democracy—Contemporary Questions*, ANU Press, Canberra, ACT, 2014, pp. 115–29.

² Graeme Orr, *Ritual and Rhythm in Electoral Systems: A Comparative Legal Account*, Ashgate, Farnham, Surrey, 2015.

that doesn't bombard you with billboards and advertising. Commerce is here, but it is not the dominant motif. Canberra has an aesthetic that both reflects and reinforces the culture, and the public service and governmental values, of the place. In our lives, appearances matter.

Law and culture

Thinking about ritual occurs at the cusp of political culture and law. The institutions and rules of democracy at once open up *and* also constrain the space in which great public events like elections occur. Culture or law? Chicken or egg? At one level it hardly matters: they obviously feed back upon each other, symbiotically.



Figure 1: Japanese street campaigning.
Image courtesy of Nigel Orr



Figure 2: Barbie for President 2004 doll

Take Japan (figure 1). It has a parliamentary and party-based system, like Australia. So it has a collective rather than individualised politics. But unlike Australia, in Japan campaign expenditure is limited by law. And Japanese public funding of election campaigns not only pays for posters on billboards—billboards that are regulated by local government. It even funds one or more campaign vehicles (cars or boats) per candidate, whilst strictly limiting more costly forms of campaigning.³ Part of the rationale is equality of resources between candidates. But the law also perpetuates traditional street-level campaigning, complete with the white gloves.

³ *Public Offices Election Act 1950* (Japan), article 141. I am indebted to Akiko Ejima for this citation.

In such street-level campaigns we see the classic inversion of election time—when the rulers come down to us, to beg for votes. Yet Japanese law also bans house-to-house solicitation of votes.⁴ Such a ban once would have been rationalised as minimising opportunities to bribe individual voters: but in a wealthy contemporary democracy it suggests a cultural more. Face-to-face, domestic solicitation takes nerve and may be considered impolite.

In contrast, the United States notoriously has a more ‘look at me’ culture. The US Constitution requires a directly elected executive or presidency, not the parliamentary model where leaders are chosen by their MPs as peers. The first amendment of the US Constitution mandates free speech. This in turn forbids any limits on political expenditure, so private political money is king. And US statute law requires primary elections, where every elector can help preselect candidates for the general election. The whole structure, from Constitution to party primary laws, is designed to weaken parties and empower charismatic, well-heeled individual candidacies. ‘Go Vote, Go Run, Go Lead, Go Girl’, as in the Barbie-for-President 2004 doll I found in Los Angeles (figure 2).

The examples can be multiplied. We can contrast our neighbours, across the ditch in Aotearoa. New Zealand has a modest campaign culture, more like the British than Australia’s. There is an accent on text-based campaigns through billboards and pamphleteering. There is also a healthy dose of humour and even disrespect, as the practice of comic defacing of electoral billboards reveals. NZ law plays a big role in this, by setting short parliamentary campaign periods and then regulating them—quite unlike the US. NZ law in fact limits (as the UK bans altogether) paid television advertisements at election time, in favour of a rationed system of free air time for parties. NZ also tones things down by banning electioneering *completely* on polling day.⁵

Why we have elections—the purposes and values behind electoral democracy

Lawyers and government officials prefer to think in terms of analytical classifications or normative goals rather than messy things like culture. Figure 3 offers a diagram which I discuss with my students in the law of politics. It shows the various answers to the question ‘Why do we have elections?’ The diagram groups together the

⁴ ACE, *Election System in Japan*, ACE Electoral Knowledge Project, 2007, pp. 42–3.

⁵ Andrew Geddis, *Electoral Law in New Zealand*, LexisNexis, Wellington, NZ, 2007, chapter 9 (broadcasting rules) and *Electoral Act 1993* (NZ) section 197. In comparison Australia allows open slather election advertising and broadcasting, except for a ‘blackout’ on broadcast advertising in the last three days of the campaign. Like the New Zealand ban on any campaigning on polling day, this was designed to create a quiet period of repose.

different concepts through which we can understand electoral democracy, and the goals that might drive regulation.

The top two quarters of the diagram are by far the dominant strains in official and academic thinking. Officially, we think about elections either as instruments of government or as triumphs of liberal democracy. Yet when you talk to the media, or follow conversations at parties, the bottom half of the diagram rears its head. The elections as charade view is a cynical, outsiders' counterpoint to the idea of elections as integrity mechanisms. My theme today however occupies the neglected other quadrant. It is the idea of electoral democracy as a 'secular ritual'.

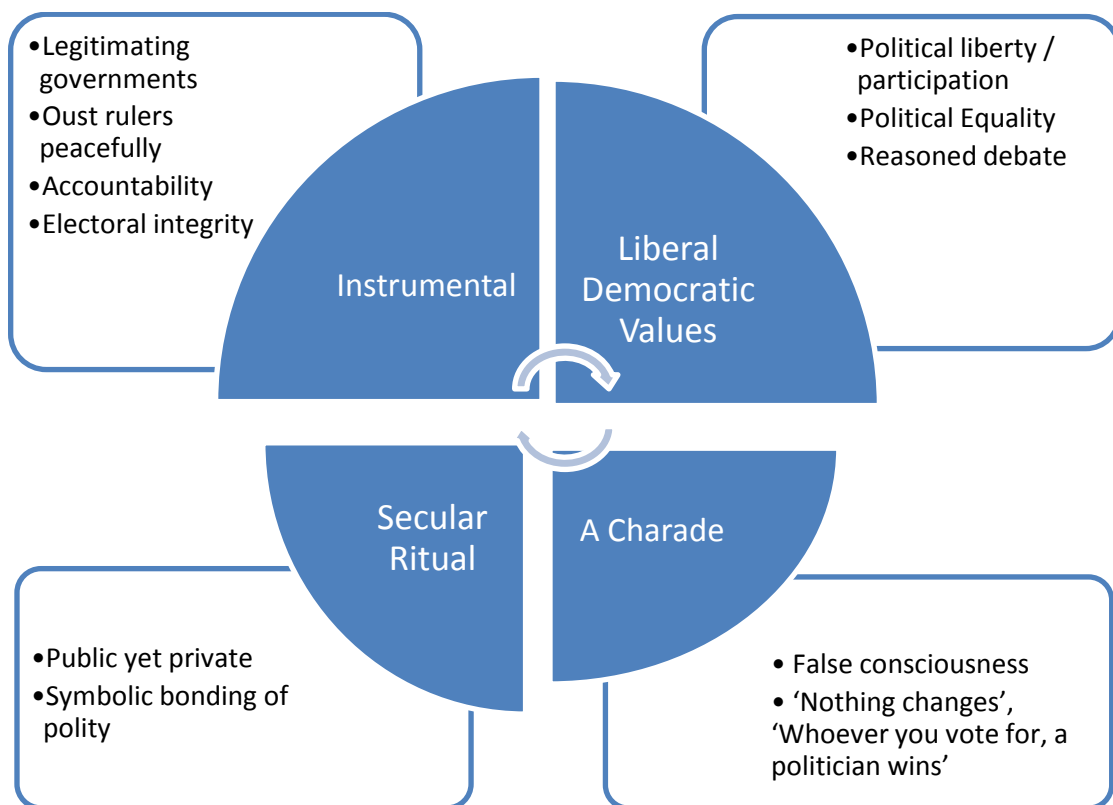


Figure 3: Purposes of elections

We can define ritual as any *patterned human activity embodying social value or meaning*. The patterned, recurrent and hence rhythmical nature of rituals does not mean that just any old habit is a public ritual. I scratch my flaky scalp when I am bored or agitated: it is just a habit with no meaning. Rituals can also be private: someone who takes her coffee at the same place and time every day might seem to be in a routine or even a rut; but if the café is where she met her late partner, we would recognise that she is living out something meaningful embodied in a personal ritual. It is my contention that when we think about electoral democracy and constitutional law and institutions more widely, we need to think about public or shared rituals. In saying we need to, I do not mean we should worship ritual uncritically. Rituals can be

rich and positive. But they also can be ‘ritualistic’, in the negative sense, like a North Korean harvest festival.

So my book was born of dissatisfaction with the language and concepts we use to describe and evaluate the framework through which we run elections. That language and those concepts draw on ideas of elections as instrumental competitions for power, whose *integrity* must be managed. Or they draw on theories of elections as great exercises destined to achieve *liberal values* like political freedom and equality and, if we are optimistic, popular deliberation. In the instrumental or integrity model, the analysis is drily numerical. In the vision of elections as cornerstones of liberalism, the analysis is lofty.

Don’t get me wrong. Each of these perspectives is vital to encapsulate the ideal of free and fair elections. However, we—especially academics, bureaucrats, politicians and judges who study or shape the electoral process—rarely address elections from the *experiential* dimension. There are exceptions. Some historians have focused on early elections as communal events.⁶ Sociologists also sometimes consider the colour and meanings of wider political practices, like public demonstrations. In recent years, two insightful professors of politics, Ron Hirschbein and Stephen Coleman, have explored the rites and experiences of voting in the US and the UK.⁷

The study of electoral systems however has largely lacked this dimension. It has been fixated on the outcome of electoral democracy and not on the journey. It concerns itself with ‘purposive goals’ rather than the ‘latent function’ of elections, to quote from Professor Jean Baker.⁸ We purport to know a lot about elections, through abstractions, book learning and through quantitative studies of voter behaviour and electoral statistics. We do so without sufficient concern for knowing about the electoral experience, let alone how systems and rules shape that experience.

Cocooned in these instrumental and liberal analyses, we forget that elections are *nothing* if not grand social events, events whose configuration shapes our experience of electoral democracy. Elections are giant rituals. They are recurring political masquerades and festivals. Each election itself is then made up of lots of what I call

⁶ An excellent example, from the US perspective, is Mark W. Brewin, *Celebrating Democracy: The Mass-Mediated Ritual of Election Day*, Peter Lang, New York, 2008. From the UK perspective see Frank O’Gorman’s work, especially his *Voters, Patrons and Parties: The Unreformed Electoral System of Hanoverian England, 1734–1832*, Clarendon Press, Oxford, 1989. Jon Lawrence has recently woven past and present campaign styles and norms together in his incisive and entertaining *Electing Our Masters: The Hustings from Hogarth to Blair*, Oxford University Press, Oxford, 2009.

⁷ Ron Hirschbein, *Voting Rites: The Devolution of American Politics*, Praeger, Westport, Conn., 1999 from a philosophical perspective, and Stephen Coleman, *How Voters Feel*, Cambridge University Press, Cambridge, 2013 from both an empirical and theoretical sociology-of-politics perspective.

⁸ Jean H. Baker, *Affairs of Party: The Political Culture of Northern Democrats in the Mid-Nineteenth Century*, Cornell University Press, Ithaca, 1983, p. 262.

‘everyday rituals’: campaign activities, balloting, declarations of results, investitures. They are events whose rhythms, patterns and activities are either set or contoured by law and administrative institutions.

Western analysts have tended to ignore or even deride ritual understandings of politics. A US professor noted once that ‘anthropological studies have too often been dismissed as bearing only on the political organization of “primitives” living in small-scale societies’.⁹ So we find it easy to stare at other cultures, or to look back on our past, as quaint foreign countries. Like in the painting ‘The Chairing of the Member’ (figure 4). In it British artist William Hogarth caricatured a typically feisty Oxfordshire election in eighteenth century England.¹⁰ Polling, before the late Victorian era, was a multi-day festival: colourful, full of reciprocity, bribes and booze, with voting by voice rather than secret ballot.



Figure 4: William Hogarth, An Election: Chairing the Member, 1754–1755 © Sir John Soane’s Museum, London

Then leap forward to today. To the image in figure 5, taken in a New South Wales town early on an election morning in 1998. That’s a family, including casual Australian Electoral Commission (AEC) workers, heading down the road to set up the one-day-every-3-or-4-years ritual of secret balloting. They carry with them the recyclable cardboard booths which act as shelters to cater for the pencil on paper ballot which is mandated by law in Australia.¹¹ And, unlike the US or UK, which vote

⁹ David Kertzer, *Ritual, Politics and Power*, Yale University Press, New Haven, 1988, p. x.

¹⁰ See further Christina Scull, *The Soane Hogarths*, Trefoil Publications/Sir John Soane’s Museum, London, 1991 and David Bindman et al (eds), *Hogarth’s Election Entertainment: Artists at the Hustings*, Apollo Magazine/Sir John Soane’s Museum, London, 2001.

¹¹ ‘[E]ach voting compartment shall be furnished with a pencil for the use of voters’: *Commonwealth Electoral Act 1918* (Australia) section 206. Pencils are more failsafe than pens or computers. That few Australians object to their use reflects a high level of trust. Unfortunately, when he thought he

on Tuesdays and Thursdays, it's a Saturday, not a busy work day but traditionally a family day.

Hogarth's pre-reform election is bursting with public ritual. But various democratic reforms—especially secret balloting, clamping down on corruption in the form of direct treating of voters—have led to the ritual becoming quieter, embedded as part of the ritual of the 'everyday'.



Figure 5: The locals at Hill End, north of Bathurst, preparing for the 1998 election, Robert Pearce / Fairfax Syndication, FXJ196360

On its face there is a linguistic contradiction here. The coming together of a secular society as a polity is hardly 'everyday', not in the sense of something that happens every day. An election is a national moment; a constitutive one and a theatrical one. Our triennial elections establish the rhythm of the political seasons. But at the level of legal rules and administrative practice, elections are also a quotidian or everyday experience. No more so than in the trip to the local school or community hall, as we are summonsed—indeed compelled to turn out by law in Australia—back to the site of our coming of age and rounding out as citizens.

Voting—a private affair

Let us now focus on polling day, that traditional culmination of the electoral ritual. Polling is at once a private, a communal and also a public action. To cast a ballot is

was narrowly losing the 2013 election in Fairfax on the Sunshine Coast, Clive Palmer MHR raised vague claims about ballots being erasable. When at the completion of recounts he narrowly won the seat, Mr Palmer did not pursue the allegations.

the most public of citizen actions, yet it is done in private. In figure 6, we have an image of Tiwi Islanders voting behind those cardboard screens. If you believe the ballot is a sign of hope, if not in its transformative potential, then watching people disappear behind a voting screen or compartment evokes the metaphor of a ‘closet of prayer’, which appears in Les Murray’s poem ‘My Ancestress and the Secret Ballot, 1848–1851’.¹²



Figure 6: Tiwi Islands polling place during the 2010 election, Australian Electoral Commission, Creative Commons Attribution 3.0 Licence, <http://creativecommons.org/licenses/by/3.0/au/>

The everydayness of the ritual of modern voting was foreseen as long ago as the late 1850s. Here’s a quote from an observer in Victoria, just after secret balloting was first instituted in Australia:

The [secret] ballot does away with all the base dissembling and hollow protestations of the canvass ... of kissing squalid children, flattering slatternly housewives, and cajoling partial fathers. It abrogates the demoralising influences of the flagon and the purse ... *everything proceeds with the same tranquil placidity as if the community was undergoing a trying operation under the influence of chloroform, waking up to*

¹² Les A. Murray, *Subhuman Redneck Poems*, Farrar, Strauss and Giroux, New York, 1997. For a history of the secret ballot in Australia (also invoking that poem) see Michael McKenna, ‘The story of the “Australian Ballot” ’ in Marian Sawyer (ed.), *Elections: Full, Free and Fair*, Federation Press, Annandale, NSW, 2001, p. 45.

*consciousness on the declaration of the poll ... the proudest civil rights may be exercised with all the peace and security of a religious ceremony.*¹³

As they pander to ‘working families’, modern politicians might chuckle at the vain hope that campaigning would ever be free of solicitation. Campaigning, as we have noted, *inevitably* involves a ritualised inversion of the normal order of ruler and ruled, where every candidate from the prime minister down asks for our votes.

But what was noticeable, even in the 1850s, was a utilitarian desire to chloroform the hubbub of elections. This was to be done with the legal technology of the secret ballot and orderly polling stations. Admittedly at the time there was some push-back: South Australian Governor Ferguson lamented the lassitude he saw in the quietness of the secret ballot.¹⁴ But the technocrats had their way.

Voting—a communal affair

The secular ritual of polling day is itself now under threat, by what is known as ‘convenience voting’.¹⁵ I have traced that term to at least 1948 in the US, where a reformer, who wanted all voting to be by postal ballot, argued for ‘laws to make possible the economy of carrying the one or two ounce ballot to the polls instead of the 100 or 200 pound elector’ to the polls.¹⁶ (Obesity, it seems, was a problem even then.)

Postal voting has had a renaissance, driven partly by cost-saving considerations. All-mail elections have been trialled in local government in Australia and in the UK. They are also mandated by law at all levels of elections in a few US jurisdictions, currently Oregon, Washington and Colorado. In Queensland, postal voting on demand was recently legislated as a right.¹⁷ As a technology this is ironic, given that the red post-box is going the way of the dodo. Nevertheless postal voting, once the preserve of the immobile or infirm, now accounts for over 10 per cent of turnout in Australia.

Even on integrity grounds, this is curious. Postal voting was originally a legally guarded *privilege*, because it cannot guarantee a secret ballot. As recent UK electoral rorting cases show, postal voting has obvious integrity weaknesses. Parties in

¹³ William Kelly, *Life in Victoria, or, Victoria in 1853 and Victoria in 1858*, Lowden, Kilmore, Vic., 1977, p. 318. Emphasis in the original.

¹⁴ Cited in McKenna, *op. cit.*, p. 60.

¹⁵ For more, see Graeme Orr, ‘Convenience voting: the end of election day?’, *Alternative Law Journal*, vol. 39, no. 3, 2014, pp. 151–5.

¹⁶ George F. Miller, *Absentee Voting and Suffrage Laws*, Daylton, Washington, 1948, p. 18.

¹⁷ See now *Electoral Act 1992* (Qld) section 114.

Australia have even manipulated the law to make themselves conduits for postal voting.¹⁸

Even more significantly, pre-poll or early voting in person is also on the rise. In contrast to postal voting it doesn't save money. Admittedly, in parts of the US early voting is critical. Americans vote on Tuesday, a working day. In less resourced communities and in states that mandate photographic voter ID, minorities have to push hard for the right to queue at pre-polling stations. However in Australia pre-polling attracts mostly staunch middle-class electors. Typically these are people who think 'I always vote for party X so let's "get it out of the way" '. This is a consideration of pure convenience. In the 2015 Victorian state election, over 30 per cent voted early, whether in person or by post, and a majority voted this way in one recent by-election.¹⁹ Electoral commissions, encouraging this trend, are thus gearing up for elections where almost half may vote early. All this threatens the once every year or so experience and symbolism of polling both communally and on the same day.

In the brave new electoral world, internet voting, we are told, is inevitable. It is being rolled out and trialled in NSW, although at this stage just for visually impaired and service people. Yet will we stop to consider the shift in performative meaning of logging in, at any time, to vote on our iPhones? And how that differs from visiting a communal polling station on election day? It is a change on par with the way the ritual of brewing and sharing tea was replaced by the convenience of the tea bag or, in a more blokey metaphor, the way T20 cricket, in short bursts at night, is threatening the more leisurely formats of the past.

There are deliberative and participative angles to this shift from 'election day' to 'election month'. Not knowing who has voted early, parties are wondering how to stage campaigns. But my concern here is to tease out the ritual and rhythmical elements in the shift.

A *London Times* columnist recently wrote that 'the act of voting [in Britain] has all the glamour of queuing for a wee at a school jumble sale'.²⁰ This wasn't a whinge: she meant that the pedestrian nature of voting at a local school had an 'authenticity', a symbolic value in which 'we the people' see 'we the people' gathering to put pencil marks on paper and exercise recall power over our political masters. It is quite a leap

¹⁸ See further Norm Kelly, *Directions in Australian Electoral Reform: Professionalism and Partisanship in Electoral Management*, ANU E-Press, Canberra, ACT, 2012, chapter 9.

¹⁹ Nathaniel Reader, 'The growth of early voting in Australia', paper to the Challenges of Convenience Voting Workshop, University of Sydney, 4 November 2015.

²⁰ Carol Midgley, 'The British ballot box is a glamour free zone—long may it last', *The Times* (London), 6 May 2010, p. 33.

from the tangible communal paper ballot to the ephemerality of e-voting anytime from anywhere.

Voting—a public affair

Finally there is the rhythm of election night. Election night is a time when elections and drinking are reunited. (My book includes chapters on both alcohol and betting at election time). Political parties may be wary of offering alcohol—the old crime of treating—at meetings these days. Indeed Australian law has, since 1902, forbidden voting on the licensed parts of premises even though, in some small towns, the pub has always been the one and only public venue.²¹ But well-lubricated election night *parties* remain the climax of the ritual for many.



Figure 7: National Tally Room, 2010, Australian Electoral Commission, Creative Commons Attribution 3.0 Licence, <http://creativecommons.org/licenses/by/3.0/au/>

Australia once had a National Tally Room, as depicted in figure 7. It evolved from the practice of newspapers setting up giant tally boards on election night. A National Tally Room was born out of a desire to have a public focus for election results. The National Tally Room became an institution: overseen by the Electoral Commission, open to all citizens and a tangible symbol of democracy. It was a scene of triumph and despair. Australians of a certain age still recall Prime Minister-elect Bob Hawke being mobbed in 1983 as Malcolm Fraser wept whilst he lost office.

But the National Tally Room died at the hands of cost-cutting, the advent of computerised feeds, and a drift by media and politicians to more controlled environments. Just as political parties shy away from public rallies, so they prefer now the secure interior of a hotel ballroom, whilst the media sucks in the electronic data and brands it with their own graphics. No more the gaze of the physical tally board, that symbol of the river of numbers, encompassing each individual vote, forming a flood that sweeps away rulers.

²¹ See now *Commonwealth Electoral Act 1918* (Australia), section 205.

Now I do not wish to be a Luddite. The public space of election night has been, at least since the mid-twentieth century, a mediated one for most people. Electronic voting in time will transform the public rhythm of election night, with its parties, live crosses, and *schadenfreude*. With e-voting, the results can all be known instantly, then dumped en masse into a super computer, rather than unfolding with suspense. (Relatedly, many countries ban opinion polls in the last week or two before polling day—ostensibly for integrity reasons, but also for deliberative repose.²² Limiting opinion polls also invests the event of election night with greater suspense).

Compare Australian and British election nights. The British vote until 10pm GMT, whereas Australian polls close four hours earlier. The British have a curious ritual of counting every ballot on election night. British people vote on a single ballot, with a cross, so the count is simpler than here where preferential voting is used. Moreover, unlike in Australia, British postal votes have to be in by close of polling. As a result, city councils, who manage each count, can race to be the first to declare each result. Talk about ritual triumphing over purity! When, in 2010, to save money on overtime (and perhaps ensure more accurate counts) British returning officers sought to delay counting until the morning after polling, there was a backlash in the form of a ‘Save General Election Night’ campaign. It succeeded in generating a law mandating that counting start no later than four hours after polls close.²³

Under UK law the local mayor, as nominal returning officer, declares the poll for each House of Commons constituency. These declarations happen across over 600 communal tally rooms. The customary rule is that all candidates attend and are invited, like Edmund Burke of old,²⁴ to give a final address to their electors. Even a re-elected PM can thus be brought down to level. After the Iraq war, Tony Blair faced not only a Monster Raving Loony Party candidate wearing a ‘Blar’ hat, but an independent candidate whose serviceman son had died in the invasion of Iraq.²⁵

Conclusion—ritual and civic quietism

In contemporary times, fear or resentment of electoral passivity is often not far from the surface. Especially amongst political progressives. A US professor wrote, in *The New Yorker*, that she longed for more electoral ‘hue and cry ... Sometimes, inside that

²² See Graeme Orr and Ron Levy, ‘Regulating opinion polling: a deliberative democratic perspective’, *UNSW Law Journal*, vol. 39, no. 1, 2016, pp. 318–40.

²³ *Constitutional Reform and Governance Act 2010* (UK), section 48. I am indebted to Dr Heather Green for this reference.

²⁴ Compare Burke’s famous ‘Speech to the Electors of Bristol’ (3 November 1774) where he set out the concept of an MP as a trusted agent, elected to exercise discretion, in distinction to an MP being a delegate following the bidding of their electors.

²⁵ The image now graces the front cover of Lawrence’s book, op. cit.

tiny booth, behind that red-white-and-blue curtain, it's just a little too quiet.'²⁶ A fellow American, Professor Hirschbein wrote similarly that he is worried that 'for many, Election Day is bereft of its former liturgical fullness ... the carnival spirit is gone.'²⁷ I wonder what they would have thought about the Liberal National Party proposal in Queensland in 2014 to ban all electioneering on polling day. (A measure I opposed as a final leaching of the colour and activity of the day as much as a risk to the freedom of non-party activists to protest, or opposition parties to use how-to-vote cards to encourage preference swaps.)

At the heart of this concern lies a regret about contemporary electoral quietism. It is the feeling that whilst we don't want the excessive money or razzamatazz of the US, elections in other developed countries today are *too* placid or insufficiently passionate. This regret can be a friendly critique of electoral democracy: elections are worthwhile, but they should be *more* engaging. It is thus a rallying cry for 'elections plus', a call for a more integrated participatory democracy throughout the electoral cycle.

Once one established practice or rule supersedes another, the old practice becomes seen as 'archaic and senseless' and the new one, in time, comes to feel natural. This is true of politics, where streamlined forms of electoral administration and top-down, professionalised and centralised campaigns now seem natural or inevitable. In turn, older forms of electoral practice appear highly ritualised: we gape at the past as if it were a foreign country, like early anthropologists at the workings of some unfamiliar tribe.

It is unrealistic to expect the typical election in a settled democracy to bear the same passion as when the ballot was younger. Ultimately, the lament is not for a lost oasis, as it is for a perceived lack of political engagement and interest. There is no magic wand to revivify politics—it is not something laws or electoral commissions can ordain. The law can create the space, but it is up to parties and citizens to fill that space.

Whilst the lament about electoral quietism carries a whiff of nostalgia, it is far from new. As I said earlier, when secret ballot laws were introduced, there were those who despaired that elections had assumed a new 'quietness and indifference', just as others welcomed a 'tranquil placidity' around election day. Contemporary concerns about

²⁶ Jill Lepore, 'Rock, paper, scissors: how we used to vote', *The New Yorker*, 13 October 2008.

²⁷ Hirschbein, op. cit., p. 130.

‘civic privatism’, to borrow a phrase from Professors Ackerman and Fishkin,²⁸ thus turn out to be nothing new.

Just as there was no ‘sausage sizzle’ in the electoral days of rolling out the barrel, my ultimate point is that the electoral processes and rituals of today are different from but not necessarily lesser than those of the past. However, if we do not attend to describing and understanding the ritual dimension of public law and practices, we cannot begin to appreciate their importance. Let alone openly undertake the normative task of deciding which elements we want to savour, update or farewell.



Rosemary Laing — I am glad you mentioned the sausage sizzle at the end, because there is also the cake stall. There is also running the gauntlet of all the people handing out how-to-vote cards and the dreadful choice between, do I politely just accept them all and collect them, or, do I say, ‘No thank you, I’m fine’?

Question — Did you know that there is actually a Twitter account and now somebody is developing an app that will tell voters where the sausage sizzles are on polling day so that they can queue up? Last election, in 2013, there were reports, I believe, from the account in some polling stations, of the queue being twice as long for the polling booth because people turned up just for the sausage sizzle.

Graeme Orr — Well I am a former vegetarian and I think it is great, and yes, I mentioned snagvotes.com in the book. These are totally organic, grassroots community-style things that you don’t usually see overseas. The whole idea of where we vote is interesting because people say: ‘Yes, voting at schools has certain meanings’, whereas others say, ‘Well look if you go to school or church halls, you are going to influence the way people think’.

We do these political acts in a physical space. If those physical spaces can be welcoming then obviously it is better than in a country where you might turn up at a courthouse to vote and, if you had been in trouble with the law or you are young, that is not going to be so welcoming. Or if you had to turn up at an Electoral Commission office, colourful as they are, that would have a more bureaucratic feel than the sausage sizzle at the local school, the P&C, the ladies auxiliary and the scouts and all that.

²⁸ Bruce Ackerman and James S. Fishkin, ‘Deliberation day’, *Journal of Political Philosophy*, vol. 10, no. 2, 2002, pp. 129–30.

Question — The last election I voted at, my local school did their fete and they had a jumping castle at an election. I thought: this is the best thing ever; we should make this the law!

Graeme Orr — I won't ask how many times you pushed aside the kids to jump in the jumping castle. There are some academics who had funding in America to trial the idea of having non-alcoholic fetes and parties at election day. Part of the problem they have is voting on a Tuesday. Schools are all taken, unless it is an election in a holiday, and they are set in November so it is unlikely.

Question — Something you didn't mention is the good old-fashioned public meeting. I do wonder whether such things can exist in Australia any more, particularly in the light of the episode that occurred at the Queensland election last year where a gentleman went along wearing a t-shirt standing next to people with the logo, 'I am with stupid' on it and was arrested by ten of Queensland's finest. Now it is unimaginable that in the Menzies era persons seeking to disrupt a public meeting by interjecting or otherwise would have had the police called on them. I was talking to some of my electoral friends in East Timor and described the way in which campaigning has become so sanitised in Australia today. Their response was, 'How hopeless are your politicians that they won't stand up in front of whoever wants to come along and answer whatever is said to them?' How have we got to this point of the sanitisation of this institution of the public meeting?

Graeme Orr — I almost thought you were going to say we can't have public meetings because there will always be some person who wants to upstage it. That may be a good thing. I don't know. In my next project, I want to look at the issue of the regulation of speech horizontally. So the way that social media and employers and others are protecting their brand and image by trying to crack down on what people say and do and how they express themselves, people over whom they have some contractual power. I am reminded of a lovely photograph of a guy who used to run in the New Guinea elections, Mr Shit, who was half advertising his business which, I think, was to suck out excrement from drains. But he would appear on the ballot paper and with his t-shirts as 'Mr Shit'. So there is some of that kind of colour. We don't necessarily want people running to promote the fact that they are a prostitute, which happened in Queensland a few years back. Or people who run (I won't mention names) allegedly to get the money that follows the four per cent of the vote.

But I think the death of the public meeting and the rally is probably traced back to John Hewson's days. He went around the country and there were lots of Labor Party operatives and activists trying to create a sense of disorderliness. But it is very odd in

a country like Australia, with its Irish and Indigenous roots and so on, that we have got this fear of disorder. In terms of law, the public meeting was written long ago into early Australian law and British law—the idea that candidates were entitled at law to free use of rooms in schools and school halls for those traditional gatherings and meetings, with adults turning up and having to sit in tiny chairs and pews. But to have a kind of deliberative discussion, well that’s now almost gone even in the United Kingdom. But we certainly have a top-down culture and such a control-freak culture. I won’t condemn Queensland’s finest; you can. I guess it is a worry and a concern.

Question — In Sweden, elections are very quiet affairs. It is always the same time of the year. It is a dark time of the year, it is cold and you go in and you quietly leave. So even the sausage sizzle isn’t there. But I did want to mention a ritual that has gone the same way in Sweden as what you are describing—that is, paying taxes. When I was younger, I lived very close to the main tax office and the date for paying taxes was the same date for everybody. People would come on the date with the envelopes. Now these days you can pay with a text message; you can sign your tax declaration. But in those days you paid on the day. There was a marching band, people out with big sacks to gather the envelopes—it was a huge street party for paying taxes. But election day was actually very quiet, so everything you are describing about elections, I remember with paying taxes. Now you do it with your phone.

The point I wanted to make was about climate and ritual and colour. Your book is very focused on, in general, quieter countries. So Sweden is very cold, very dark and not a lot of colour and noise outside. But in countries where they have elections outdoors, you really see what you are describing. This sense of something public, of something that engages people, so when elections are held under a tree and when counting is very public, ‘Frelimo un voto’ and people yelling and screaming. You can see that in one of the neighbouring countries here in Indonesia, where it is a public count in the village square. Everybody is there to watch it. So I think that in addition is this idea of warmer weather and outdoors that adds to colour and noise.

Graeme Orr — Two things: one is the change in public space, that political scientists and sociologists have tracked for centuries now, which you have effectively touched on there. The other thing, our public spaces are becoming more internalised, individualised or transactionalised, to use the jargon. I was thinking the other day, it is mentioned in my book, of watching my children grow up. Their generation is highly ‘iPadic’. It happens very young, as you may know, because these devices are so well designed and intuitive. And yet, with something as fundamental as money—you mentioned taxes—the tangibility of coins and even our polymer plastic notes is fundamental to them coming to understand the idea of all this: is it contained value, is it value, or is it something I should worship? Much different from plastic credit cards.

And now we are moving into the era of, as you say, you just text your account details. It is just digits somewhere in some big computer, so the meaning of money changes particularly. And yet, watching my kids, they need that tangibility to at least at some point begin to understand an abstract concept like money and certainly, an abstract concept like democracy.

Question — Could I solicit a comment from you about how-to-vote cards, which are surely strange and, in my view, one of the silliest parts of elections. In the age of convenience pre-poll postal voting, are we all headed the way of the ACT where in practice how-to-vote cards are banned and election days are dreary and colourless?

Graeme Orr — I must have been a bit of a nerd, but I used to actually collect how-to-vote cards. I thought it was like collecting football cards. The reds versus the blues and the greens. Because I liked blue and white—that was my football team, not Canterbury Bankstown, but Brisbane Brothers—I remember saying to my mother when I was very young, ‘I am going to follow these Liberals, the blues’. A few weeks later I went back to her and I said, ‘No, I heard that these Liberals and these people—the Country Party back then—they are ganging up on the reds and that is unfair! I am going to follow the reds.’

More seriously, you wouldn’t invent how-to-vote cards in any other system. They are an artefact of the preferential voting system. We are not going to get rid of them, because it suits the major parties because they are the only ones who can get enough activists to man the polling stations. They are having increasing problems with three-week long early voting. They will almost have to do a ‘Clive Palmer’ and pay people to hand out how-to-vote cards. I think they are a horrid waste of paper and so on, but they are still part of the whole process. As Rosemary said, do you accept them all, to not reveal your ballot? Or do you get in a huff and only take the ones from the party you like? Do you take them home to write your shopping lists on! It’s a big issue.

Rosemary Laing — Graeme, you had a lucky childhood, because when I was a child we had to stay in the car. Polling places were not places for children, according to my parents at least. We missed out on the ritual of the polling booth. It was a very serious place where mummy and daddy went to do something very important.

Graeme Orr — Well, (a) that would be illegal in Queensland and (b) you would probably die, if it was a summer election!

Question — I was wondering what impact you think compulsory voting has had on the ritual of election day. There are not that many countries that compel people to be there and you get pictures in newspapers all across the world of that shot of people

lined up at the polling booth—one with a surfboard in thongs and all this kind of stuff—because everyone has to be there. It presumably makes it a different ritual from someone making an active choice to go out of their way to go to their local school to be there and vote.

Graeme Orr — Yes, compulsory voting is interesting. I have to give a talk in April at the National Law Reform Conference at the ANU. Compulsory voting is an interesting thing in Australia because I don't think it necessarily changes politics dramatically. In the long term it may mean that our policies are a little bit more egalitarian. I am not sure, but it also encourages out a lot of people who would not otherwise vote, who are suburbanites. Not the guy with the surfboard, but people who are suburbanites, with kids, who are too busy for politics. They appear to be late swinging voters. Really it is just people turning up and saying 'I will stick to the devil I know'. So it can actually have a status quo effect at state and national elections. That is my theory at least.

In terms of the ritual, yes, I think it adds to the order and quietude of the ritual. It certainly makes the Electoral Commission very keen to maximise turnout, for good reasons. One argument is you are going to have more convenience voting when you are compelled to vote. You have got to make it as easy as possible. On the other hand, it has done away with some of the hand-to-hand or face-to-face nature of politics. The whole 'get out the vote' that you might have known from the UK, or the use of cars and conveyances, getting your activists in jalopies to go around and pick up people, particularly elderly people, to make sure they get out. Once upon a time that was made illegal by law. At least paying someone the bus ticket was made illegal in the 1880s. But now it is an integral part of the communality of election day in other countries—less so in Australia.

Question — A quick comment and then a question. For those who are relatively new to voting, one of the reasons we have had how-to-vote cards in Australia is, as Graeme mentioned, the preferential voting system. But also, prior to 1984 party names were not written on ballot papers. So if you wanted to vote for a particular party's candidate, you needed their how-to-vote.

Just one question—I invite you to comment on the shrinking unregulated space around elections given, for example, that following the Western Australian Senate issue the AEC's regulations around polling places and handling of ballot papers were tightened up. Also, in some states how-to-vote cards are now required to be on a certain template. The increasing professionalisation of elections management is arguably shrinking the space in which ritual can thrive in Australia or so it seems to me anyway. Do you have any comments about that?

Graeme Orr — Certainly, as a law person, we love laws and our bias is towards what we call ‘juridification’. So you take things that happen naturally in society and then you start adding these layers of regulation. Always for good reasons, or apparently good reasons, but it is used to add more and more and then it can become a kind of stifling edifice. There is obviously a risk of that, yes. As you say, it can be part of the professionalisation, it can be part of what I call the ‘juridification’. It can also just make things more difficult for newer entrants and players in terms of participation, because they are less likely to have good legal advice or they are more likely to get caught up in the net. Even local constituencies and branches are less able to deal with some of the laws that are otherwise very favourable, such as proper accounting of political money, that can often catch up newer players or outsiders, some of whom are bringing both the new blood and colour to election campaigns. So it is obviously something we need to be thinking about.

Question — During the talk you noted the demise of the National Tally Room. That got me thinking about its place in the concept of ritual. It was a big part of the rhythm and the ritual for decades. I was thinking it was maybe more than just ritual because on election night it is part of the nation’s expectations. They know what the outcome is going to be or what it will probably be. The tally room, of course, was televised and the commentators were in the tally room as well. It did occur to me that those things happening within the tally room, run by the Electoral Commission, gives the whole process of reporting of what is going on an authenticity that it might lose if it is left to be done from television studios. Do you have any thoughts about that?

Graeme Orr — Yes, there is a certain gravitas that can come with it. The place was always buzzing and it must have been an enormous logistical nightmare to run. What we have moved to now is Antony Green and people getting the feeds into Channel Two and Channel Nine and so on. When we move to internet voting there will be the potential for all the results to be known almost instantaneously, apart from those that rely on late postal votes. There might come a time when there will be a lot of people saying: ‘How can we trust this? I go to vote and I press something on a screen and then it enters the black box and it comes out with a set of numbers that are delivered to us by five different networks’. I can see your point exactly.

I don’t think we have completely lost rituals though. The ability of the modern media to cross to peoples’ backyards, to get ‘beamed’ into the backyards of the winning or losing candidate with the booze flowing and their kids in the background, and people crying or not crying, or laughing. Then they will be put on the spot and they may not be well versed in dealing with the media, especially with live crosses on national TV. That is one thing we have gained in the swings and roundabouts of the change from a

more singular physical focal point of the National Tally Room to this more dispersed coverage.

Question — The diagram you used took me to thinking that you would be following the thread of how ritual can offset cynicism. Your bottom left quadrant can offset your bottom right quadrant. I want you to think about how you might stretch that thread out. I feel a lot of people in Australia will be very cynical about politics, that politicians are all the same and that it doesn't matter what we do. Yet they still love a good election day. They will still go down and buy a sausage. How do those two things offset and, as we go forward with the future of ritual, can it still combat that cynicism?

Graeme Orr — Yes, I think Australians have by nature, at least allegedly, strong 'bullshit' detectors, as we say. Some very small-l liberal academics have said to me, 'Look, ritual is a good way of describing what goes on, but if you are going to try to design rituals top down, that tell people that you will be marched off to school like scouts to worship Anzac Day, it is a worry.' We are a long way from that situation. What I see instead, is in Queensland we may have almost a snap referendum coming up in the next month or two, to do away with three-year cycles and go to a four-year rhythm. Now, the major parties have both backed that. The bill has gone through parliament. The business community, or at least the Chamber of Commerce and the large businesses, are all behind it. So far the Council for Civil Liberties and a few academics like me are saying, 'Hang on a minute, even if you think that we need fewer elections ...' The argument will go, 'Oh people don't really enjoy voting and we need more time as public servants to develop policy.' I understand that. And maybe another year's job security for politicians will make them more in touch with people! I don't know. Queensland does not have an upper house, does not have a bill of rights, does not have proportional representation. It has only got one major newspaper. We are the last state that needs to be voting less often. So there is my plug on a different issue.

But I think you are right. Opinion polls say most Australians would still turn out even without compulsory voting. They believe that they would still want to vote, they are habituated to vote and we only need compulsory voting because there are these other people who have to be prodded along. I think we do have relatively high levels of trust in our institutions—on international standards, certainly. A lot of people seem to value the communal aspects of voting but there are others obviously who don't. If we get a generation who get used to voting on a computer we might lose that.

Australian Democracy and Executive Law-making: Practice and Principle (Part I)*

Stephen Argument

As detailed in this paper, there has been a remarkable growth in the volume of delegated legislation in the 115 years since Federation. It is through this delegated legislation that the executive, under powers delegated to it by the parliament, makes laws—hence the reference to ‘executive law-making’ in the title of this Senate Occasional Lecture.

Beyond pure volume, however, is the issue of the content of delegated legislation and the effect of delegated legislation on the Australian public (and on Australian democracy). It is my view that there is too little understanding, by the Australian public, of the extent to which their lives are affected by legislation that is made by the executive and the extent to which the operation and effect of that delegated legislation may be beyond what an ordinary citizen might otherwise expect.

This paper restates the fundamental principles that underpin executive law-making, including the processes by which executive law-making is monitored and supervised in the Commonwealth Parliament. It also considers some recent challenges presented by executive law-making. Finally, the paper considers some recent issues in relation to delegated legislation in the United Kingdom that demonstrate (in my view) the relative maturity of the processes applicable in the Commonwealth, in comparison.

Executive law-making

It may be useful, given the apparent lack of understanding about the operation and importance of delegated legislation (particularly in some sections of the Australian media), to begin by setting out some fundamental information in relation to executive law-making. In this context ‘executive law-making’ is intended to refer to the making

* This paper, together with the following paper by Professor Cheryl Saunders, was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra, on 11 March 2016. Questions and answers from the joint presentation follow Professor Saunders’ paper.

Any views expressed in the paper are views of the author and not those of the Senate Standing Committee on Regulations and Ordinances or the ACT Standing Committee on Justice and Community Safety. I am very grateful for comments on the initial draft of this paper that were provided by the secretariat of the Senate Standing Committee on Regulations and Ordinances (Ivan Powell, Jessica Strout and Eloise Menzies) and by Dr Greg Weeks. However, I take full responsibility for any statements in the paper (and, in particular, for any errors, etc.).

of regulations and other forms of delegated legislation by ministers and the bureaucracy, under powers delegated by the parliament, in legislation.

‘Delegated legislation’ or ‘subordinate legislation’?

An important threshold point is the use, in this paper, of the term *delegated* legislation, in preference to *subordinate* legislation or *secondary* legislation, terms that are also routinely used to describe the legislative emanations of executive law-making. While, clearly, delegated legislation is subordinate to primary legislation (i.e. Acts), the term ‘delegated’ legislation is preferred for presentational reasons. This reflects a point recently made by the Hansard Society (UK), in its 2014 report, *The Devil is in the Detail: Parliament and Delegated Legislation*.¹ While the report is discussed further below, it is important to note at the outset that, in *The Devil is in the Detail*, the Society is careful to use the term ‘delegated legislation’ in preference to ‘subordinate legislation’. The first footnote to the report states (in part):

Throughout this report, for the purposes of simplicity, and in order to avoid confusion, we have chosen to use the term ‘delegated’ legislation (with ‘secondary’ legislation used when seeking to distinguish the balance with primary legislation). We do not use the term ‘subordinate’ legislation as such nomenclature might convey to the general reader that it is of lesser importance than primary legislation, a view this report seeks to dispel. However, we recognise that it is commonly used in a legal context ...²

This is a significant point for the Society to make and reflects a general point that the report propounds—that delegated legislation:

... is crucial to the effective operation of government and affects almost every aspect of both the public and private spheres: individuals, businesses, charities and public bodies are all affected by regulations it creates, often financially in terms of major new cost burdens.³

Why do we have delegated legislation?

Odgers’ Australian Senate Practice (Odgers) notes that the Constitution does not explicitly authorise the Commonwealth Parliament to delegate the power to make

¹ Ruth Fox and Joel Blackwell, *The Devil is in the Detail: Parliament and Delegated Legislation*, Hansard Society, London, 2014. An executive summary of the report is available at <https://www.hansardsociety.org.uk/publications/the-devil-is-in-the-detail-parliament-and-delegated-legislation>.

² *ibid.*, p. 23.

³ *ibid.*

laws.⁴ Odgers points to the High Court decision in *Baxter v Ah Way* as an early recognition of the need for a power to make regulations, etc. In that decision, O'Connor J stated:

... the legislature would be an ineffective instrument for making laws if it only dealt with the circumstances existing at the date of the measure. The aim of all legislatures is to project their minds as far as possible into the future, and to provide in terms as general as possible for all contingencies likely to arise in the application of the law. But it is not possible to provide specifically for all cases, and, therefore, legislation from the very earliest times, and particularly in more modern times, has taken the form of conditional legislation, leaving it to some specified authority to determine the circumstances in which the law shall be applied, or to what its operation shall be extended, or the particular class of persons or goods to which it shall be applied.⁵

Odgers goes on to state:

The essential theory of delegated legislation is that while the Parliament deals directly with general principles, the executive, or other body empowered to make subordinate legislation, attends to matters of administration and detail. As the theory was expressed in 1930 by Professor K.H. Bailey: 'It is for the executive in making regulations to declare what Parliament itself would have laid down had its mind been directed to the precise circumstances.' (Evidence to the Senate Select Committee on the Standing Committee System, PP S1/1929–31, p. 20.)⁶

Another fundamental issue in delegated legislation are the justifications traditionally advanced for its use. In *Delegated Legislation in Australia* (4th edition), Pearce and Argument refer to three situations in which delegated legislation 'is generally considered to be both legitimate and desirable, subject to certain safeguards'. The three situations are:

1. *To save pressure on parliamentary time*: It is generally accepted that parliamentary sitting time is relatively scarce, partly because Australian parliaments tend to sit for shorter periods than many of their counterparts in other countries. As a result, governments have fairly limited time within which

⁴ Harry Evans and Rosemary Laing (eds), *Odgers' Australian Senate Practice* (Odgers), 13th edn, Department of the Senate, Canberra, 2012, p. 413, http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/odgers/chap1502.

⁵ *Baxter v Ah Way* (1910) 8 CLR 626 at pages 637–8 cited in Odgers, op. cit., pp. 413–14.

⁶ Odgers, op. cit., p. 414.

to pass essential legislation and oppositions have limited opportunities to demonstrate the deficiencies of governments. This tends to have the effect of parliaments being accepted as places where only the broad policy issues are considered (although this effect is, itself, lessened by the increasing use of parliamentary committees as forums for detailed debate and consideration of legislation and other issues). Parliaments therefore tend to set the parameters of a particular area of legislative activity in an empowering Act, leaving the details to be worked out by the executive in delegated legislation.

2. *Legislation too technical or detailed to be suitable for parliamentary consideration:* The pressure on available parliamentary time is magnified when legislation is necessarily of a technical or scientific nature. Parliaments have neither the time nor the expertise to consider such matters (although note the comment above concerning the increased use of parliamentary committees). This tends to result in parliaments resolving that legislation is warranted but, having done so, deciding that the detail is best left to delegated legislation. Civil aviation orders, voluminous documents dealing with highly technical aspects of air safety, etc, are a good example.
3. *Legislation to deal with rapidly changing or uncertain situations:* One of the features of the legislative process and the limited sitting times is that the process of amending Acts is laborious and slow. This means that amendment of primary legislation is ill-suited to situations requiring flexibility and responsiveness, where the environment in which the legislation operates is uncertain and rapidly changing (for example, in areas such as the approval of drugs and other therapeutic goods). A variation on this situation is the need to be able to deal promptly with cases of emergency, something that, again, the primary legislation process is ill-suited to do.⁷

Pearce and Argument also note the suggested six reasons for the ‘necessity’ of delegated legislation that are set out in the report of the Donoughmore Committee (the Committee on Ministers’ Powers) of the United Kingdom Parliament in 1932, namely:

1. pressure on parliamentary time;
2. technicality of subject matter;
3. unforeseen contingencies;
4. flexibility;
5. opportunities for experiment; and

⁷ D.C. Pearce and S. Argument, *Delegated Legislation in Australia*, 4th edn, LexisNexis Butterworths, Chatswood, NSW, 2012, p. 6.

6. emergency powers.⁸

On the ‘unforeseen contingencies’ point, Pearce and Argument note that the Donoughmore Committee report states (at page 51):

If large and complex schemes of reform are to be given technical shape, it is difficult to work out the administrative machinery in time to insert in the Bill all the provisions required; it is impossible to foresee all the contingencies and local conditions for which provision must eventually be made.⁹

Regulations and ‘legislative instruments’

As Odgers notes, regulations have traditionally been the primary form of delegated legislation. Acts of the Commonwealth Parliament have generally contained a provision allowing the Governor-General (acting on the advice of the Federal Executive Council (ExCo)) to make regulations ‘required or permitted’ by the Act or ‘necessary or convenient to be prescribed for carrying out or giving effect’ to the Act.¹⁰ Over the years, delegated legislation expanded beyond regulations, to encompass a wide variety of other species of delegated legislation, with varying names and made by a variety of executive and administrative authorities, including ministers, heads of departments and agencies, and their delegates.¹¹

Since the commencement of the *Legislative Instruments Act 2003* (recently renamed as the *Legislation Act 2003* (Legislation Act)), the standard terminology for delegated legislation (including regulations) has been the concept of a ‘legislative instrument’. The (now) Legislation Act sets out requirements for the registration of legislative instruments on the Federal Register of Legislation (FRL—formerly the Federal Register of Legislative Instruments (FRLI)) and for them to be tabled in both Houses of the parliament within six sitting days of having been registered on the FRL.¹² Once tabled, legislative instruments are generally then subject to disallowance by either House.

⁸ Great Britain, Committee on Ministers’ Powers, Report, London, 1932, Cmd 4060, pp. 51–2 cited in Pearce and Argument, *op. cit.*, p. 7.

⁹ *ibid.*

¹⁰ Odgers, *op. cit.*, p. 414.

¹¹ See Pearce and Argument, *op. cit.*, paragraphs [1.16] to [1.17]. See also, generally, S. Argument, ‘Parliamentary scrutiny of quasi-legislation’, *Papers on Parliament*, no. 15, May 1992, chapter 3, <http://www.aph.gov.au/binaries/senate/pubs/pops/pop15/c01.pdf>.

¹² See sections 24, 38 and 42 of the *Legislation Act 2003*. The provisions relating to tabling and disallowance largely replicate provisions that had previously been located in the *Acts Interpretation Act 1901*.

Parliamentary review of delegated legislation

In delegating to ministers (as advisers to the Governor-General and ExCo) and others the power to make delegated legislation, the Commonwealth Parliament has also put in place mechanisms to ensure that the parliament retains an oversight role in relation to delegated legislation that is made. This is primarily achieved by the requirement that delegated legislation be tabled in both houses of the parliament. This allows the parliament to see what use is made of the delegated power. It also allows the parliament to bring the relevant minister to account if it has any concerns about or disapproves of the use of that power. It also generally allows the parliament to disallow the delegated legislation in question.

In all Australian jurisdictions, parliamentary review of delegated legislation is assisted by the work of parliamentary committees. It is important to note at the outset, however, that the role of those committees is to conduct a ‘technical’ review of delegated legislation, according to their terms of reference, concentrating on matters such as the adherence to formalities, on the one hand, and the protection of the basic rights of the citizen, on the other. Disallowance of delegated legislation on the basis of its policy content is intrinsically a political matter and one for the various houses of parliament themselves, since the relevant committees studiously avoid matters of policy.

Senate Standing Committee on Regulations and Ordinances

Turning specifically to the Senate, all disallowable legislative instruments are subject to scrutiny by the Senate Standing Committee on Regulations and Ordinances (R and O Committee), against terms of reference set out in Senate standing order 23. It should be noted at the outset that the R and O Committee has been in existence since 1932 and has served as an exemplar for legislative scrutiny committees throughout Australia and around the world.¹³

In this context, I note that, until about five years ago,¹⁴ I had always assumed that the establishment of the R and O Committee at this time was in some way connected to the report of the Donoughmore Committee, which was published in 1932. However, in researching an earlier paper, I discovered that there seems to be no link to the report of the Donoughmore Committee and that, in fact, the innovation was entirely the work of the Australian Senate.

¹³ See, generally, S. Argument, ‘Legislative Scrutiny in Australia: Wisdom to Export?’, *Statute Law Review*, vol. 32, no. 2, 2011, pp. 116–48 and L. Grenfell, ‘An Australian spectrum of political rights scrutiny: “Continuing to lead by example?”’, *Public Law Review*, vol. 26, no. 1, 2015, pp. 19–38.

¹⁴ See Argument, ‘Legislative Scrutiny in Australia’, p. 117.

In 1929, the Senate appointed a select committee to consider, report and make recommendations on the advisability or otherwise of establishing a standing committee system and, in particular, on establishing standing committees on:

- (a) regulations and ordinances;
- (b) international relations;
- (c) finance; and
- (d) private members' bills.

The Senate Select Committee on Standing Committees (Select Committee) produced two reports. The first, tabled in 1930, duly recommended that a Standing Committee on Regulations and Ordinances be established. The basis of the recommendation appears primarily to have been the volume of regulations that were, at that time, being promulgated. The report referred to evidence before the Select Committee that 'no fewer than 3,708 pages' of Commonwealth Acts had been passed between 1901 and 1927, compared to 11,263 pages of regulations, etc. in the same period.¹⁵ I will return to the issue of volume of regulations, etc. below.

The Select Committee stated:

The power to make regulations is necessarily used very freely by Governments and as a result a very large number are submitted to Parliament every Session. They are so numerous, technical and voluminous, that it is practically impossible for Senators to study them in detail and to become acquainted with their exact purport and effect. It is admitted that Senators receive copies of these regulations or Statutory rules, but the many calls upon their time render it almost impossible for them to make a detailed examination of every regulation.¹⁶

The Select Committee went on to state:

A very strong case has been made out by various witnesses before the Committee in favour of some systematic check, in the interests of the public, on the power of making statutory rules and ordinances.¹⁷

¹⁵ Senate Select Committee on the Standing Committee System, First report, Parliamentary Paper S1/1929–31, p. ix.

¹⁶ *ibid.*

¹⁷ *ibid.*

The Select Committee went on to refer to a number of bills (six are listed), ‘the chief effect of which was to give a regulation-making power’.¹⁸ I briefly mention this issue below, in a more recent context.

It is interesting to note that one of the reasons canvassed for the establishment of the R and O Committee was the availability of such a committee to receive submissions critical of regulations. The Select Committee refers to the ‘probable usefulness’ of affording the public such an opportunity, noting that this would be ‘both more timely, and obviously cheaper’ than taking matters to the High Court, as had recently been required in relation to various regulations that the Select Committee listed in the report.¹⁹

The Select Committee recommended that a ‘proper and sufficient check’ was required on the power to make regulations and that such a check could be provided by the establishment of a Regulations and Ordinances Committee.²⁰

It is interesting to note that the Select Committee’s recommendation was that the proposed R and O Committee ‘would be charged with the responsibility of seeing that the clause of each bill conferring a regulation-making power does not confer a power which ought to be exercised by Parliament’.²¹ The fascinating element of this recommendation is that what is, in fact, recommended here is a role (in relation to delegated legislation) similar to that performed (since 1981) by the Senate Standing Committee for the Scrutiny of Bills.

The Select Committee’s recommendation as to the terms of reference of the proposed Regulations and Ordinances Committee was that the committee scrutinise regulations to ascertain:

- (a) that they are in accord with the Statute;
- (b) that they do not trespass unduly on personal rights and liberties;
- (c) that they do not unduly make the rights and liberties of citizens dependent upon administrative and not upon judicial decisions;
- (d) that they are concerned with administrative detail and do not amount to substantive legislation which should be a matter for parliamentary enactment.²²

¹⁸ *ibid.*, p. x.

¹⁹ *ibid.*

²⁰ *ibid.*

²¹ *ibid.*

²² *ibid.*, pp. x–xi.

A final thing to note was the following observation about the proposed Regulations and Ordinances Committee's role in relation to 'policy' issues:

It is conceivable that occasions might arise in which it would be desirable for the Standing Committee [on Regulations and Ordinances] to direct the attention of Parliament to the merits of a certain Regulation but, as a general rule, it should be recognized that the Standing Committee [on Regulations and Ordinances] would lose prestige if it set itself up as a critic of governmental policy or departmental practice apart from the [terms of reference] outlined above.²³

The issue of whether the R and O Committee should consider 'policy' issues is not an issue that this paper will canvass. However, my views on this issue (and opposing views from Professor Dennis Pearce) are on the record.²⁴

Again, these are issues that the paper returns to below.

For completeness, it should be noted that the Select Committee's second report, tabled in 1930, again recommended that a Regulations and Ordinances Committee be established, though the recommendation did not, on this occasion, contain recommended terms of reference for the committee. As already noted, the Regulations and Ordinances Committee was, in fact, established in 1932.

A matter of trust?

In the course of preparing this paper, I had cause to revisit something that I said in a 2007 book, titled *Australian Administrative Law: Fundamentals, Principles and Doctrines*.²⁵ In that book, I stated:

Parliamentary committees, specifically legislative scrutiny committees, play a very important role in the oversight of delegated legislation. The most significant of the 'evils' identified by Lord Hewart [author of *The New Despotism* and a member of the Donoughmore Committee] relates to the likelihood that delegated law-making, because of its volume and complexity, makes it difficult or impossible for the Parliament to check the

²³ *ibid.* p. xi.

²⁴ D.C. Pearce, 'Legislative scrutiny: Are the Anzacs still the leaders?' and S. Argument, 'The Poms can't teach us nuthin'—Commentary on paper by Professor Dennis Pearce', papers delivered to Australia–New Zealand Scrutiny of Legislation Conference, 'Scrutiny and Accountability in the 21st Century', 6–8 July 2009, Canberra, http://www.aph.gov.au/About_Parliament/Senate/Whats_On/Conferences/sl_conference/papers.

²⁵ M. Groves and H.P. Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines*, Cambridge University Press, Port Melbourne, 2007.

detail of the various regulations, rules, orders, and so on. Lord Hewart might not have appreciated just how voluminous and just how complex delegated legislation would become. Experts are appointed to assist legislative scrutiny committees in scrutinising the minutiae of delegated legislation.

There is a certain irony that one of the answers to the evils of delegated legislation is for Parliament to entrust the task of scrutinising delegated legislation to a committee and for the committee then (in effect) to entrust an expert with the responsibility of providing it with technical advice as to the content of the legislation and whether or not it might offend against a series of established (but nevertheless highly subjective) principles. The committee also has to be able to trust the legal adviser not to go off on a campaign or frolic of his or her own.²⁶

When I wrote this, I had been the Legal Adviser (Subordinate Legislation) to the ACT Scrutiny Committee for just over a year. At that time, I could not have envisaged that I would end up in the privileged role of legal adviser to the Senate R and O Committee. However, my view is largely unchanged. The only thing that I would add is that the secretariats to the various committees also play an invaluable role in providing technical advice to the committees (and also—with the support of highly engaged committee members—play a role in keeping in check legal advisers with any inclination to frolic).

A side issue that I have come to appreciate is the role of committee members and, in particular, *ex*-committee members. In presentations that I have given both in Australia and overseas, I have often been asked about the ‘engagement’ of committee members in the work of committees. There seems to be a widespread assumption that legislative scrutiny reports are principally the work of legal advisers and committee secretariats and that committee members merely rubber-stamp them. I have always been quick to point out that that has *never* been my experience. In fact, my experience of legislative scrutiny committees has been that committee members are highly engaged in the finalising of reports and there is no suggestion of merely rubber-stamping drafts prepared for them by others.

But a further, little-appreciated issue is the role of *ex*-committee members. It has been my experience that many committee members have gone on to become ministers in executive governments. They do so having (presumably) learned a great deal about the kinds of issues that attract the attention of legislative scrutiny committees. In their later, ministerial capacity, *ex*-committee members invariably become the recipients of

²⁶ S. Argument, ‘Delegated legislation’ in Groves and Lee, *op. cit.*, p. 142.

comments by legislative scrutiny committees. They end up on the receiving end of the sorts of comments that they were previously responsible for formulating. While I cannot point to any particular examples, it is my view that the involvement of ex-committee members in the legislative scrutiny committee process, as ministers responding to committee comments, is a significant factor in informing the kinds of responses that legislative scrutiny committees receive from ex-committee members.

For completeness, I note that, in the 2007 book, I went on to state:

There is another element of trust in the process. The committees, to a certain extent, have to be able to trust the rule-makers (as the [Legislative Instruments Act] calls them) to do the right thing. In particular, the committees need to be able to trust rule-makers to be open and fulsome in their Explanatory Statements. Whether this trust is warranted may on occasions be questioned.²⁷

I do not resile from anything in the above paragraph.

I concluded the chapter by stating:

Delegated legislation involves the Parliament entrusting the Executive with the power to make legislation, without requiring that it be passed by the Parliament. The key mechanism for ensuring that the Executive does the right thing is the legislative scrutiny process and the role of parliamentary committees such as the Senate's R and O Committee. Australia has, for seventy years, led the world in legislative scrutiny. With the enactment of the [Legislative Instruments Act], the Commonwealth jurisdiction has gone to the cutting-edge of legislative scrutiny, by implementing a scrutiny trigger that operates by reference to what legislative instruments do, rather than by what they are called. In so doing, the Commonwealth Parliament has set an example that other jurisdictions would do well to follow.²⁸

Again, I do not resile from anything in the paragraph above. Though I note that the R and O Committee has now been in existence for closer to 85 years.

²⁷ *ibid.*

²⁸ *ibid.*

Some current challenges presented by delegated legislation

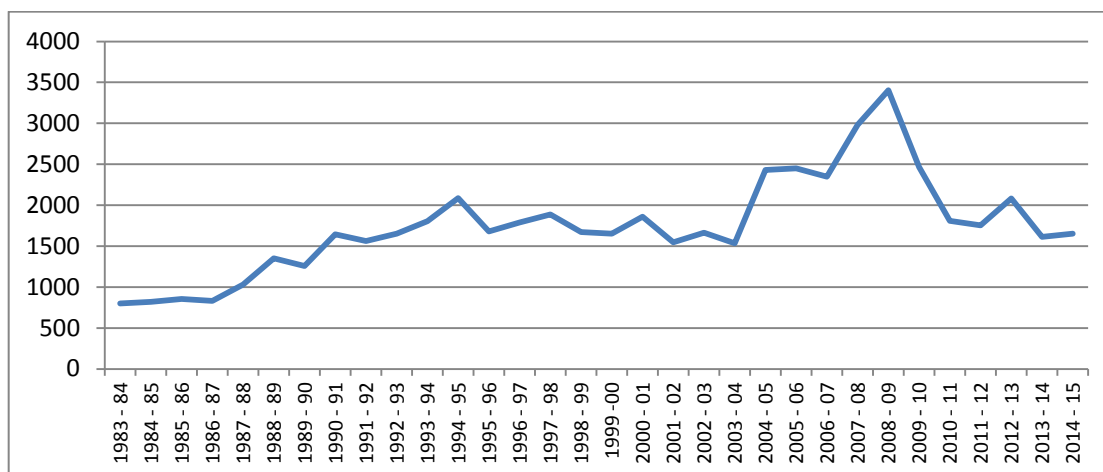
I turn now to some challenges that I identify in delegated legislation (particularly in the Commonwealth jurisdiction). The challenges discussed below are not intended either as being an exhaustive representation or to be set out in an order that demonstrates their importance.

Volume of delegated legislation

As I have noted above, the R and O Committee was, at least in part, set up in recognition of the volume of delegated legislation that was being made in the years leading up to 1930. As I have noted, the Senate Select Committee on Standing Committees referred to evidence that ‘no fewer than 3,708 pages’ of Commonwealth Acts had been passed between 1901 and 1927, compared to 11,263 pages of regulations, etc. in the same period. The current figures are frightening in comparison. In its annual report for 2014–15, OPC reported that, for that financial year, 172 bills, totalling 6,395 pages, were introduced. OPC also reported that, in that same period, 253 ExCo legislative instruments, totalling 8,091 pages, drafted by OPC were made and registered on the FRL. On top of that, OPC reported that a further (approximately) 103 legislative instruments, totalling 1,647 pages, had been drafted by OPC. And the number of instruments drafted by OPC only tells a fraction of the story. Going purely by the highest FRL registration number for 2015 calendar year, it would appear that 2,141 ‘legislative instruments’ (this being the common term for delegated legislation in the Commonwealth, since 2005) were registered on FRL in that calendar year.

Internal statistics of the R and O Committee indicate that, in the 2015 calendar year, the R and O Committee scrutinised 1,828 instruments that were disallowable by the Senate.

I am grateful for the assistance of the secretariat of the R and O Committee and the Senate Research section for preparing the following graphical representation of the number of disallowable instruments examined by the R and O Committee from 1983–84 to 2014–15:



The 1983–84 figure is 800 disallowable instruments. The 2008–09 figure is 3,404 disallowable instruments. While the more recent 1,828 disallowable instruments pales into comparison with the 2008–09 figure (which may, in fact, be attributable to the ‘backcapturing’ process of existing instruments that the Legislative Instruments Act initially required²⁹), it is surely the case that this sort of volume of delegated legislation carries with it challenges for the parliament, if it is to maintain proper control over the content of delegated legislation. Clearly, scrutinising the content of such a volume of delegated legislation is a significant challenge.

Quality of drafting of delegated legislation

A related issue is the drafting of delegated legislation. As I have already mentioned, it was initially the case the delegated legislation in the Commonwealth consisted mainly of regulations. In all states and territories, except Victoria, regulations are drafted by the same people (i.e. legislative drafters, in the various offices of parliamentary counsel) who draft primary legislation. Based on my experience *as* a legislative drafter, it is difficult to imagine that any lesser level of skill is brought to the drafting of regulations than is brought to the drafting of primary legislation.

In the Commonwealth jurisdiction, all regulations are now drafted by the OPC. Previously, regulations were drafted by a separate office—most recently, the Office of Legislative Drafting and Publishing (OLDP), a division of the Attorney-General’s Department—also staffed with trained legislative drafters. In 2012, the functions of

²⁹ But for other explanations of the fluctuations in instrument numbers around that time see also Senate Standing Committee on Regulations and Ordinances, *Report on the Work of the Committee in the 42nd Parliament*, report no. 115, paragraph 3.4, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Reports/report115/index, and Senate Standing Committee on Regulations and Ordinances, *Report on the Work of the Committee in 2010–11*, report no. 116, paragraph 3.3, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Reports/report116/index.

OLDP were transferred to OPC.³⁰ Under the new arrangement, regulations are nevertheless drafted only by trained legislative drafters.

However, as I have already mentioned, there is a vast body of Commonwealth delegated legislation outside of regulations. In my three years as Legal Adviser to the R and O Committee, I have been fascinated to observe both the proportion of delegated legislation drafted other-than-by-OPC and also the (at best) variable quality of the non-OPC-drafted legislation.

On the proportion issue, I did some rough calculations for the purposes of a seminar that I presented in November 2013. The calculations were based on figures provided to me by OPC.

In 2011, there were 1,471 legislative instruments registered on the FRLI (as it then was). Of those legislative instruments, 286 were ‘Select Legislative Instruments’ or SLIs. Regulations are SLIs. In simple terms, it can safely be assumed that most SLIs were drafted by OPC. This being so, for 2011, just over 19 per cent of legislative instruments registered on the FRLI were drafted by OPC.

For 2012, there were 2,591 legislative instruments registered on the FRLI, of which 331 were SLIs. That means that, for 2012, just under 13 per cent of legislative instruments registered on the FRLI were drafted by OPC.

As of November 2013 (when I presented the seminar), 1,832 legislative instruments were registered on the FRLI, of which 235 were SLIs. That means that, to that point, for 2013, just under 13 per cent of legislative instruments registered on the FRLI were drafted by OPC.

From 2014 onwards, I have been keeping figures for myself. In particular, I have been keeping a running weekly total of the overall number of disallowable instruments that I scrutinise and the number of instruments within that number that have been drafted by OPC (with the latter group being identifiable by the presence of an OPC footer). For the 2014 calendar year, I scrutinised 1,722 instruments, of which 295 had been drafted by OPC. That is just over 17 per cent.

For the 2015 calendar year, I scrutinised 1,828 instruments, of which 329—or just under 18 per cent—had been drafted by OPC.³¹

³⁰ For a more detailed history of OPC, see C. Meiklejohn, *Fitting the Bill: A History of Commonwealth Parliamentary Drafting*, Office of Parliamentary Counsel, Kingston, ACT, 2012.

³¹ See also S. Argument, ‘The importance of legislative drafters—Challenges presented by recent developments in the Commonwealth jurisdiction’, *AIAL Forum*, no. 81, 2015, p. 52.

While 18 per cent is obviously better than 13 per cent, I find the volume of drafting that is left to other-than-OPC drafters alarming. I would be surprised if it is generally known that OPC drafts such a small proportion of Commonwealth delegated legislation.

Use of 'legislative rules' in preference to regulations

A further, related issue is a 'novel' approach to delegated legislation that was introduced by OPC in 2014.

In 1904, a definition of 'prescribed' was introduced into the *Acts Interpretation Act 1901* (Cth). The definition (which now sits in section 2B of the Acts Interpretation Act) provides that 'prescribed' means 'prescribed by the Act or by regulations under the Act'. Since the introduction of that definition, users of Commonwealth legislation who saw the term 'prescribed' used in an Act would generally look to the regulations made under the Act for any matter that was to be 'prescribed'.

Early in 2014, the federal Minister for Industry made the Australian Jobs (Australian Industry Participation) Rule 2014. The Rule was made under section 128 of the *Australian Jobs Act 2013*, which allows for various matters in relation to that Act to be prescribed, by the minister, by 'legislative rules', rather than by the Governor-General, by regulations. This was first commented on by the R and O Committee in March 2014, in the context of its *Delegated Legislation Monitor* no. 2 of 2014.³² Over the following nine months, the R and O Committee explored with relevant ministers and with the First Parliamentary Counsel (FPC) this 'novel' approach to making delegated legislation in the Commonwealth jurisdiction. The exploration occurred through a series of letters and, in response, further questions from the R and O Committee.

I do not propose to go through the various issues raised by the R and O Committee here.³³ However, a focus of the R and O Committee's concerns was on the possible impact of the new approach on the quality of Commonwealth delegated legislation. A significant part of the issue related to the drafting of legislative rules as opposed to the drafting of regulations. Under existing arrangements (including the Legal Services Directions 2005³⁴), OPC is required to draft all Commonwealth regulations.

³² The R and O Committee's Delegated Legislation Monitors are available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Monitor.

³³ For further information, see generally, *Delegated Legislation Monitor*, no. 17 of 2014. See also S. Argument, 'The use of "legislative rules" in preference to regulations: A "novel" approach?', *Public Law Review*, vol. 26, no. 4, 2015, pp. 12–18 and also S. Argument, 'The importance of legislative drafters', op. cit.

³⁴ Available at <https://www.legislation.gov.au/Details/F2015C00533>.

Importantly, OPC does so at no cost to the instructing agency. For legislative rules, however, neither the OPC monopoly nor the ‘at no cost to the agency’ rule applies, meaning both that *anyone* can draft legislative rules and that OPC will only draft legislative rules on the payment of a fee. The R and O Committee was concerned that there might be an impact on the quality of drafting of delegated legislation if the new approach meant that less delegated legislation ended up being drafted by OPC.

In 1990, the late Emeritus Professor Douglas Whalan, while working as one of my eminent predecessors as Legal Adviser to the R and O Committee, said:

There is relatively easy access to statutes, regulations and, indeed, ordinances. Not only are they drafted by specialist professionals, but they are properly published in a series in print that can be read without the aid of a microscope. In contrast, some instruments have turned up on rather scrappy bits of paper, with the drafting in them of poor standard and with an indecipherable signature.³⁵

Professor Whalan was speaking at a time when the passage of the *Legislative Instruments Act 2003* was still quite some way (and quite some pain for everyone involved) into the future. It has always been my view that the Legislative Instruments Act did much to address the sorts of problems identified by Professor Whalan. Further, it was also initially my view that section 16 of the Legislative Instruments Act (now section 16 of the *Legislation Act 2003*), which imposes on (now) the FPC an obligation ‘to encourage high standards in the drafting of legislative instruments’ would do much to address ongoing issues. After my time in OLDP/OPC, as a legislative drafter, and after three years of scrutinising Commonwealth delegated legislation for the R and O Committee, my fear is that there has been little real impact. If there *has* been any real impact then it has eluded me. And I stand to be corrected on this point.

More worrying, however, is my concern that the recent developments in relation to pushing material that was previously in regulations into ‘legislative rules’ may result in the Commonwealth legislative landscape being taken backwards, not forwards. If non-OPC drafters are to be responsible for drafting even more Commonwealth delegated legislation than they do at present then—in the absence of a concerted effort by OPC to carry out the obligations imposed by section 16 of the (now) Legislation Act (something that, I should note, FPC has told the R and O Committee *is* now

³⁵ D.J. Whalan, ‘The final accolade: Approval by the committees scrutinizing delegated legislation’, paper given to seminar conducted by the (Commonwealth) Attorney-General’s Department titled ‘Changing attitudes to delegated legislation’, held in Canberra on 23 July 1990, p. 9.

occurring³⁶)—I have significant concerns for the effect on the overall quality of Commonwealth delegated legislation.

This is not to disparage the work of non-OPC drafters in the Commonwealth jurisdiction. I am sure that they all do their best to produce the best legislation that they possibly can. The problem is that (in my experience) most of them do so without formal training as legislative drafters, without any substantive guidance as to how they should approach their drafting and (presumably) without the same sorts of formal settling and editing process implemented in offices such as OPC. That being so, it is important (in my view) that the FPC does all that he can to fulfil his obligations under section 16 of the (now) Legislation Act.

In this context, there is a link between my earlier comments on the increasingly pervasive nature of delegated legislation and the importance of legislative drafting and legislative drafters. In *The Devil is in the Detail*, the Hansard Society highlights the importance of delegated legislation to the effective operation of government, not the least because of its effects on almost every aspect of both the public and private spheres. That being so, great care should be taken in the drafting of *all* forms of delegated legislation, both to ensure that it is effective and also to ensure that its effects on the public and on business are as optimal as they can be.

In a recent text on legislative drafting, Professor Helen Xanthaki, of the University College London, (writing from a UK perspective) has stated:

... the life of citizens tends to be more directly affected by delegated legislation than it is by general framework type laws passed by the Houses of Parliament. Moreover, it is delegated legislation that is applied by most authorities in their interaction with citizens, thus rendering the possibility and danger of corruption all the more pronounced. It is for these reasons that delegated legislation requires the attention and skill of the legislative drafter.³⁷

Significantly, Professor Xanthaki goes on to state:

The task is mammoth, and the resource implications of allocating all legislation to the Office of Parliamentary Counsel are extreme.³⁸

³⁶ See *Delegated Legislation Monitor*, no. 17 of 2014, especially pp. 15–16.

³⁷ H. Xanthaki, *Drafting Legislation: Art and Technology of Rules for Regulation*, Hart Publishing, Oxford and Portland, Oregon, 2014, p. 261.

³⁸ *ibid.* See also S. Argument, ‘Delegated legislation not of lesser importance to primary legislation—But is it subject to the same standards of scrutiny?’, *Public Law Review*, vol. 26, no. 3, 2015, pp. 137.

This applies equally in Australia. With the ongoing squeezing of bureaucratic resources in Australian jurisdictions (by the imposition on the bureaucracies of successive ‘efficiency dividends’ and the like), the challenges will only increase.

Challenges presented by issues arising from the High Court’s Williams decisions

It is trite to observe that the High Court’s decisions in *Williams (No. 1)*³⁹ and *Williams (No. 2)*⁴⁰ present challenges for the parliament and for the R and O Committee. In *Williams (No. 1)*, the High Court confirmed that executive authority to spend appropriated monies is not unlimited and therefore generally requires legislative authority. As a result of the subsequent decision in *Williams (No. 2)*, which strengthened the requirements in relation to legislative authority, the R and O Committee started requiring that the explanatory statements for all instruments specifying new programs for the purposes of section 32B of the *Financial Framework (Supplementary Powers) Act 1997* explicitly state, for each new program, the constitutional authority for the expenditure.

I do not propose to deal with the *Williams* decisions in any detail in this paper. First, because Professor Cheryl Saunders, in her paper for this Senate Occasional Lecture, will deal with the *Williams* decisions with greater insight than I could possibly muster. Second, because I defer to the analysis set out in Dr Patrick Hodder’s excellent *Papers on Parliament* paper, titled ‘The *Williams* Decisions and the Implications for the Senate and its Scrutiny Committees’.⁴¹ However, I make the following, brief comments about the practical implications of (in particular) the *Williams (No. 2)* decision for the work of the R and O Committee.

Since *Williams (No. 2)*, the R and O Committee has required that instruments that add new programs to the Financial Framework (Supplementary Powers) Regulations 1997, under the power set out in section 32B of the Financial Framework (Supplementary Powers) Act are specific about the constitutional authority for the new program. If a program cites the external affairs power of the Constitution (section 51(xxix)) as authority, the R and O Committee has sometimes required that the relevant instrument, or its explanatory statement, identify the international instrument whose obligations are relied upon *and* the particular obligations involved (i.e. by

³⁹ *Williams v Commonwealth* (2012) 248 CLR 156.

⁴⁰ *Williams v Commonwealth* (2014) 252 CLR 416.

⁴¹ *Papers on Parliament*, no. 64, January 2016, pp. 143–59, http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/~media/7D469B4A037244249054B09FEA72C34A.ashx. See also A. Lynch, ‘Commonwealth spending after *Williams* (No. 2): Has the new dawn risen?’, *Public Law Review*, vol. 26, no. 2, 2015, pp. 83–90.

reference to specific articles of the relevant international instrument).⁴² This is based on the R and O Committee's understanding that, in order to rely on the power in connection with obligations under international treaties, legislation must be appropriately adapted to implement relatively precise obligations arising under the relevant treaty.

Similarly, where the executive nationhood power (section 61) or the express incidental power (section 51(xxxix)) are relied upon, the R and O Committee has sometimes required that the relevant instrument, or its explanatory statement, identify the reasons why the relevant enterprises or activities are enterprises or activities that are peculiarly adapted to the government of a nation and cannot otherwise be carried out for the benefit of the nation. This is based on the R and O Committee's understanding that the relevant powers provide the Commonwealth executive with a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried out for the benefit of the nation.

The R and O Committee's requirements in this regard are in accordance with principle (a) of the R and O Committee's terms of reference, which requires the R and O Committee scrutinise instruments to ensure that they are 'in accordance with the statute'.

It is pleasing to observe that, despite questioning the appropriateness of responding to the R and O Committee's requirements,⁴³ and despite routinely qualifying any reference to constitutional authority (i.e. by prefacing any reference to constitutional authority with a statement to the effect of '[n]oting that it is not a comprehensive statement of the relevant constitutional considerations'⁴⁴), the executive has generally been quite cooperative in relation to the R and O Committee's requirements in this regard.

There was a not-insignificant hiccup in this approach when the R and O Committee considered the Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 3) Regulation 2015. The Minister for Finance, Senator Mathias Cormann, declined to provide the R and O Committee with legal advice in relation to the constitutional authority that supported the relevant new programs. However, the minister also failed to advance a public interest immunity claim in relation to

⁴² See, for example, *Delegated Legislation Monitor*, no. 6 of 2015, pp. 11–13.

⁴³ See, for example, letter from the Minister for Finance to the R and O Committee, dated 1 September 2015, in relation to the R and O Committee's comments on the Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 3) Regulation 2015, reproduced in *Delegated Legislation Monitor*, no. 10 of 2015, p. 33.

⁴⁴ See, for example, explanatory statement for Financial Framework (Supplementary Powers) Amendment (Education and Training Measures No. 1) Regulation 2016 [F2016L00163].

declining to provide the requested advice, leading the R and O Committee to pursue the issue (including by lodging a ‘protective’ motion to disallow the relevant regulation). Finally, the R and O Committee effectively gave the minister the option of providing the legal advice *or* assuring the R and O Committee that he was satisfied that the new programs were constitutionally supported by the relevant powers. The minister eventually provided the R and O Committee with that assurance.⁴⁵

Use of delegated legislation in anticipation of primary legislation

A more unusual (and in many ways more troubling) challenge recently presented by delegated legislation in the Commonwealth is the making of regulations that make amendments in anticipation of the same amendments later being made to primary legislation. An example is the amendments made by the Corporations Amendment (Streamlining Future of Financial Advice) Regulation 2014 [F2014L00891], which the R and O Committee first considered in *Delegated Legislation Monitor* no. 10 of 2014. The R and O Committee noted that the explanatory statement for the regulation provided the following reason for introducing the changes via regulation rather than primary legislation:

... time sensitive FOFA amendments will be dealt with through regulations and then put into legislation. This approach provides certainty to industry and allows industry to benefit from the cost savings of the changes as soon as possible.

The R and O Committee then noted that the Senate Standing Committee for the Scrutiny of Bills had expressed doubt as to whether industry certainty (and benefit) amounts to a sufficient justification for effecting significant policy change via regulation, noting that that committee had stated:

... enabling a regulated industry to benefit from legislative change ‘as soon as possible’ is not a sufficient justification to achieve policy change through regulations rather than Parliamentary enactment as this justification could be claimed with respect to any proposal. The fact that the changes may subsequently be enacted in primary legislation does not moderate the scrutiny concerns in this regard.⁴⁶

The R and O Committee then stated:

⁴⁵ See, generally, *Delegated Legislation Monitor*, no. 13 of 2015.

⁴⁶ Senate Standing Committee for the Scrutiny of Bills, *Ninth Report of 2014*, 16 July 2014, p. 348.

In light of these comments, the committee notes that key elements of the regulation (item 7) may be described as involving ‘fundamental change’ to the primary legislative scheme, and as ‘mirroring’ the proposed amendments in the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014.

Given this, the committee considers that the changes effected by the regulation may be regarded as more appropriate for parliamentary enactment, in respect of both their substantive effect and temporary or interim character. **The committee therefore requests the advice of the minister in relation to this matter.**⁴⁷

It should also be noted that the R and O Committee recognised from the outset that various amendments were time-limited in their effect, operating only from the commencement of the regulation (1 July 2014) until 31 December 2014. This meant that the amendments (in the regulations) had a limited operation and effect.

The Minister for Finance and Acting Assistant Treasurer, Senator Mathias Cormann, responded to the R and O Committee in a letter dated 13 September 2014. The R and O Committee dealt with the minister’s response in its *Delegated Legislation Monitor* no. 12 of 2014, in which the R and O Committee quoted the minister’s response in some detail. While what I set out below involves voluminous quotes from the minister and the R and O Committee, I think that the detail that is provided by reproducing the quotes is illuminating.

In his 13 September 2014 letter, the minister stated:

My response to the first issue raised in *Delegated Legislation Monitor* No. 10 of 2014 (the monitor) is that the magnitude of the burden on the financial advice industry by Labor’s reforms warranted swift action. In the lead up to the 2013 federal election, I outlined how Labor’s Future of Financial Advice (FOFA) reforms had been too costly to implement and failed to strike the right balance between consumer protection and the need to ensure the ongoing availability, accessibility and affordability of high quality financial advice. From speaking with numerous industry stakeholders, it was clear that the financial services industry was being significantly affected by Labor’s FOFA reforms. As such, I stated that we would move quickly to implement changes to FOFA if the Coalition were elected.

⁴⁷ *Delegated Legislation Monitor*, no. 10 of 2014, pp. 2–3.

It should be noted that Treasury's estimates of the ongoing cost savings of the Regulation are approximately \$190 million per year, with one-off implementation savings of approximately \$90 million; these estimates represent just over half of the estimated \$375 million ongoing costs of complying with FOFA. Further, the Australian Securities and Investments Commission's facilitative compliance approach to FOFA was scheduled to end on 30 June 2014; this provided additional impetus to ensure industry received certainty through legislative change.

As the Committee noted, the Regulation is largely mirrored in the Bill. Those provisions in the Bill have been—and will continue to be—subject to full parliamentary scrutiny. The Bill passed the House of Representatives on 28 August 2014 and was introduced in the Senate on 1 September 2014. The interim Regulations will be repealed once the Bill receives Royal Assent. I note that both the Senate Economics Legislation Committee and the Senate Economics Reference Committee are—respectively—conducting inquiries into the Bill and financial advice reforms.⁴⁸

The R and O Committee thanked the minister for his response but noted that:

... the minister's response has not satisfactorily addressed the key scrutiny concern raised by both the Scrutiny of Bills committee and this committee—namely, that the regulation makes fundamental legislative change that may be more appropriate for parliamentary enactment (that is, via primary rather than delegated legislation). While the minister cites both the need for 'swift action' and the estimated savings or benefit to industry, the minister has not addressed the committee's concern that such imperatives may not amount to sufficient justification for effecting significant policy change via regulation (and therefore without the full scrutiny and approval of the parliament). The committee notes that the minister's advice as to the scale of the intended effect of the regulation, and the existence and significance of the bill currently being considered by other Senate committees, could be equally taken as supporting a conclusion that the measures are more appropriately subject to the Senate's full deliberative processes. The committee is particularly concerned that the policy imperatives cited to justify the use of regulation in this case do not appear to be distinguishable from any case in which, in view of the anticipated timeframes and uncertainty applying to the full legislative process, the government might regard it as preferable or convenient to

⁴⁸ *Delegated Legislation Monitor*, no. 12 of 2014, p. 5.

effect policy change via delegated legislation. **The committee therefore seeks further advice from the minister as to whether the legislative changes made by the regulation should be considered appropriate for delegated legislation.**

The committee further notes that, notwithstanding the minister's assurance that the regulation will be repealed once the bill receives Royal Assent, the nature of the full legislative process is such that there remains significant uncertainty as to whether and in what form the bill may eventually be passed. **Given this, the committee also seeks the minister's advice as to whether all or part of the instrument will be repealed in the event that the bill is not passed by the parliament, or is passed with substantive amendments to matters currently provided for in the regulation.**⁴⁹

The minister responded to the above comments in a letter dated 23 October 2014. The R and O Committee dealt with the minister's response in *Delegated Legislation Monitor* no. 14 of 2014, where it quoted extensively from the minister's response, noting that the minister had advised:

I previously outlined to the Committee the magnitude of the burden imposed on the financial advice industry by Labor's Future of Financial Advice (FOFA) changes, and I indicated that the burden warranted swift action. In my discussions with industry stakeholders since the commencement of the Regulation on 1 July 2014, it has become clear that the Regulation has provided much needed clarity and certainty to the financial advice industry. Importantly, the Regulation has reduced costs in the financial advice industry by removing costly and burdensome red-tape such as requiring clients to resign contracts with their advisers at least every two years to continue an ongoing advice relationship. As such, the Regulation has been a crucial first step in ensuring the ongoing availability, accessibility and affordability of high-quality financial advice; further improvements will ensue from the accompanying legislative amendments.

I would like to bring to the Committee's attention the fact that some of the amendments contained in the Regulation have always been considered an interim solution. The Government has consistently stated that time-sensitive changes would initially be made through regulations and then reflected through legislative amendments. Indeed, as far back as 7 November 2013, the Assistant Treasurer, Senator the Hon Arthur

⁴⁹ *ibid.*, pp. 5–6.

Sinodinos AO, indicated that ‘time sensitive amendments will be dealt with through regulations and then locked in to legislation’. The Government has not wavered from this commitment. Indeed I again confirmed this approach in a comprehensive statement on improvements to Labor’s regulations on 20 June 2014.

The Committee should note that parts of the Regulation are designed to only have effect from 1 July 2014 to 31 December 2015. This arrangement appropriately reflects the differential treatment of primary and secondary law. It also demonstrates the bone fides of the Government that it would not permit a temporary mechanism to turn into a permanent legislative artefact.

As I indicated in my 13 September 2014 letter to the Committee, the financial impacts of Labor’s FOFA reforms compelled an urgent response. Treasury’s estimates of the ongoing cost savings of the Government’s Regulation to improve FOFA are approximately \$190 million per year, with one-off implementation savings of approximately \$90 million. These estimates represent just over half of the estimated \$375 million ongoing costs to industry—and ultimately to consumers—of complying with Labor’s FOFA.

Further, the Australian Securities and Investments Commission’s facilitative compliance approach to FOFA was scheduled to end on 30 June 2014. This provided an interim period where the compliance emphasis was on education and assistance, before the regulator moved to a stricter enforcement approach. This provided additional impetus to ensure industry received certainty through legislative change before businesses incurred substantial costs implementing Labor’s FOFA reforms in an unamended form in the 2014–15 financial year. It would be evidently less disruptive for this significant industry and for Australians saving for their retirement and managing financial risks through life, to avoid the costs of implementing short-lived changes and then incur costs to unwind them. Given this urgency, making amendments through regulations provided the most effective mechanism to ensure certainty to industry and to investors alike.

As the Committee previously noted, many of the amendments made in the Regulation are to be reflected in legislation: specifically, the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014 (the

FOFA Bill). Those provisions in the FOFA Bill have been—and will continue to be—subject to full parliamentary scrutiny.

Although Senate scrutiny processes for regulations are different to that for principal legislation, the deliberative processes of the Senate have provided for extensive scrutiny of this Regulation. I draw the Committee's attention to the considerable Senate debate on two motions for disallowance of the Regulation: the first was a full disallowance motion, which was resolved in the negative on 15 July 2014; the second was a partial disallowance motion—on items 1 to 27 and 30 of the Regulation—which was resolved in the negative on 1 October 2014. Disallowance had been scheduled for debate and deferred on an almost daily basis for most of the Spring sittings to date.

The FOFA Bill has also been subject to two comprehensive Senate Economics Legislation Committee inquiries, which reported on 16 June 2014 and 22 September 2014 respectively, as well as consideration by the Senate Standing Committee on the Scrutiny of Bills. The Senate Economics Legislation Committee recommended that the Senate pass the FOFA Bill in both its reports. It should be noted that the FOFA Bill, which is endorsed by the Senate Economics Legislation Committee, creates entrenchment of some bridging reforms that are reflected in the Regulation.

Regarding the Committee's question as to whether all or part of the Regulation will be repealed in the event the FOFA Bill is not passed by the Parliament, the Government is committed to working with the Senate to deliver our election commitment. I do not presume to pre-empt the outcome of this process.

Having provided clarity and certainty to industry through the Regulation, the Government can now turn its attention to additional efforts to improve the accessibility, affordability and quality of financial advice. This work includes progressing an enhanced public register of financial advisers and supporting efforts to raise professional, ethical and educational standards in the industry.⁵⁰

The R and O Committee responded as follows:

⁵⁰ *Delegated Legislation Monitor*, no. 14 of 2014, pp. 8–10.

The committee notes the minister's reiteration of the claim to the urgency of the measures in question, arising from the minister's assessment of the 'magnitude of the burden imposed on the financial advice industry by Labor's Future of Financial Advice (FOFA) changes'. The minister also reiterates his previous advice regarding the financial benefit of the changes to industry. However, the committee notes that the considerations raised are not in the nature of exigencies (intrinsically requiring the measures in question) but are in fact political and policy considerations falling outside the scope of the committee's technical scrutiny of delegated legislation. The appropriateness, desirability and cost-benefit implications of particular measures for regulating a specific industry are not matters which go to the substance of the key concern raised by this (and the Scrutiny of Bills) committee, which is that the regulation makes fundamental legislative change that may be more appropriate for parliamentary enactment (that is, via primary rather than delegated legislation).

In this respect, the committee notes the minister's view that the 'deliberative processes of the Senate have provided for extensive scrutiny' of the regulation. However, while the technical matters flagged by the committee have been referenced in debates on the regulation, those debates have centred on the policy aspects of the regulation. The scrutiny concerns and principles relevant to this matter have not yet been the primary subject of any motion debated by the Senate.

Simply stated, the committee remains concerned that the minister's position is capable of forming a precedent for the use of delegated legislation in favour of primary legislation on the basis that, due to the inherent uncertainty of the Parliament's full legislative processes, it is the most convenient or preferred means to effect policy change. While the committee acknowledges the minister's advice that the end-dating of some measures 'demonstrates the bona fides of the Government that it would not permit a temporary mechanism to turn into a permanent legislative artefact', the committee considers that questions of duration are secondary to the fundamental question of whether the Parliament approves of the legislative approach.

Finally, the committee notes the minister's advice regarding the government's intentions in the event that the bill is amended or not passed by the Parliament:

Regarding the Committee's question as to whether all or part of the Regulation will be repealed in the event the FOFA Bill is not passed by the Parliament, the Government is committed to working with the Senate to deliver our election commitment. I do not presume to pre-empt the outcome of this process.

The committee does not view consideration of the potential consequences of using regulation to implement fundamental changes that anticipate a particular legislative outcome on a bill as pre-emptive. As the committee has previously noted, it is in fact the pre-emptive character of the use of regulation in this case that gives rise to the committee's inquiries. The committee's questions on this issue point to the significant possibility that the bill is not passed in a form which contains all the measures in the regulation. The committee considers that the potential for this approach, in this and future cases, to 'permit a temporary mechanism to turn into a permanent legislative artefact', or to continue in operation despite the clearly expressed will of the Parliament (for example, if the bill were passed with an amendment to remove one of the measures in the regulation), is critical to the assessment of whether the legislative approach offends the committee's scrutiny principle (d).

In light of these concerns about the potential inclusion of matters more appropriate for parliamentary enactment in primary legislation (scrutiny principle (d)), the committee draws this matter to the attention of senators. Noting the end-dating of the regulation, the committee leaves the question of whether the use of regulation is appropriate in this case to the Senate as a whole.⁵¹

In coming to this conclusion, the R and O Committee also withdrew the 'protective' notice of motion that it had placed on the regulations in question.

One might have expected that, after the interchange reproduced above, ministers might have been more circumspect in adopting a similar approach for future instruments. Not so. More recently, the R and O Committee considered the Corporations Amendment (Financial Advice) Regulation 2015 [F2015L00969] in *Delegated Legislation Monitor* no. 11 of 2015.

The R and O Committee noted that the explanatory statement for the instrument provided the following reason for introducing the changes by way of delegated legislation rather than primary legislation:

⁵¹ *ibid.*, pp. 10–11.

The majority of these time sensitive [Future of Financial Advice] amendments will also be enacted in legislation. The Government has adopted this approach to provide certainty to industry as quickly as possible.⁵²

The R and O Committee questioned this approach, again noting the questions previously asked by the Senate Standing Committee for the Scrutiny of Bills as to whether industry certainty (and benefit) amounts to a sufficient justification for effecting significant policy change via regulation.

In light of these considerations, the R and O Committee advised the Minister for Finance that it considered that the changes effected by the regulation could be regarded as more appropriate for parliamentary enactment.

The minister's response stated (in part):

The majority of the amendments made through the Revising FOFA Regulation and the Regulation will also be enacted in legislation through the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014, which is currently before the Senate and will be subject to full Parliamentary scrutiny.⁵³

The minister's response also advised that there was 'bipartisan support' for the relevant amendments.

The R and O Committee again engaged the minister over a series of *Delegated Legislation Monitors* and responses from the minister. In the light of the extensive quoting in relation to the previous example, above, I will not reproduce those answers here. Suffice to say that the R and O Committee was equally vigorous in maintaining its position in relation to the approach of implementing amendments by regulation, in anticipation of later amendments being made by primary legislation.

In concluding its dealing with the matter, the R and O Committee noted the current progress of the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014, namely that it had been introduced into the Senate on 1 July 2014 (i.e. more than two months prior to the R and O Committee's current consideration of the instrument). However, the R and O Committee indicated that it maintained its concern that the minister's position was capable of forming a precedent for the use of

⁵² *Delegated Legislation Monitor*, no. 11 of 2015, p. 4.

⁵³ *ibid.*, p. 5.

delegated legislation in favour of primary legislation, on the basis that, due to the timing or inherent uncertainty of the parliament's full legislative processes, implementing amendments by delegated legislation could be the most convenient or preferred means to effect (interim) policy change. The R and O Committee concluded by stating:

While the committee notes the minister's advice that there is bipartisan support for the changes contained in the regulation, as the committee has previously noted, it is the pre-emptive character of the use of regulation in this case that gives rise to the committee's inquiries. The committee's questions on this issue point are based on the possibility that, notwithstanding the apparent bipartisan support for the regulation, the bill may not be passed in a form which contains all the measures in the regulation. The committee considers that the potential for this approach, in this and future cases, to 'permit a temporary mechanism to turn into a permanent legislative artefact', or to continue in operation despite the clearly expressed will of the Parliament (for example, if the bill were passed with amendments to remove one of the measures in the regulation or not complemented by the operation of the regulation), is critical to the assessment of whether the legislative approach offends the committee's scrutiny principle (d).

In light of these concerns about the potential for the regulation to implement changes that are subsequently not passed by the Senate, the committee has determined to give a notice of motion for disallowance to ensure that the ability to disallow the instrument is protected prior to the finalisation of the Senate's consideration of the bill.⁵⁴

Fortunately, the primary legislation was passed and there was no need for the disallowance motion to proceed. However, it is important to note that the minister's final response to the R and O Committee explicitly referred to the timetable for the passage and commencement of the relevant primary legislation, in an evident attempt to address the R and O Committee's concerns. Nevertheless, attempts to legislate in this way remain a matter for concern, especially if the previous attempts indicate that this is intended to be an acceptable approach to legislating.

Quite correctly, the R and O Committee has not accepted that the use of delegated legislation in this way was justified on the basis of Pearce and Argument's 'legislation to deal with rapidly changing or uncertain situations' justification or the

⁵⁴ *ibid.*, p. 6.

Donoughmore Committee’s ‘emergency’ justification. What was involved were issues of political expediency (albeit that the expediency also went to providing certainty to relevant stakeholders). Underlining my concern about the exercise of legislative power in this way is that my inquiries of other Australian jurisdictions indicate that this is genuinely a novel approach to legislation. I can find no example of a similar approach being adopted in any other jurisdiction.

This is an issue in relation to which the R and O Committee will have to maintain its vigilance.

Challenges presented by issues arising from the Federal Court’s Perrett decision

Another recent challenge presented to the Senate arises from the decision (on 13 August 2015) of the Federal Court of Australia in *Perrett v Attorney General of the Commonwealth of Australia (Perrett)*.⁵⁵ In that decision, the Federal Court (Dowsett J), rejected a challenge by five applicants to the Family Law (Fees) Amendment (2015 Measures No. 1) Regulation 2015 (Cth) (the Second Regulation). The basis of the application was that the Second Regulation was ‘the same in substance’ as the Federal Courts Legislation Amendment (Fees) Regulation 2015 (Cth) (the First Regulation), which was disallowed by the Senate on 25 June 2015.

The applicants argued that the making of the Second Regulation, on 9 July 2015, was contrary to section 48 of the Legislative Instruments Act (now section 48 of the Legislation Act), which prohibits the making of a legislative instrument (or a provision of a legislative instrument) that is ‘the same in substance’ as a legislative instrument (or a provision of a legislative instrument) that has been disallowed, within six months of the disallowance of the first legislative instrument. In the particular case, provisions of the First Regulation provided for significant increases in the filing fees for various Family Court applications. Those provisions were disallowed by the Senate. The Second Regulation largely replicated the disallowed provisions but also increased relevant fees by a further \$5.

The Federal Court upheld the validity of the Second Regulation. Dowsett J (in essence) concluded that section 48 of the Legislative Instruments Act required ‘complete identity’ between disallowed regulations and subsequent regulations before it would come into effect.

While I do not intend to analyse the *Perrett* decision in great detail for this paper, I nevertheless record my concern about the potential effect of the decision on the work of the Senate. My view is that the decision operates to leave section 48 of the (now)

⁵⁵ [2015] FCA 834.

Legislation Act with *little* (if any) operation and effect, since (on Dowsett J's analysis) it can be so easily side-stepped by an executive government. In fact, the particular case demonstrates that point. In that regard, it is significant to note that *no* explanation is given for the additional \$5 increase provided for by the Second Regulation. One of the justifications for the fees increases provided for by the First Regulation was the funding of the relevant courts. Surely, a further \$5 increase would have negligible practical effect on the 'structural deficits currently facing the family courts' that are referred to in the explanatory statement for the Second Regulation. One does not have to be a rampant cynic to speculate that the principal reason for the further \$5 increase was to get around section 48 of the (now) Legislation Act.

The Senate disallowed the Second Regulation on 11 August 2015.

Several of the applicants to the Federal Court appeal initially appealed the Federal Court decision to the Full Federal Court. However, that appeal was discontinued on 5 February 2016.⁵⁶ This means that, despite the immediate issue of the increase in fees having been dealt with, the issue of the possible 'precedent' value of the Federal Court decision remains. That being so, the R and O Committee has stated, in its *Delegated Legislation Monitor* no. 2 of 2016:

In concluding its examination of the instrument, the committee notes that the appeal to the Full Federal Court of the *Perrett* decision was discontinued on 5 February 2016.⁵⁷ However, the committee observes that tensions remain between the interpretation of the concept of 'the same in substance' by the Federal Court in that decision and the authoritative decision of the High Court in *Victorian Chamber of Manufactures v Commonwealth (Women's Employment Regulations)* (1943) 67 CLR 362. The committee's examination of any 'same in substance' issues in the future will continue to take into account relevant jurisprudence on this question, as well as the broader concepts of parliamentary sovereignty and accountability which inform the application of the committee's scrutiny principles.⁵⁸

Given the potential impact of the *Perrett* decision on the Senate's effectiveness in its supervisory role in relation to delegated legislation, this is a significant position for the R and O Committee to take. Watch this space.

⁵⁶ See <https://www.comcourts.gov.au/file/Federal/P/QUD757/2015/actions>.

⁵⁷ *Ting Wei v George Henry Brandis, Attorney-General of the Commonwealth of Australia* (QUD757/2015).

⁵⁸ *Delegated Legislation Monitor*, no. 2 of 2016, p. 44.

'Skeletal' or 'skeleton' legislation

In his recent text, *Soft Law and Public Authorities: Remedies and Reform*, Dr Greg Weeks discusses 'the perils of skeletal legislation'. He states:

There is a tendency to draft legislation in minimalist or 'skeletal' form and to leave issues of detail or uncertainty 'to the Regs'.⁵⁹

Dr Weeks footnotes my paper titled ' "Leaving it to the Regs"—The pros and cons of dealing with issues in subordinate legislation', presented to the Australia–New Zealand Scrutiny of Legislation Conference, Brisbane, from 26–28 July 2011.⁶⁰ In that paper, I noted that this issue was touched on by Professor Pearce, in his paper to the 2009 Australia–New Zealand Scrutiny of Legislation Conference. Professor Pearce stated:

More and more we are seeing major policy matters being dealt with in delegated legislation. There are probably many reasons for this. For example, I am told that matters are often left to be included in regulations because there has not been time to cover all issues in the Bill introduced into the Parliament. Time is thus gained to deal with matters that may be of significance.

Another reason for using delegated legislation for substantive issues flows from the approach that has many advocates of drafting Bills in skeletal form setting out only the major principles. By definition, this means that significant material must be included in the delegated legislation.⁶¹

My 'Leaving it to the Regs' paper was largely based on my observations as a legislative drafter, in the years leading up to the 2011 conference. 'Skeletal' legislation is not an issue that I have particularly noticed in my three years of working with the R and O Committee. However, Dr Weeks' comments suggest that it is an issue that should continue to be monitored.

As I indicated at the outset, these are just some of the recent challenges that delegated legislation has presented in the Commonwealth jurisdiction.

⁵⁹ G. Weeks, *Soft Law and Public Authorities: Remedies and Reform*, Hart Publishing, London and Portland Oregon, 2016, p. 27.

⁶⁰ Available at http://www.parliament.qld.gov.au/documents/committees/SLC/2011/SLC_Conference/SLCCConf-Sess11-Argument.pdf.

⁶¹ Pearce, 'Legislative scrutiny', op. cit.

Some issues in the United Kingdom—*Strathclyde Review: Secondary Legislation and the Primacy of the House of Commons*

Background

I now turn to some recent, highly contentious issues involving delegated legislation in the United Kingdom that (in my view) allow some observations to be made about how we deal with delegated legislation in Australia. I note at the outset that there is a lot of detail in what I set out below. However, I hope that at least some of the material will be of interest to readers and that the observations (by reference to the situation in Australia) that I make are useful.

On 17 December 2015, the UK Government published the report of the ‘Strathclyde Review’.⁶² The review, led by Lord Strathclyde, had been commissioned, by the UK Government, the previous October (meaning that it was completed in a very short time frame). The purpose of the review was ‘to examine how to protect the ability of elected governments to secure their business in Parliament in light of the operation of [relevant parliamentary] conventions’ and to ‘consider in particular how to secure the decisive role of the elected House of Commons in relation to its primacy on financial matters, and secondary legislation’.⁶³

The stimulus for the review was a decision of the House of Lords, made on 26 October 2015, to ‘withhold agreement’ to the Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015. Those regulations were put to the House of Lords under section 66 of the *Tax Credits Act 2002* (UK), which provided (in part):

66 Parliamentary etc control of instruments

This section has no associated Explanatory Notes

- (1) No regulations to which this subsection applies may be made unless a draft of the instrument containing them (whether or not together with other provisions) has been laid before, and approved by a resolution of, each House of Parliament.

⁶² David Cameron, ‘Government publishes Strathclyde Review’, press release, 17 December 2015, <https://www.gov.uk/government/news/government-publishes-strathclyde-review>; *Strathclyde Review: Secondary Legislation and the Primacy of the House of Commons*, December 2015, Cm 9177, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/486790/53088_Cm_9177_Web_Accessible.pdf.

⁶³ ‘Strathclyde Review: Statement by Baroness Stowell’, 4 November 2015, <https://www.gov.uk/government/speeches/strathclyde-review-statement-by-baroness-stowell>.

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- (2) Subsection (1) applies to—
- (a) regulations prescribing monetary amounts that are required to be reviewed under section 41,
 - (b) regulations made by virtue of subsection (2) of section 12 prescribing the amount in excess of which charges are not taken into account for the purposes of that subsection, and
 - (c) the first regulations made under sections 7(8) and (9), 9, 11, 12 and 13(2).
- (3) A statutory instrument containing—
- (a) regulations under this Act,
 - (b) a scheme made by the Secretary of State under section 12(5), or
 - (c) an Order in Council under section 52(7),
- is (unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament) subject to annulment in pursuance of a resolution of either House of Parliament.

It appears that the regulations in question were ‘first regulations’, for the purposes of paragraph 66(2)(c) of the Tax Credits Act. As a result, a positive resolution of both Houses was required in relation to the regulations if they were to proceed into effect. As indicated, the House of Lords declined to make such a positive resolution.

The report notes that on the following day (i.e. 27 October 2015), a motion was moved and narrowly defeated which would have annulled the Electoral Registration and Administration Act 2013 (Transitional Provisions) Orders 2015.

These were obviously considered to be momentous events, leading the Prime Minister to invite Lord Strathclyde ‘to conduct a review of statutory instruments and to consider how more certainty and clarity could be brought to their passage through Parliament’.⁶⁴

In the foreword to the report, Lord Strathclyde stated:

The Lords convention on statutory instruments has been fraying for some years and the combination of less collective memory, a misunderstanding of important constitutional principles, a House more willing to flex its

⁶⁴ *Strathclyde Review: Secondary Legislation and the Primacy of the House of Commons*, op. cit., p. 3.

political muscles, and some innovative drafting of motions against statutory instruments has made it imperative that we understand better the expectations of both Houses when it comes to secondary legislation and, in particular, whether the House of Lords should retain its veto.⁶⁵

In some of the background information in the report, Lord Strathclyde referred to work previously done by a 'Joint Committee on Conventions of the UK Parliament', noting:

A third convention considered by the Joint Committee is central to the current review and relates to secondary legislation. The Committee noted that assertions had been made in debate in the Lords since the 1950s that it would be wrong for the Lords to reject delegated legislation. When the Committee considered the matter, there had only been two occasions on which the House of Lords had rejected an SI (in 1968 and 2000 ...). The Committee concluded that 'the House of Lords should not regularly reject Statutory Instruments, but that in exceptional circumstances it might be appropriate for it to do so'. A number of specific circumstances were identified, for example, when the provisions of an SI were of the sort more normally found in primary legislation or in the case of certain specific orders. If these or other particular circumstances did not apply, then 'opposition parties should not use their numbers in the House of Lords to defeat an SI simply because they disagree with it'.

Since the Joint Committee reported in 2006, and the Lords and Commons noted the report with approval, the Lords have rejected SIs on the three further occasions [that are discussed later in the report].⁶⁶

The important thing to note here is the apparent rarity of the House of Lords challenging (for want of a better word) delegated legislation.

I do not propose to consider here the detail of the reasoning of the report of the Strathclyde Review. It is largely UK Parliament specific, referring both to UK legislation, particular conventions (and history) of the UK Parliament and also the complex and confusing nature of legislative scrutiny in the UK Parliament.⁶⁷ What is important is the three options put forward by Lord Strathclyde, as a result of his review:

⁶⁵ *ibid.*

⁶⁶ *ibid.*, pp. 11–12 (footnotes omitted).

⁶⁷ Fox and Blackwell, *op. cit.*, pp. 73–90.

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- One option would be to remove the House of Lords from statutory instrument procedure altogether. This has the benefit of simplicity and clarity. However, it would be controversial and would weaken parliamentary scrutiny of delegated legislation and could make the passage of some primary legislation more difficult.
 - The second option would be to retain the present role of the House of Lords in relation to statutory instruments, but for that House, in a resolution or in standing orders, to set out and recognise, in a clear and unambiguous way, the restrictions on how its powers to withhold approval or to annul should be exercised in practice and to revert to a position where the veto is left unused. This option seeks to codify the convention. However, since a resolution of the House could be superseded, or standing orders could be suspended, by further decisions of the House, it would not provide certainty of application.
 - A third option would be to create a new procedure—set out in statute—allowing the Lords to invite the Commons to think again when a disagreement exists and insist on its primacy. This would better fit with the established role of the House of Lords as regards primary legislation.⁶⁸

Lord Strathclyde recommended the third option. To me, all of the options seem pretty extreme.

Why is the reaction indicated by the report of the Strathclyde Review so extreme?

Clearly, I do not know enough about the situation in the UK Parliament to be able to offer any informed analysis of the reasoning behind Lord Strathclyde's recommended options. However, I note that Professor Meg Russell of the Constitution Unit at the University College London offered this contemporary analysis:

The current argument concerns the Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015 which significantly limit people's eligibility for tax credits. This is a piece of 'delegated legislation' (a 'statutory instrument') meaning that it is subject to an expedited parliamentary process, much less onerous than the process for passing a bill ... The government is seeking to use powers delegated to it under the *Tax Credits Act 2002*, which allows for regular updating of rates and bands. This kind of delegated power is commonplace, to ensure that a new bill is not required every time there are small changes to the

⁶⁸ *Strathclyde Review: Secondary Legislation and the Primacy of the House of Commons*, op. cit., p. 5.

implementation of policy. Notably, delegated legislation cannot be amended by the Lords, only rejected or agreed.⁶⁹

The point to note about the above paragraph is the suggestion that delegated legislation is to be used for ‘small changes’. Professor Russell goes on to discuss the role of the House of Lords in relation to delegated legislation:

The House of Lords has a formal veto over delegated legislation.

If the House of Lords used its veto power on a regular basis this could be very disruptive. In practice it has treated such matters with caution. The House of Lords Library have collated useful data on such motions. These show that in the period 1999–2012 the Lords voted on 27 fatal and 42 non-fatal motions, which resulted in 17 defeats—just three of them on fatal motions. Two occurred in 2000 over arrangements for the London mayoral elections, and another in 2007 over the Manchester ‘supercasino’.

Prior to this there had been only one such fatal defeat of a statutory instrument, in 1968, leading to claims of a convention that the Lords should not vote on such matters. It is hence not unprecedented for the Lords to use its veto power, but it is unusual.⁷⁰

Professor Russell goes on to state:

Two other political points are important. First, the threat of a Lords defeat on a statutory instrument can result in compromise. While they cannot be amended, the tabling of a motion, or even the threat to table a motion, occasionally results in an instrument being withdrawn by the government and replaced by an amended version. A vote, and possible defeat, only occurs when these informal processes fail. Second, it is a far greater threat to the government than it is to the Lords if the existing convention breaks down. If it became routine for statutory instruments to be rejected, a great deal of government business could grind to a halt. The maintenance of the system depends on some give and take on both sides.⁷¹

⁶⁹ M. Russell, ‘Everything you ever wanted to know about tax credits and the House of Lords—but were afraid to ask’, *The Telegraph*, 26 October 2015, <http://www.telegraph.co.uk/comment/11955288/Everything-you-ever-wanted-to-know-about-tax-credits-and-the-House-of-Lords-but-were-afraid-to-ask.html>.

⁷⁰ *ibid.*

⁷¹ *ibid.*

While I will go on to make some remarks about how *different* things are in the Senate, I note that the preceding paragraph suggests that compromise (and ‘informal processes’) is as much a factor in the House of Lords as it is in the Senate.

Professor Russell offered some further insight in evidence that she gave to the Public Administration and Constitutional Affairs Committee of the House of Commons on 19 January 2016, in oral evidence given to that committee’s inquiry into the Strathclyde Review:

Q8 Mrs Cheryl Gillan: In the same vein as ‘one swallow doesn’t a summer make’, were you surprised that one defeat triggered a whole review?

Professor Russell: Well, tempers had got very high. I was a little surprised at the way it was handled, although not entirely. One of the things that I commented on, which is another crucial piece of context for all of this, was when I published something immediately after the 2010 election saying, we are now in uncharted political waters. We have a majority Conservative Government, albeit a slender majority in the Commons, facing a House of Lords that is potentially politically hostile to it, in which the Labour Opposition can potentially join forces with others to outnumber the Conservative Government.

This is a new situation, and I think it is taking Ministers some time to get used to that situation. I think it has also taken the Opposition some time to get used to that situation, and Lord Strathclyde acknowledged this in his speech in the debate last week. This is a new situation for the Conservatives. It is also a new situation for Labour, and indeed for the Liberal Democrats, who are very important voters in the Lords.

In that sense it is not surprising, because this is new and people are finding their feet in this new situation, but I think what was potentially surprising was that Ministers raised the temperature so much on this issue so early, because this is not by any means the first time that there have been rumblings in the House of Lords that a statutory instrument is problematic and that it might be rejected. What has historically happened is that Ministers have thought about it before the vote and withdrawn the instrument, and sometimes relaid an amended instrument in order to defuse the situation, whereas the Government’s approach here was that they wanted to have the fight. Once tempers had got that raised, perhaps it is not surprising that you end up with a review to see what is going on.

Q9 Mrs Cheryl Gillan: It is fair to say that the drive came from Ministers, and it was surprising that the drive was quite so vociferous to move to a review. Is that what you are inclined to say?

Professor Russell: I do not have any difficulty with there being a review. I think it is a perfectly reasonable thing to do. It is an important area. It is a very thorough review. It presents us with some nice evidence that we can discuss. It is difficult to criticise Ministers for deciding that there should be a review, but the reason that this became such a contested topic was perhaps in the end because Ministers were not adequately aware of the risk of defeat and the fact that speaking out against the Lords publicly would not necessarily make the problem go away.

Q10 Mrs Cheryl Gillan: They had not done their homework, is what you are saying?

Professor Russell: It is the job of the business managers to advise Ministers as to what they can get through Parliament, and somehow Ministers seemed to have the impression that by pushing ahead very loudly they would be able to get this through, and it did not work.⁷²

Perhaps it was all just a stuff-up.

Small changes?

An obvious point to make is that if delegated legislation is only for ‘small changes’, how can it be that the rejection by the House of Lords of a piece of delegated legislation resulted in the British Prime Minister being reportedly ‘furious’ with the House of Lords and threatening to take ‘rapid’ action in response?⁷³ If only ‘small changes’ were involved in the Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015, why did their rejection result in the Strathclyde review and, in turn, the three ‘reform’ options suggested by Lord Strathclyde?

An obvious possibility is that, in fact, the relevant regulations did *not* contain ‘small changes’ but, rather, *significant* changes. If that is the case, then why were the changes not implemented by way of primary legislation?

⁷² Available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/public-administration-and-constitutional-affairs-committee/strathclyde-review/oral/27335.html>.

⁷³ See, for example, N. Watt, ‘Tax credits vote: PM accuses Lords of breaking constitutional convention’, *The Guardian*, 27 October 2015, <http://www.theguardian.com/money/2015/oct/26/tax-credit-cuts-halted-as-lords-vote-to-protect-low-income-earners>.

In Australia, in the Commonwealth jurisdiction, the *Legislation Handbook*, published by the Department of the Prime Minister and Cabinet, offers the following guidance in relation to what should go into primary, rather than delegated, legislation:

Primary or subordinate legislation

1.12 While it is not possible or desirable to provide a prescriptive list of matters that should be included in primary legislation and matters that should be included in subordinate legislation, it is possible to provide some guidance. Matters of the following kinds should be implemented only through Acts of Parliament:

- (a) appropriations of money;
- (b) significant questions of policy including significant new policy or fundamental changes to existing policy;
- (c) rules which have a significant impact on individual rights and liberties;⁷⁴

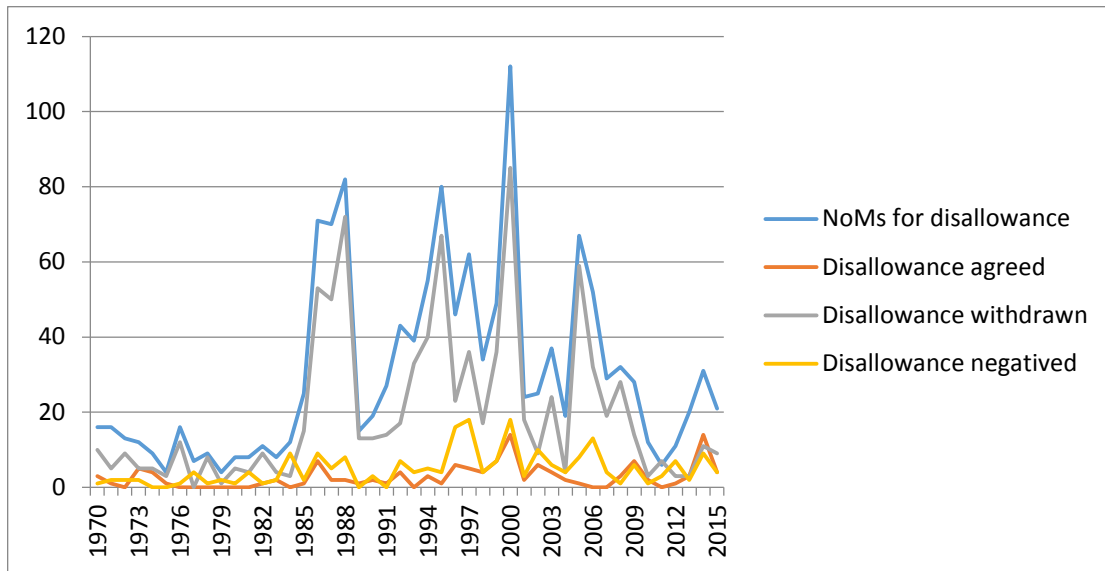
I suggest that (b) or (c) would probably apply if the legislation that led to the Strathclyde Review was to be implemented in the Commonwealth jurisdiction and that primary legislation would have been required, rather than delegated legislation.

An overreaction perhaps?

My overwhelming initial reaction to reading the three options presented in the report of the Strathclyde Review is that the three options were so drastic that (in the absence of any other explanation) they represented an overreaction. However, my initial reaction was tempered somewhat when I considered the statistics on how often delegated legislation had been stymied in the House of Lords over the past 50 years.

This caused me to look into the equivalent figures for the Senate. I am grateful for the assistance of the secretariat of the R and O Committee and the Senate Research Section for preparing the following graphical representation of the number of disallowance motions for which notices were given, agreed, withdrawn and negatived in the Senate between 1970 and 2015:

⁷⁴ *Legislation Handbook*, Department of the Prime Minister and Cabinet, Canberra, 1999, updated May 2000, p. 3, <http://www.dpmpc.gov.au/pmc/publications/legislation-handbook>.



The peak above is for 2000, when 112 notices were given. In more recent years, 20 notices were given in 2013, 31 in 2014 and 21 in 2015.

The table above does not separate out notices given on behalf of the R and O Committee. Odgers offers the following explanation in relation to the R and O Committee's role in relation to notices of motion for disallowance of delegated legislation:

The Standing Committee on Regulations and Ordinances follows a practice of giving notices of motions to disallow regulations or other subordinate legislation within the prescribed period, and then withdrawing the notices after correspondence with the responsible minister satisfies the committee's concerns.

Giving notices of motions to disallow indicates concern about the delegated legislation in question, and these are known colloquially as protective notices of motion, in that they protect the right of the committee, and of any senator, to move disallowance if it is subsequently decided that this is appropriate. Such concern is often allayed by further explanatory material from the minister or an undertaking to amend the legislation. Where the committee's concerns are met, the notice of motion to disallow is withdrawn (although it may be taken over by another senator). There are some occasions where the responsible minister does not satisfy the committee and the motion to disallow proceeds.

Frequently a protective notice of motion is withdrawn on the basis of undertakings from a minister to take action addressing the matters causing concern, usually by amending the legislation in question.

The practice of ministerial undertakings has the benefit of securing an outcome agreeable to the committee without necessarily interrupting administration and implementation of policy by disallowance of the instruments in question.⁷⁵

It is an oft-quoted fact that in the over-80-year history of the R and O Committee, there has been no occasion on which the R and O Committee has proceeded to a Senate vote on a notice of motion to disallow and the vote was not passed by the Senate (though this has not actually occurred since 1988).⁷⁶

Of the 20 notices given in 2013, two were given on behalf of the R and O Committee. Both were later withdrawn (i.e. on the basis of the R and O Committee receiving a satisfactory response from the relevant minister). Of the 31 notices given in 2014, five were given on behalf of the R and O Committee. All were later withdrawn (though one instrument was disallowed by the Senate in any event, on the motion of an individual senator). Of the 21 motions given in 2015, 12 were given on behalf of the R and O Committee. All but two (on which the R and O Committee is still awaiting a satisfactory response from the minister) were later withdrawn.

Two obvious points arise from the figures stated above. First, notices of motion for disallowance are routinely given (without there being any obvious calamity or cause for fury). Second, the later withdrawal of the notices, on the R and O Committee receiving a satisfactory response from the relevant minister, demonstrates that there is a high degree of cooperation (and possibly compromise) between the R and O Committee and ministers.

As to the effect of motions that actually result in disallowance, I note that 59 disallowance motions have been agreed to by the Senate since 2000. In 2000 and 2014 alone, 14 motions were agreed to in each of those years. The sky has not fallen in. I have seen no reports of prime ministerial fury in the press.

⁷⁵ Odgers, *op. cit.*, pp. 432–3, http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/odgers13?file=chapter15§ion=15&fullscreen=1.

⁷⁶ Pearce and Argument, *op. cit.*, paragraph 3.12.

Some possible explanations for the Strathclyde Review and its recommended options

I now offer some further, fairly unstructured observations on the possible reasoning behind the Strathclyde Review and the options that it gives for the way forward. On 17 December 2015, in the debate in the House of Lords on the report of the Strathclyde Review, Baroness Smith of Basildon (a Labour peer) stated:

At this point, most normal people's eyes will glaze over, but SIs [ie Statutory Instruments] are the Government's secret weapon. Traditionally, they were not used for issues that should be in primary legislation or for major policy changes where there should be full scrutiny and consideration. But their use has grown over a number of years and, more significantly, at a faster rate since 2010. The tax credits changes originally proposed were a major policy shift, and it would have been entirely appropriate for them to have been considered in primary legislation. But the Government chose to use an SI.

We will want to consider the report from the noble Lord, Lord Strathclyde, in more detail, but I say to the noble Baroness that the process he recommends is a very significant change. First, it is a major departure to use legislation to address this issue. Secondly, in terms of procedure, a statutory instrument is not sent to your Lordships' House from the House of Commons but from the Executive—from the Government. It is not like legislation where proposals are considered and sent from one House to another.

In terms of statutory instruments, both Houses separately consider measures proposed by the Government. Either House can accept or reject, and rejection by either House is in effect a veto. That is why this House has so rarely rejected a statutory instrument. Since 1999, it has happened just four times in 16 years—approximately once a Parliament. The noble Baroness referred to this, but let us be clear that in this Parliament three attempts at a so-called fatal Motion to reject an SI have failed.⁷⁷

I was interested by the proposition that the use of statutory instruments had 'grown over a number of years and, more significantly, at a faster rate since 2010'. Appendix H to *The Devil is in the Detail* is a table of statutory instruments laid in the House of Commons, in accordance with scrutiny procedures between 1997–98 and 2013–14, divided into instruments subject to 'negative' procedures, instruments subject to 'affirmative' procedures, instruments subject to 'strengthened' procedures (special

⁷⁷ Available at <http://www.publications.parliament.uk/pa/ld201516/ldhansrd/text/151217-0001.htm>.

procedures that apply to instruments that amend primary legislation) and instruments laid in the House but not subject to any formal scrutiny.⁷⁸ I reproduce the figures below:

Session	Negative	Affirmative	Strengthened	Laid (no scrutiny)
1997–98	1,591	225	5	35
1998–99	1,266	178	4	34
1999–00	1,241	180	0	32
2000–01	717	123	2	26
2001–02	1,468	262	10	57
2002–03	1,216	233	10	24
2003–04	1,038	207	4	34
2004–05	660	126	6	6
2005–06	1,583	271	4	31
2006–07	1,135	24	5	2
2007–08	1,049	257	6	13
2008–09	1,010	261	8	26
2009–10	631	179	3	10
2010–12	1,371	386	11	51
2012–13	742	214	26	37
2013–14	882	267	13	23

I do not discern in the above figures any particular increase since 2010. Further, in comparison to the number of disallowable legislative instruments that have come through the R and O Committee over the equivalent periods (and bearing in mind the disparities in populations), the delegated legislation workload of the UK Parliament seems positively benign.

I was also struck by this statement in Professor Russell’s article (quoted above):

The broader politics matter a great deal here as well. The House of Lords will rarely go out on a limb on a controversial policy matter where there is not widespread political concern elsewhere. Although unelected, peers are aware of the wider political mood, including public opinion and media responses. In particular, the chamber will tend to act with greater boldness where there is clear unhappiness on the government benches in the Commons.⁷⁹

⁷⁸ Fox and Blackwell, *op. cit.*, p. 236.

⁷⁹ Russell, *op. cit.*

It has been suggested to me that part of the fury that has been directed at the rejection of the legislation by the House of Lords that prompted the Strathclyde Review might be explicable by the fact that the House of Lords is ‘unelected’ and might be considered to be ‘unrepresentative’. The point apparently being that an ‘unrepresentative’ legislative body has no right to act in a way that obstructs the elected government. I have two observations to make in response to that proposition.

First, what is the point of giving a legislative body powers if it is on the (unstated) understanding that the legislative body will not actually exercise those powers? This simply makes no sense to me.

Second, there is the very issue of the House of Lords being ‘unrepresentative’. I was reminded of the famous Paul Keating reference to the Senate as ‘unrepresentative swill’.⁸⁰ I also recall giving a guest lecture at the University of Wollongong Law School at around that time (when I was actually working full time for the Senate) and being asked about the comment. Of course, I rejected (and continue to reject) the proposition. My detailed response was that (leaving aside the ‘swill’ issue) the Senate was *differently* representative, rather than *unrepresentative*. The same might be said of the members of the House of Lords. While it is certainly the case that they are unelected, I am not convinced that they are necessarily *unrepresentative*. Surely, they represent *something*. In the case of former parliamentarians, they are (at least) representative of their former political parties, perhaps. And, of course, it is not irrelevant that many former parliamentarians were elected *at some time*.

The main point, however, is that I can see no point in a legislative body having powers if the body is not actually allowed to use them.

A final comment on the situation in the UK—the excellent work of the Hansard Society

Before concluding my comments on the UK situation, I would like to offer a plug for two excellent reports from the (UK) Hansard Society. I have already referred to *The Devil is in the Detail* report. That report is the result of a study by the Society over several years into the use and parliamentary scrutiny of delegated legislation in the United Kingdom (UK). The report serves as an excellent companion-piece to the Society’s 2010 report, titled *Making Better Law: Reform of the Legislative Process*

⁸⁰ See, for example, A. Crabb, ‘Senate is hardly unrepresentative swill’, *Sydney Morning Herald*, 4 April 2014, <http://www.smh.com.au/comment/senate-is-hardly-unrepresentative-swill-20140405-36690.html>.

from *Policy to Act*,⁸¹ in which the Society considered the legislative process more generally.

In *The Devil is in the Detail*, the Society looks at the process by which delegated legislation is made, exploring how decisions are made about what goes into primary and what goes into secondary legislation and who makes them. It also looks at the evolution of delegated legislation, how the process works in both Houses of the UK Parliament, and examines different aspects of the current scrutiny system, revealing how and why—in the Society’s view—the system is no longer fit for purpose.

In reading both reports, I was struck by how many of the comments made could be applied equally to what happens in the Commonwealth jurisdiction. However, particularly in relation to *The Devil is in the Detail* report, I was also struck by how much better we do things here in Australia. In some respects, at least.

Concluding comments

I hope that the first part of this paper (rather than insulting the intelligence of the reader) provides a timely reminder of the principles that underpin the use of delegated legislation and the excellent, proven-over-time processes that are employed in the Australian parliament to monitor its use. I hope that the second part of the paper gives at least a flavour of some of the issues that currently arise in relation to the use of delegated legislation in the Commonwealth jurisdiction.

The comparisons that I make with the situation in the UK (including by reference to the report of the Strathclyde Review) are intended to demonstrate my view that we do things so much better in Australia. I firmly believe that the Strathclyde Review could not happen in Australia. For example, I cannot conceive of a situation where an option was put forward to remove the Senate’s power to disallow delegated legislation. There is a *maturity* about the scrutiny of delegated legislation in Australia (particularly in the Senate) that includes an acceptance by the executive that delegated legislation will be scrutinised, questioned and, even, disallowed in the Senate. The fact that the Senate has routinely disallowed delegated legislation over the years, without provoking public ‘fury’ from prime ministers and the like, and without the system grinding to a halt, is something of which we can be proud.

I hope that there may be some lessons in the discussion above for people outside of the Commonwealth jurisdiction.

⁸¹ A short summary of the report is available at <http://www.hansardsociety.org.uk/research/making-better-law/making-better-law-reform-of-the-legislative-process/>. See also Argument, ‘Delegated legislation not of lesser importance to primary legislation’, *op. cit.*

Postscript—further reaction from the House of Lords

I was comforted in relation to the views on the Strathclyde Review that I have expressed above by the findings of three subsequent reports by House of Lords committees. In a report published on 23 March 2016, the House of Lords Select Committee on the Constitution stated:

Lord Strathclyde was asked “how to secure the decisive role of the elected House of Commons in the passage of legislation”. This remit, set by the Government, cast the Strathclyde Review’s consideration of secondary legislation procedure as concerning the balance of power between the two Houses of Parliament. The title of the Review, *Secondary legislation and the primacy of the House of Commons*, echoes that emphasis on inter-House relations.⁸²

The report went on state:

a focus on inter-House relations ignores the other, vital, balance of power that would be altered should changes be made to statutory instrument procedure in the House of Lords: the balance of power between Parliament and the Executive. By tasking Lord Strathclyde with considering the balance of power between the two Houses of Parliament, the Government focused his Review on the wrong questions. We believe that consequently it addressed the wrong issues.⁸³

After discussing issues surrounding the proposition that the legislative scrutiny powers of the House of Lords might be weakened, the report stated:

Given the increasing concerns we and others have in respect of broad or poorly-defined powers, and the key role played by the House of Lords in the scrutiny of delegated legislation, any diminution of the House’s power to hold the Government to account over its use of delegated powers is of great concern. Weakening the House’s power to hold the Government to account for delegated legislation—making it easier for “elected Governments to secure their business in

⁸² House of Lords, Select Committee on the Constitution, 9th Report of Session 2015–16, *Delegated Legislation and Parliament: A response to the Strathclyde Review*, March 2016, HL Paper 116, paragraph 35, available at <http://www.publications.parliament.uk/pa/ld201516/ldselect/ldconst/116/116.pdf>.

⁸³ *ibid.*

Parliament”—would increase the incentives for Governments to widen the use of delegated legislation.⁸⁴

In a ‘special’ report also published on 23 March 2016, the House of Lords Delegated Powers and Regulatory Reform Committee also addressed the proposition from the Strathclyde Review that the issue was the relationship between the House of Lords and the House of Commons. The report stated:

We do not agree. The relationship at issue is not between the two Houses but between the Government and Parliament.⁸⁵

The special report goes on to state:

The House of Lords’ votes on the Tax Credits Regulations challenged the Government, not the House of Commons, and the effect of the options set out in the Strathclyde Review would be to tilt the balance of power away from Parliament generally and towards Government. These are very important issues which, as we say in our conclusion, warrant further investigation. Underlying this important constitutional debate is the fact, however, that if governments were to follow the guidance about the appropriate threshold between primary and delegated legislation, then the issue which the Strathclyde Review seeks to address might well never have arisen.⁸⁶

The special report then went on to endorse comments made by the Strathclyde Review in relation to the quality of primary legislation and the use (or over-use) of delegated legislation, noting current concerns about the width of delegations, the use of ‘Henry VIII’ powers and the use (and volume) of ‘skeleton’ bills and provisions.⁸⁷

Similar comments were made by the House of Lords Secondary Legislation Scrutiny Committee, in a report dated 14 April 2016.⁸⁸ That committee did not support any of the three Strathclyde Review options.⁸⁹ The committee also stated that the three

⁸⁴ *ibid.*, paragraph 44.

⁸⁵ House of Lords, Delegated Powers and Regulatory Reform Committee, 25th Report of Session 2015–16, *Special Report: Response to the Strathclyde Review*, March 2016, HL Paper 119, paragraph 74, available at <http://www.publications.parliament.uk/pa/ld201516/ldselect/lddelreg/119/119.pdf>.

⁸⁶ *ibid.*, paragraph 77.

⁸⁷ *ibid.*, paragraph 78.

⁸⁸ House of Lords, Secondary Legislation Scrutiny Committee, *Response to the Strathclyde Review: Effective parliamentary scrutiny of secondary legislation*, April 2016, HL Paper 128, available at <http://www.publications.parliament.uk/pa/ld201516/ldselect/ldsecleg/128/128.pdf>.

⁸⁹ *ibid.*, paragraph 88.

options should not be regarded as ‘a definitive list from which a selection had to be made’.⁹⁰

The following comments and recommendation by the committee should be noted:

67. The contentious issue is not how often the House of Lords defeats statutory instruments but when it is appropriate for the Lords to defeat an instrument. This is a matter of judgement. But it is a judgement that the House, as a self-regulating institution, can be expected to make. That the House makes this judgement reasonably is evidenced by the very small number of defeats since 1968. In asserting this view, we acknowledge that opinion in the House of Lords varies as to whether it was appropriate for the House to vote in favour of the deferral motions in respect of the Tax Credits Regulations.

68. We recommend that the House of Lords should retain the power to reject secondary legislation, albeit to be exercised in exceptional circumstances only, as an essential part of Parliament’s power to scrutinise and, where appropriate, challenge Government legislation.⁹¹

In relation to ‘skeleton bills’, the committee stated:

78. We support those who caution against the use of skeleton bills and skeleton provision in bills. In taking this view, we bear in mind, in particular, the fact that although the government which originally sought such wide powers might offer assurances as to their exercise, such assurances will not bind the actions of future governments. We welcome [the Leader of the House of Commons, Mr Grayling’s] commitment to ensuring that the [Parliamentary Business and Legislation] Committee [a committee of the Executive Government] will be more rigorous about challenging the use of skeleton bills and skeleton provision in bills.⁹²

The importance of disallowance mechanisms

⁹⁰ *ibid.*, paragraph 24.

⁹¹ *ibid.*, paragraphs 67 and 68.

⁹² *ibid.*, paragraph 78.

I find the reports of the three House of Lords committees in relation to the Strathclyde Review heartening, especially in their rejection of the proposition that the central issue concerned the relationship between the government and the parliament, rather than the relationship between the houses. That is surely the key issue. In delegating legislative power to the executive, the parliament entrusts the executive with the relevant powers. But it does so on the basis that a significant degree of supervision is retained by the parliament. As I have already stated, the power to disallow delegated legislation is crucial to that supervision. As Starke J stated in *Dignan v Australian Steamships Pty Ltd*, ‘the power of disallowance is to ensure the control and supervision of Parliament over regulations’.⁹³ In the same decision, Dixon J stated:

The power [to disallow] may be considered as a substitute in the case of delegated legislation for the requisite of a prior assent in the case of direct legislation.⁹⁴

Any attempt to diminish that power (which was a necessary consequence of any of the options suggested by the Strathclyde Review) must be resisted, by the parliament. As I have already indicated, I believe that any such suggestions *would* be strongly resisted by the Australian Parliament.

⁹³ *Dignan v Australian Steamships Pty Ltd* [1931] HCA 19, 201.

⁹⁴ *Dignan v Australian Steamships Pty Ltd* [1931] HCA 19, 208.

Australian Democracy and Executive Law-making: Practice and Principle (Part II)*

Cheryl Saunders

It is a pleasure to be involved in the Senate lecture series again, speaking this time on the important question of executive law-making with my friend and colleague Stephen Argument. Executive law-making is a perennial issue, which has risen to prominence recently in Australia and elsewhere through some high-profile examples of its use. Stephen and I bring different perspectives to the topic. He speaks as an insider, in the sense that he has long and deep knowledge of the workings of the Senate in scrutinising legislative instruments. I am an outsider, who has studied the Australian constitutional system for a long time, in its own right and in the light of comparative experience. Together, it is our task to canvass some of the most important issues for the practice and principle of executive law-making in Australia as we see them.

The principles at stake

One of the most basic of all constitutional principles is that law is made by parliament. It is so basic that it is simply assumed, by the Australian and most other constitutions.

At one level, the principle can be understood in symbolic terms. The power of the state to change the rules by which the whole community is bound is extraordinary, even though we take it for granted. As the only elected institution in the Australian system of government, parliament is the only body with sufficient legitimacy to exercise a power of this kind. If democracy is viewed in procedural terms, it is parliament that embodies the promise of democratic process, through which decisions are made to which all Australians can submit, whether they approve of the incumbent government or particular decisions or not.

There is a deep ambiguity in all parliamentary systems that have derived from Westminster about how parliaments are expected to exercise their authority. The ambiguity stems from the origins of parliament as advisor to the Crown and its long evolution since, in the course of which ministers with the confidence of the parliament assumed the executive authority. The ambiguity goes to the extent to which parliament can be expected to be deliberative and is entitled to insist on a view that

* This paper, together with the preceding paper by Stephen Argument, was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra, on 11 March 2016.

differs from that of the executive branch. In England, from whence this style of parliament derived, resolution of this question is complicated by the historic aura that surrounds the parliament and its size and relative accessibility on the one hand and an unelected second chamber with power to delay rather than veto on the other. In Australia, at the Commonwealth level, the answer is affected by different factors, including the entrenched federal Constitution providing for a powerful elected Senate. These make it clear that, on some matters at least, the will of the parliament will differ from that of the executive and tip the balance in favour of a deliberative style.

While the problem nevertheless remains in play in Australia, it does not affect the principle that parliament makes law. That principle rests not only on the arguments from symbolism to which I have referred but on functional logic as well. In both composition and mode of operation, parliament is designed as the appropriate institution to carry out the high task of law-making. It comprises competing voices, representing diverse community views. It meets in public, requiring new laws to publically be justified in advance. The public proceedings of parliament also enable voters to hold their representatives to account for the stance that they take on particular decisions. Relative care is devoting to the drafting of laws made by the parliament, which are published in forms that are relatively accessible.

These principles and practices do not exist for the benefit of parliament itself and the question of which organ of state should make law is not an inter-institutional game. The requirement for law to be made by parliament, with all that flows from it, exists for the benefit of the people who will be subject to the law and from whom the authority to make new law derives. Without such a requirement, the rationales for respect for law fail. The law-making role of parliament underpins legal doctrines as well, including the hierarchical ordering of common law and statute and the principles of statutory interpretation that courts recognise and apply.

The limits of executive law-making

Of course, it is trite that it is not practicable for every new legal rule to be made by parliament directly. It has long been the case that a great deal of law is made by the executive branch, acting pursuant to circumscribed authority from parliament. Classically, the executive branch for this purpose refers to the Governor-General in Council. This has the advantages of involving the highest level of executive government for the significant function of executive law-making and doing so in a way that engages the collective responsibility of ministers who are accountable to the legislature. Constitutional proprieties also are preserved by the formal capacity of parliament to repeal the enabling legislation and by procedures for ex post facto parliamentary scrutiny of the exercise of its delegated authority. However good these

are, they cannot capture the properties of law-making by parliament itself; hence the need to keep the practice of delegation within bounds.

Delegation of law-making power to the executive might be justified by reference to substance or by reference to purpose. The two overlap to a considerable degree. In terms of substance, the principal guideline must be the significance of a proposed new rule, in the sense that matters of any import are left to primary legislation. In one way or another, this consideration underlies most of the matters listed in the current *Legislation Handbook* as requiring primary legislation, including the catch-all reference in paragraph (b) to 'significant questions of policy'.¹ While this is a standard that can lend itself to differing interpretations in marginal cases, requiring resort to purpose, its exemplifications are more concrete. These range over proposed laws that affect rights, impose obligations, appropriate funds, create offences and tax, to take only a selection. The need for amendment of Acts of parliament to be done by primary legislation rather than executive law-making in the manner historically associated with Henry VIII is referable both to the status of parliament and to the intelligibility of statute.

In terms of purpose, it may be accepted that delegation of legislative power to the executive branch is useful to keep unnecessary detail out of primary legislation; to deal with at least some matters that are transitory; and to make optimal use of the time of parliament and its members by these means. Matters for which parliament is the appropriate forum on account of its design characteristics, however, should be the stuff of primary legislation. Claims that matter is too complex for parliament; that there was not enough time to include some matters in the principal legislation; or, even that 'the necessary policy decisions were not made' when the time came for introduction of the bill are unacceptable reasons for leaving to the executive law-making authority that should be exercised by parliament itself.²

It is received wisdom that there are effectively no enforceable constitutional limits on the extent of the law-making authority that can be delegated to the executive government by the Commonwealth Parliament. This assessment stems from the 1931 decision of the High Court of Australia in *Dignan* and the lack of any significant case law to the contrary since, despite sometimes extravagant delegations.³ Without being too heretical, let me draw attention to some of the limits that were expressed or

¹ *Legislation Handbook*, Department of Prime Minister and Cabinet, Canberra, 1999, updated May 2000, p. 3, https://www.dpmc.gov.au/sites/default/files/publications/Legislation_Handbook.pdf.

² The Administrative Review Council reported these as some of the reasons given by OPC for the inclusion of substantive matters in delegated legislation in 1991: Administrative Review Council, *Rule Making by Commonwealth Agencies*, Report no. 35, Australian Government Publishing Service, Canberra, 1992, p. 12, <http://www.arc.ag.gov.au/Publications/Reports/Pages/Reportfiles/ReportNo35.aspx>.

³ *Victorian Stevedoring and General Contracting Company Pty Ltd v Dignan* (1931) 46 CLR 73.

implied in *Dignan*, which could become relevant in an appropriate case, informed by other developments in understanding of the constitutional separation of powers over the intervening 85 years. One to which reference often is made is the warning in the judgement of Dixon J that it must be possible to characterise the law delegating authority to the executive as one that is supported by a head of legislative power. This warning goes both to the ‘width’ and the certainty of the scope of the power that is delegated. Evatt J was broadly in agreement, but drew a difficult distinction between laws with respect to legislative power and laws with respect to a head of power. In the course of this he suggested that the repository of the law-making power and in particular the extent to which the rule maker was ‘removed ... from continuous contact with Parliament’ might affect the validity of a delegation in some (admittedly extreme) circumstances. Underlying both sets of reasons was the difficulty of overturning then established practice, with its advantages for the operations of government, coupled with assumptions drawn from the principle of parliamentary sovereignty and the practices of responsible government, both of which were inherited from the United Kingdom. Both justices qualified the implications that might be drawn from these inherited practices by reference to the context of the Commonwealth Constitution, a technique that has since become considerably more refined. *Dignan* also confirms the constitutional separation of legislative and executive power, while denying its application in this context and acknowledging consequential ‘asymmetry’.

Judicial review has more bite once delegated legislative power is exercised. Executive law-making is just another form of executive action. It falls to the judicial power, in the last resort, to ensure that it is exercised within lawful bounds. The respect due to Acts of the elected parliament does not apply here, except at one remove. In the words of Dixon J in *Dignan*, the ‘statute is conceived to be ... the expression of the continuing will of the Legislature’ while ‘subordinate legislation’ lacks ‘the independent and unqualified authority which is an attribute of true legislative power’. The standard terms for conferring regulation-making power on the Governor-General have some inbuilt flexibility in the ‘necessary or convenient’ formulation. This cannot, however, be used to ‘support attempts to widen [its] purposes ... to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends’.⁴ Thus, for example, in 2012, a regulation that added an adverse security assessment to the criteria for granting a protection visa was held to be ‘inconsistent’ with the scheme in the principal Act and beyond the law-making power conferred.⁵ An AGS briefing notes with some justification that the risk of invalidity on these grounds is greater in detailed legislation than (for example) in

⁴ *Shanahan v Scott* (1957) 96 CLR 245, 250, cited in Australian Government Solicitor, *Legislative Instruments – Issues in Design*, AGS Legal Briefing, no. 102, February 2014, p. 3, <http://www.ags.gov.au/publications/legal-briefing/br102.pdf>.

⁵ *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46, [71].

legislation that ‘merely sets out the skeleton of the proposed scheme’.⁶ The latter is clearly contrary to constitutional principle, however, and runs a greater risk of invalidity on constitutional grounds, however remote the possibility might presently appear to be.

Whether in the absence of judicial constraints or as a complement to them, it falls to the legislature itself to scrutinise the practice of executive law-making and to keep it in appropriate bounds. The composition and powers of the Senate have been critical in this respect, given the impact of responsible government on the willingness of a majority in the House of Representatives to publically oppose any decision attributable to ministers, no matter how principled the cause. The regime that applies at the Commonwealth level, for the publication, tabling, and disallowance of legislative instruments by either house derives its principal effect from the activities of the two Senate scrutiny committees and from the willingness of the Senate to take action to disallow. I agree with Stephen that in these respects, scrutiny of executive law-making in the Commonwealth sphere has an edge over many other comparable jurisdictions. As I will argue later, however, the delicate path that the Senate committees tread, between commenting on procedures and avoiding policy questions, in order to foster the consensual approach on which they rely, becomes less effective if and when executive law-making expands into policy areas. The history of scrutiny of executive law-making in Australia suggests that the system cannot rest on its laurels, but needs to take stock from time to time.

Keeping the balance

In any Westminster-style parliamentary system there are incentives to expand the reach of executive law-making. The very attributes that make parliament the appropriate law-making body also make it something of a nuisance from the standpoint of executive government. Ministers, their advisors and their departments are not naturally programmed to spell out policies in detail in public in advance of their application, to debate them with opposition members, to make changes on contentious points and to delay implementation while all this occurs. Consistently with the functional attributes of the executive branch, their typical modus operandi is the opposite: to work quickly and confidentially in an environment in which everyone is broadly on the same page, all going well. It is natural enough, in these circumstances, to try to minimise the exposure of government policy to parliament, if that can be done. In Australia, the problem is exacerbated by uncertainty about outcomes in the Senate. The underlying ambiguity about the role of parliament, to which I referred at the outset, fuels the situation as well. Ministers who take the view that a government has the right to have its policies given effect by parliament may be

⁶ Australian Government Solicitor, *op. cit.*, pp. 3–4.

less concerned about the means than the end, when faced with a Senate in which the government lacks a majority.

I am not seeking to be cynical here. Government is no easy task. There is a genuine tension between the roles of parliament and executive government in our system. These contribute to the checks and balances of which in other circumstances we are proud, but they nevertheless need to be managed in particular instances. In some respects this also is, or can be portrayed as, a tension between values: openness and inclusion on the one hand and speed and efficiency on the other. A balance is needed here too. Wherever it is struck, however, it needs to preserve the constitutional essentials, including the principle that parliaments make law.

One relatively recent occasion on which there was a comprehensive review of the practice of executive law-making in the Commonwealth sphere was the report of the Administrative Review Council (ARC) in 1992⁷ that led ultimately to the enactment of the *Legislative Instruments Act 2003* (Cth). That Act in turn was reviewed in 2008, in compliance with the statutory requirement in section 59.⁸ Some of the recommendations of the 2008 review were incorporated into the *Acts and Instruments (Framework Reform) Act 2015*, which came into effect on 5 March, renaming the principal Act the *Legislation Act 2003* (Cth).

I was President of the ARC in 1992 and was impressed by the value of the exercise of taking stock of a practice that inevitably drifts in different ways over time, although generally in one direction. By 1992, many of the elements of the current system were in place. Executive law-making, in the form of regulations made by the Governor-General had been a common practice since 1901. These were published in a systemic way under a *Statutory Rules Publication Act 1903* (Cth) and were subject to tabling and disallowance under the *Acts Interpretation Act 1901* (Cth). The Senate Standing Committee on Regulations and Ordinances had been in operation since 1932. The Senate Standing Committee for the Scrutiny of Bills had been established more recently, in 1982, but nevertheless had been in operation for 10 years.

The immediate catalyst for the ARC review was reflection on whether and, if so, to what extent, executive law-making should be brought under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act). Executive law-making is executive action that must be kept within the lawful bounds of the authority conferred and is subject to many of the grounds of judicial review including, for example, improper purpose. It was and is excluded from the ADJR by the threshold

⁷ Administrative Review Council, op. cit.

⁸ Legislative Instruments Act Review Committee, *2008 Review of the Legislative Instruments Act 2003*, March 2009, <https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Documents/2008%20Review%20of%20the%20Legislative%20Instruments%20Act%202003.PDF>.

requirement for action to which the Act applies to be of an 'administrative' character. On one view, there was much to be gained by bringing all executive action under the umbrella of the same judicial review legislation. In the end, the ARC decided against that path, because not all the provisions of the ADJR Act would apply to executive law-making, at least in the same way. By way of obvious example, the requirements of procedural fairness are well-adapted to administrative actions affecting particular individuals or groups but arguably are less suited to action of a legislative kind, which need fair procedures of their own.

The ARC therefore embarked on a project to examine the need for an Act dealing with executive law-making that would complement the ADJR Act. To this end, it had to examine the contemporary practice of executive law-making and the suitability of the existing legal and political framework for it. The findings were instructive for present purposes. Some of the most striking were the following:

- The traditional form of executive law-making, through regulations or 'statutory rules', on which the current legislative framework was predicated, were now the tip of the iceberg.
- In addition to these, there were more than 115 other rules of a legislative kind, with a variety of names, made by a variety of persons and bodies in the executive branch.
- By 1990-91, the number of these other legislative instruments more than doubled the number of statutory rules and were solely responsible for a huge growth in executive law-making over the previous decade.
- The Senate committees had, of course, picked up on this phenomenon during the legislative scrutiny process. One consequence was that many enabling statutes now required the legislative instruments that they authorised to be made to be subject to the statutory regimes for tabling and disallowance, notification and purchase.
- This was an ad hoc arrangement, however. No-one knew how many other such instruments there were, which had so far escaped the scrutiny process altogether. Nor were there systematic procedures for publishing (and therefore ensuring public access to) these other categories of 'disallowable instruments'.
- In other matters, the Council reported 'considerable discrepancies' between official guidelines on the matters appropriate for executive law-making and the practice that actually was followed.⁹
- Drafting quality was variable: certainly for disallowable instruments and to some extent also for statutory rules.

⁹ Administrative Review Council, *op. cit.*, p. 12.

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- There was no general requirement for consultation or regulatory impact statements before rules were made, in contrast to the position in some states.
 - Nor was there a requirement for sun-setting of legislative instruments, at least some of which by definition have a finite purpose; again, contrary to the practice in some states.

The outcome of the ARC review will be familiar to many and I will not canvass the details here. Implementation took more than a decade. Many of the recommendations of the ARC were watered down along the way, at cost to the simplicity and effectiveness of the new regime. Even so, however, the outcome was a considerable improvement over what had existed before. A single Legislative Instruments Act applied the same procedures for tabling, disallowance, consultation, sun-setting and publication on a single Federal Register to (almost) all executive law-making. A better attempt was made in the *Legislation Handbook* to identify the appropriate border between primary and delegated legislation, drawing on the ARC's criteria. And administrative reorganisation sought to ensure that a single Office of Legislative Drafting (OLD) based in the Attorney-General's Department had responsibility to oversee the quality of the drafting of legislative instruments, whether this happened in OLD or in agencies elsewhere.

Current challenges

If we were now to conduct a comprehensive review of the practice of executive law-making, taking up the issues of our time, what would we find and what might be done about it?

This is not such a review, but let me suggest what we might find amongst the principal points.

First, the amount of executive law-making remains vast. It may not be proliferating at the same rate, however. Stephen's paper notes that 1828 instruments were scrutinised by the Regulations and Ordinances Committee in 2015. The comparable number in 1990-91, according to the ARC report was 1645, which did not catch all the instruments of a legislative character that at that stage were not subject to disallowance.

Secondly, at least some executive law-making seems to be being used for matters more appropriate for primary legislation. More work needs to be done on the extent to which this is so, whether the practice is increasing and how serious the infringements are. The following are indicators of the trend, however:

- Rather alarmingly, ‘skeleton legislation’ seems to have become a term of art.
- Recent reports of the Senate Standing Committee for the Scrutiny of Bills regularly draw attention to proposed laws that delegate matters that ‘may be considered more suitable for Parliamentary enactment’; in some instances in relation to matters that are ‘central elements’ of the legislative scheme’.¹⁰
- And the regulations made to give parliamentary cover to the host of Commonwealth spending schemes in the wake of the first High Court decision in *Williams v Commonwealth*¹¹ clearly provide for important policy initiatives, inconsistently with the appropriate scope for delegated legislation, as well as being drafted in very odd form.

These unusual instruments responding to *Williams* might have brought the separation of powers issue to a head, had the High Court not invalidated the challenged regulation for the lack of a head of power in the second round of proceedings in *Williams*.¹² This said, the involvement of the parliament in decisions about spending schemes, even in such an unsatisfactory way, is an advance on previous arrangements, which relied on inherent executive power alone. By way of example, as Stephen notes in his paper, as the Regulations and Ordinances Committee has handled these instruments, ministers now are obliged to identify the constitutional power on which the new regulation purports to rely and to publically take responsibility for the claim.¹³

There is at least one other recent development that appears to be a further indication of a trend to broaden the scope of executive law-making. This is the emerging practice to which Stephen draws attention of implementing significant new policy initiatives through executive law-making in anticipation of the enactment of legislation by the parliament. There is likely to be a question in these circumstances about whether the executive action is lawful at all, as an exercise of delegated legislative authority. In any event it usurps parliament’s law-making role; not least by second guessing the form in which primary legislation ultimately may be passed.

A third point that would be likely to appear from a review of current executive law-making practice is the development of a new hierarchy of delegated legislation within

¹⁰ See comments on the Social Security Amendment (Community Development Program) Bill 2015 at Senate Standing Committee for the Scrutiny of Bills, *Third Report of 2016*, March 2016, pp. 187–188, <http://www.aph.gov.au/~media/Committees/Senate/committee/scrutiny/bills/2016/pdf/b03.pdf?la=en>.

¹¹ [2012] HCA 23.

¹² [2014] HCA 23, [36].

¹³ cf. Patrick Hodder, ‘The *Williams* Decisions and the Implications for the Senate and its Scrutiny Committees’, *Papers on Parliament*, no. 64, January 2016, pp. 149–50. I take Hodder’s point that one outcome of these changes may be to justify inclusion of expenditure for such programs in the Appropriation Bill that the Senate cannot amend. It appears that this already was occurring, however: the School Chaplains’ program that was challenged in *Williams* is a case in point. As Hodder notes, these matters are difficult to monitor, given current, broad appropriation practice.

the executive branch, setting up a new set of incentives. The most obvious manifestation of this on the public record is the creation of a category of ‘legislative rules’ in empowering legislation from 2013.¹⁴ These appear to differ from the wide variety of categories of legislative instruments to which reference already has been made, in the sense that they are made by a minister and are used in lieu of regulations made by the Governor-General, with all that follows from this change, in procedural terms. One catalyst for the creation of the new category of legislative rules appears to have been a desire to rationalise the resources of the Office of Parliamentary Counsel for whom drafting regulations is ‘tied work’.¹⁵ The change also has caused a distinction to be drawn between the categories of matters appropriate to be handled in regulations and rules respectively, however, with more important matters left to the former.¹⁶ Vigilance may be required to ensure that recognition of a category of superior executive law-making, in this way, is not used to expand the scope of executive law-making itself.

A final piece of the current pattern of the practice of executive law-making concerns consultation. The ARC’s original recommendations on consultation, as the form of procedural fairness most appropriate for decisions of a legislative character, were watered down in the *Legislative Instruments Act 2003*. The 2008 review of the Act noted a significant shortfall in the adequacy of consultation practices and reporting to parliament in relation to them, while also declining to make consultation mandatory or judicially enforceable.¹⁷ The provisions of the *Legislation Act 2003* remain extremely weak in this regard.¹⁸ It need hardly be said that the more important the matters dealt with through executive law-making, the more important are both consultation and the associated requirements for regulatory impact statements.

Two distinguished commentators have recently drawn attention to at least one other way in which expansion of the scope of executive law-making has implications for current practice.¹⁹ Avoidance of policy considerations by the Senate Scrutiny Committees has served Australia well in the past, in the sense that it has enabled the committees to establish a culture of bipartisanship. It constrains the effectiveness of

¹⁴ Stephen Argument, ‘The use of “Legislative Rules” in preference to regulations: A “Novel” Approach?’, *Public Law Review*, vol. 26, no. 1, 2015, pp. 12–18.

¹⁵ *ibid.*, p. 13.

¹⁶ *ibid.*, p. 14.

¹⁷ Legislative Instruments Act Review Committee, *op. cit.*, pp. 39–42.

¹⁸ See sections 17 and 19, which are combined, somewhat oddly, in a part of the Act dealing with drafting standards.

¹⁹ Dennis Pearce, ‘Legislative Scrutiny: Are the Anzacs Still the Leaders?’ paper presented to the Australia-New Zealand Scrutiny of Legislation Conference, Parliament House, Canberra, 6–8 July 2009, http://www.aph.gov.au/About_Parliament/Senate/Whats_On/Conferences/sl_conference/papers/pearce; Mark Aronson, ‘Subordinate Legislation: Lively Scrutiny or Politics in Seclusion’, *Australasian Parliamentary Review*, vol. 26, no. 2, pp. 4–19, http://www.aspg.org.au/journal/2011spring_26_2/Aronson%20article%20at%2024Sept2011.pdf.

the committees in other ways now, however, when executive-made laws deal with matters of significant policy concern. Objections raised by the committees on procedural grounds, drawing attention to the width of executive law-making, are too easily fobbed off by ministers. Ironically, one frequent response to the Scrutiny of Bills Committee in this context is that the resulting instruments can always be disallowed, although presumably not on the basis of an analysis by the Regulations and Ordinances Committee.

It is by no means clear that there is a body now capable of conducting a comprehensive review of executive law-making in the Commonwealth sphere, by reference to both constitutional principle and contemporary governance needs. The capacity of the Administrative Review Council to offer independent insight into problems and innovative solutions was run down by successive governments to the point that, when the council was abolished as a cost cutting measure last year, few voices were raised in its defence. The ARC became yet another casualty of the ‘decline in the quality of advice and ... erosion of capability’ to which Dr Parkinson has referred, and Australia is poorer for it.²⁰ In this connection I note that the treatment of delegated legislation in the recent report of the Australian Law Reform Commission was inconclusive and disappointing, although this may have been inevitable, given the scope of the Commission’s task.²¹

It is worth considering, nevertheless, what the responses might be, on the assumption that the obvious signs of expansion of the scope of executive law-making are confirmed. It might be too late to return the entire genie to the bottle. It is not too late, however, for a frank, honest and informed discussion of how we want the laws under which we live to be made. Even if the result were to shift the boundaries between primary and executive law-making in particular respects, it should also have the advantage of settling them more firmly, thus stemming, at least for the moment, executive law-making creep. On the assumption that new criteria recognised some role for executive law-making on matters of substance, new procedures would be needed at least for instruments in this category. These might include, for example, mandatory consultation requirements along notice and comment lines, subject to judicial review; an affirmative resolution procedure; and a role for the scrutiny committees in drawing policy issues to the attention of senators, without necessarily becoming embroiled in the merits of the issues themselves. These possibilities are not mutually exclusive; nor are they exhaustive. But if the scope of executive law-making expands, the case for enhanced procedures is irrefutable, in order to realise a little

²⁰ Quoted in Laura Tingle, ‘Political Amnesia: How We Forgot to Govern’, *Quarterly Essay*, vol. 60, p. 11.

²¹ Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws: Final Report*, no. 129, December 2016, pp. 447–58.

more fully the values that the assignment of the law-making function to parliaments assumes, when that function is entrusted to the executive branch.



Rosemary Laing — Stephen, you tantalisingly mentioned the *Perrett* decision. I wanted to ask if you would like to expand on that a little. Just to give some context to the question, more or less since the Regulations and Ordinances Committee was established in the early 1930s there has been this evolution of the power of parliament to exercise supervision of executive law-making, and we think of the things that were happening in the early 30s like those infamous waterside transport workers regulations, where every time the government would make them the Senate would disallow them. There was no time lapse between the making and the disallowance and I think that happened 12 times. That led a little later to a provision in the supervising legislation about the government not being able to remake an instrument that was the same in substance as the one that had just been disallowed by the Senate unless an interval of six months had passed or unless the house that had disallowed revoked its disallowance. That mechanism lasted well for half a century and then we had the interesting case of some family law application fee regulations that increased the fees and were disallowed. Very quickly a new set of regulations were made with a \$5 difference in the amount of the fee.

Stephen Argument — But importantly it was a \$5 increase and the problem with the fees was that they were too high!

Rosemary Laing — I am going to hand over to you. My question is: would you like to comment on that decision?

Stephen Argument — Well this is just my view; it is certainly not a committee view. Rosemary very adequately explained the background to it. What the Federal Court decided in *Perrett* was that the prohibition on remaking something that was the same in substance within six months would only come into effect if the second set of regulations were in effect identical to the first set, which in my view just rips the heart out of what the provision does and creates a real challenge. The point that I always make about this decision is that the initial regulations were disallowed because the fee increases were too high and it is almost an insult that the subsequent set of regulations, which were found to be okay, actually increased the fees a further \$5. That defies logic, but that is just my view.

Rosemary Laing — There was some jurisprudence in the meantime about explaining what the courts thought ‘same in substance’ meant. Would you like to comment on that?

Stephen Argument — I have to be careful here because I do not want to insult the Federal Court judge. The jurisprudence that the R and O Committee had relied on was a 1940s case—I cannot remember it off the top of my head—and if you look at the Federal Court decision, the Federal Court judge has interpreted the earlier authority in a way that even a bad constitutional lawyer like me thinks just does not make sense. I cannot see how the judge interpreted the earlier authority in the way that he did.

Rosemary Laing — The outcome at the moment is that both sets of regulations were disallowed and have not yet been remade.

Stephen Argument — Some of the applicants in *Perrett* did initially appeal to the full Federal Court but unfortunately that appeal was recently discontinued, so the *Perrett* decision is sitting there as some sort of authority.

Cheryl Saunders — It is a pity that the appeal did not go ahead. Sitting here listening to both of you describing the problem, I agree it is a terrible problem and somehow it needs to be fixed as far as the scrutiny of delegated legislation is concerned. On the other hand, it is hard for the court to decide when something is sufficiently different in substance. What if it had gone down by \$1, or \$2 or even \$5? At what point does the court say ‘Alright, you have dropped it enough’.

Rosemary Laing — Are we asking the courts to make policy decisions, which is why we elect members of parliament?

Cheryl Saunders — I can see why the court wants to keep out of it. On the other hand, to completely neuter this arrangement, which, as you say, has been in place for a long time, is also a huge problem.

Question — I agree completely with what Stephen said about ‘the same in substance’. As a drafter, I would have advised the client that we could not do it and they presumably would have gone and got Government Solicitor advice that said what the risks were of doing it and that, yes, it was alright. I have got a few things I could ask but I will just raise one particular issue of incorporation by reference. I think in particular of things like Australian Standards, which as many people would know you have to buy. We put into law through subordinate legislation and then incorporation by reference something that is not publicly available to the individual. Having been with Attorney-General’s for 20 years or so, we did have a principle of access to

justice, including access to law, which was behind the Federal Register of Legislative Instruments and behind ComLaw and behind free publication of legislation when other countries require you to pay for it. Do either of you have any comments on the suitability of subordinate legislation incorporating material that is not freely available to the citizen?

Stephen Argument — Both the Scrutiny of Bills Committee and certainly in the last 12 months the Regulations and Ordinances Committee have been raising that very access point that you have made and seeking advice from ministers as to whether that material can nevertheless be made freely available in some way. One thing I learned from a response just recently—something I did not know before—is that apparently all state libraries and the National Library hold freely available copies of Australian Standards. Now I did not know that, not that it solves your problem. The committee has been quite vigilant lately on trying to ensure free public access to all this material.

Cheryl Saunders — I also think it is outrageous actually as a matter of principle. It is completely contrary to the rule of law. It clearly arises when there is formal incorporation in regulations of Australian Standards or anything else, but I think we can see the problem in other contexts as well when intergovernmental agreements underpin a scheme and so on. I noted as I was frantically trying to get myself on top of whatever had happened in the changes to the Legislation Act that came into effect last Monday—and I would be interested in Stephen’s view on this, or of anybody in the audience—that there is some capacity for Parliamentary Counsel to put on the Federal Register other instruments that might illuminate the meaning of legislation.

Stephen Argument — Notifiable instruments.

Cheryl Saunders — Yes, I just wondered how that is going to be used and whether it would be used for some of these and other associated purposes?

Question — Yes, on the home page for any instrument there is capacity to add material to it.

Cheryl Saunders — But how will that actually be used, do we know? Is there a policy?

Question — I am not sure. From my experience I have not done that with Australian Standards, for example, or various conventions that international organisations require you to pay for which are incorporated in legislation.

Cheryl Saunders — Absolutely. It seems to me that particularly now you have that clear requirement you should have the Australian Standards, you should have the international treaties, you should have intergovernmental agreements—anything that assists you to understand legislation should be publicly available in the same place.

Stephen Argument — This concept of a notifiable instrument I think is borrowed from the ACT. In its Legislation Act, if an instrument incorporates an Australian Standard by reference, the Australian Standard becomes a notifiable instrument and is supposed to go on the register. However, there are provisions in the Legislation Act that allow the provisions making those things notifiable instruments to be overridden and they are most often overridden in relation to Australian Standards. The answer that is always given is that there are commercial reasons why these things cannot be put on the register. One of the things that the ACT committee has been relatively successful in securing is that, where that happens, departments routinely say in the instrument that copies of it are available during business hours at this address. So there is the mechanism and they get around it, but they also make some attempt to address it.

Question — Stephen, you mentioned the practice of making regulations first and then making an Act or amending an Act later to do what the regulations did. My particular area is transport regulation and there is also a practice where the authority is given a power to give exemptions within safety parameters—I am thinking particularly of aviation and maritime—and agencies will use the exemption power as an immediate fix to say, ‘Alright, you can do this, so you are exempt from the laws that would stop you doing that, and we will get around to changing the regulations later.’ The particular concern I have is that means agencies can just make up the law as they go along and effectively with no scrutiny at all. My question is whether there would be any scope for the Senate committee to be involved in any sort of scrutiny of that sort of activity?

Stephen Argument — All I can say is that the committee does actually look at those sorts of exemptions. Particularly in situations where an exemption is given and it is explained that it is to cover a situation that is intended to be fixed by regulation later, the committee is vigilant in monitoring that that actually happens.

Question — I am aware the committee has commented on the constant renewal of some of the civil aviation exemptions, which have a time limit generally of two years. The question is: why don't you get around to fixing up the regulations?

Stephen Argument — The committee asks that question all the time.

Question — But now though not all of those exemptions are legislative instruments and so they do not come to the committee's attention. So all of this is happening beneath your purview.

Cheryl Saunders — You should call it a Charles I clause to match the Henry VIII clause!

Question — I am an agency-based occasional drafter of delegated legislation, yet to infuriate a prime minister and yet to earn the ire of the Regulations and Ordinances Committee I am thankful to say. But I wonder what advice Stephen has for people like me, who produced 77 per cent in a recent year of the delegated legislation that came before the committee. I wonder what advice you have for me as someone sitting at the keyboard faced with the task of producing delegated legislation.

Stephen Argument — The obvious thing to say is at the very least you should read the R and O Committee reports as they come out. One thing about that is that up until about two years ago the committee did not routinely publish reports so it was a bit hard to work out what were the issues that were exercising the committee's mind. But it is now much easier because after every meeting the committee produces a report and those reports have a lot of detail about what is going on. This does not answer your question, but section 16 of what is now the Legislation Act imposes on the First Parliamentary Counsel an obligation to take steps to ensure—I am paraphrasing, probably badly—high standards of drafting in the Commonwealth. My view is that, given the amount of delegated legislation that is drafted by people like you and other people in agencies, Parliamentary Counsel should be very proactive in assisting you. When I was a drafter for six years that obligation existed on the Secretary of the Attorney-General's Department. Patrick, who asked the previous questions, was my boss and we used to lament the fact that there was no evidence of the Secretary of the Attorney-General's Department doing anything in relation to that obligation. In the course of the long correspondence the R and O Committee recently had over the legislative rules issue, First Parliamentary Counsel has told the committee that indeed they are taking steps in pursuit of that section 16 obligation. So my question is: has that affected you yet?

Question — Not yet, but I look forward to having the standard of my drafting improved! Thank you.

Cheryl Saunders — Can I ask you a question before you leave the microphone. You must be one of quite a considerable number of people who draft delegated legislation for the Commonwealth. Is there some sort of network so that you can get together? That would seem to be a sensible thing as well.

Question — Not that I am aware of, Professor. As I said, I am an occasional drafter and it is highly likely that, if there was a network, I would not know about it anyway.

Cheryl Saunders — It is one thing to say you could keep an eye on the R and O Committee reports, and no doubt that would be sensible, but there are probably trends and particular issues that come out every year that it would be sensible to have some sort of loose network whereby you could look at that information easily enough.

Question — Quite so, yes. Thank you.

The Contemporary Crisis of Representative Democracy*

Simon Tormey

Is there a crisis of democracy? At one level democracy is always in crisis, and as authoritative historians of representative democracy note¹, there has never been a period in the evolution of representative democracy when someone somewhere has not declared democracy to be in crisis. What is unusual in the current conjuncture is the degree of consensus underpinning the analysis. In the past those that were shrieking ‘Fire!’ tended to be in a minority—oddball figures, radicals and zealots. Today, it would be easier to assemble those who *didn’t* think something fundamental was amiss than those who did. Political scientists, not noted for alarmist tendencies, huddle in conferences entitled ‘Representation and Renewal’, ‘The party’s over?’, and so forth.² A minor publishing industry has sprung up to examine the contours of the crisis and where it is heading. Texts already pick over the entrails of the ‘dead’ democratic body and our ‘post-democratic’ future.³ Nor is the sense of crisis confined to those with a particular political leaning. Liberals, conservatives and Marxists agree that at some level or other representative democracy is in the doldrums. Where they disagree is what to do about it. But let’s ponder for a moment what is peculiar about this particular conjuncture.

Contours of a crisis

What we can note is that the various measures used by political scientists to measure the health and well-being of representative democracy are on a downward trend. Amongst these measures, four stand out: *voter turnout*, *party membership*, *trust in politicians*, and *interest in politics*. As regards voter turnout, it is becoming ever more evident that we are becoming reluctant voters.⁴ This is highly marked at moments in time or in contexts where little seems to be at stake. On the other hand, where voters

* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra, on 13 May 2016.

¹ Bernard Manin, *The Principles of Representative Government*, Cambridge University Press, Cambridge, 1997; Pierre Rosanvallon, *Democratic Legitimacy: Impartiality, Reflexivity*, Princeton University Press, Princeton, 2011.

² Respectively the themes of the American Political Science Association annual conference 2012 and the UK Political Studies Association annual conference 2013.

³ Colin Crouch, *Post-Democracy*, Polity, Cambridge, 2004; John Keane, *The Life and Death of Democracy*, Simon & Schuster, London, 2009; Donatella Della Porta, *Can Democracy be Saved? Participation, Deliberation and Social Movements*, Polity, Cambridge, 2013.

⁴ Russell J. Dalton, *Democratic Challenges, Democratic Choices: The Erosion of Political Support in Advanced Industrial Democracies*, Oxford University Press, Oxford, 2012; Colin Hay, *Why We Hate Politics*, Polity, Cambridge, 2007.

perceive a lot to be at stake, we can see an upturn.⁵ However, the general tendency is clear. The golden age of voter turnout was half a century ago, and since then we have seen a fairly steady decline more or less across the board as far as the advanced democracies are concerned.

Perhaps a more telling measure of the decline of representative democracy is the decline of *party membership*. Parties are the crucial point of mediation between citizens and the institutions of governance and are thus a vital measure of health as far as political engagement is concerned. Again, the picture is clear.⁶ In the 1960s it was common to see around 30 per cent of the voting population in the advanced democracies as members of political parties. Today we see a fraction of that figure, often as low as one to two per cent of the voting population. Citizens are deserting political parties in droves. The result is that parties are forced to huddle up to other sources of financial support, notably corporations and private benefactors. This feeds the problem of distance from the ordinary citizen, creating a vicious circle. The closer they get to business, the less they seem to care about the needs and wishes of the ordinary voter, or indeed party member.

This in turn feeds the third variable, which is the *declining trust* in politicians. Survey after survey shows that we hold politicians in near complete contempt.⁷ A recent survey in Australia found that only four per cent of citizens thought that politicians could ‘almost always’ be trusted.⁸ Another survey placed politicians in last place among a basket of professionals that included second-hand car salesmen, lawyers and estate agents. The very word ‘politician’ has become a byword for sleaze, self-serving, narcissism and incompetence. Long gone are the days when ‘politician’ meant ‘public servant’, and when public service meant putting to one side one’s own needs and interests in favour of those of the collective. The phenomenon has given rise to the emergence of populist anti-politics. Some of the great political successes of the last decade or so—the Tea Party, the Five Star Movement, the UK Independence Party—are led by figures who trade on contempt for political elites.

⁵ Bernhard Wessels, ‘Performance and Deficits of Present-Day Representation’ in S. Alonso, J. Keane, W. Merkel and M. Fotou (eds), *The Future of Representative Democracy*, Cambridge University Press, Cambridge, 2011.

⁶ Peter Mair and Ingrid Van Biezen, ‘Party Membership in Twenty European Democracies, 1980–2000’, *Party Politics*, vol. 7, no. 1, January 2001, pp. 5–21; Ingrid Van Biezen, Peter Mair and Thomas Poguntke, ‘Going, Going, ... Gone? The Decline of Party Membership in Contemporary Europe’, *European Journal of Political Research*, vol. 51, no. 1, January 2012, pp. 24–56.

⁷ Murray Goot, ‘Distrustful, Disenchanted and Disengaged? Polled Opinion on Politics, Politicians and the Parties: An Historical Perspective’, *Papers on Parliament*, no. 38, April 2002, pp. 17–58.

⁸ Scanlon Foundation, *Mapping Social Cohesion National Report 2013*, report prepared by Andrew Markus, p. 27, <http://scanlonfoundation.org.au/wp-content/uploads/2014/07/mapping-social-cohesion-national-report-2013.pdf>.

Finally, we need to mention *interest in politics*. Whatever measure one cares to choose, whether it be the number of pages in the newspapers devoted to coverage of mainstream politics, the number of hours broadcast on the popular or mainstream media devoted to elections and parliament, or the general knowledge of ordinary citizens, the picture is bleak.⁹ We no longer care about politics as this is usually defined. Citizens have turned their backs on the affairs of politicians, except of course when that can be read literally, as sexual affairs. We are interested in mainstream politics when it is a story wrapped in a negative: when it shows politicians in a bad light, doing bad things to bad ends.

Democrats against democracy

So at one level, it is now a truism to note that democracy is in crisis. Yet this is not the whole story. As Wolfgang Merkel and others have rightly pointed out, when citizens are asked in broad terms about whether they support democracy and democratic institutions they tend to agree, often strongly.¹⁰ There is no real challenge to the hegemony of ‘democracy’ in the contemporary imaginary. Rather we should be interested in the crisis of actually existing *representative* democracy, a democracy that rotates around politicians, elections and parliaments. This kind of democracy is in crisis—though saying that should not be taken as implying that there is any likelihood of representative democracy disappearing soon. It won’t. One of the virtues of representative democracy according to advocates like J.S. Mill is, paradoxically, that it barely needs us, the *demos*, at all. Whether 80 per cent, 60 per cent or 10 per cent of citizens turn up to vote does not affect the capacity of the system to reproduce itself. We need to be careful therefore not to assume that a decline in engagement equates to systemic crisis. If the cause of the current crisis is apathy, as many believe it is, then this might as well be read as a help to the system. Apathetic citizens are citizens who pose little threat to elites, rather they can be watched, governed, taxed and pushed around with impunity. Democracies are not going to collapse because citizens are reluctant to turn up to vote or join political parties.

So we’re in a particular kind of crisis—less a crisis that threatens the ability of the system to reproduce itself so much as one in terms of public engagement with party-based liberal democratic politics. Representative democracy looks and feels exhausted. Why?

⁹ Stephen Earl Bennett, ‘Young Americans’ Indifference to Media Coverage of Public Affairs’, *PS: Political Science and Politics*, vol. 31, no. 3, September 1998, pp. 535–541; John Corner and Dick Pels (eds), *Media and the Restyling of Politics: Consumerism, Celebrity and Cynicism*, Sage, London, 2003.

¹⁰ Alonso et al. (eds), op. cit.

Much of the stress in current commentary lies on short term or contingent factors: New Public Management, the rise of neoliberalism, the decadence of the current crop of politicians, and so forth.¹¹ It is for this reason that many normative democratic theorists believe that, with a few tweaks here and there, democracy can be restored to vigour. I think we should be more cautious in our assessment. This is a crisis located in longer term structural and technological changes that are now beginning to be felt in the political field as well as the economic and social fields where the transition to ‘reflexive’ or ‘second’ modernity is well documented.

Representative democracy is a product of the modern imaginary. This in turn is built on a series of relatively simple propositions. These include the idea of the *nation state* as a relatively homogeneous and distinct territorial entity. It also includes the idea of *sovereignty* as something located in the state and which can therefore be held and possessed in the manner of a tool or resource. Integral to the idea of representative democracy is the idea that power is exercised in the name of *the people*, or rather its representatives. The exhaustion of representative democracy correlates to the progressive irrelevance of this particular image of how power and politics works under contemporary conditions.

As is well documented in the social theory and sociological commentary on the evolution of modernity, these building blocks of our understanding of the political landscape are waning in terms of their utility.¹² We are steadily and inexorably moving towards complex territorialities, complex sovereignties, and complex non- or post-identities. As regards the first, obviously much has been written about the impact of globalisation on the integrity of the nation state. The reality for most nations in the world is that they increasingly rely on regional alliances, blocs, coalitions, all of which press against the image of the post-Westphalian state. The nation state may have a certain resonance for certain purposes, but citizens increasingly understand that for much of the time and for many purposes the action is elsewhere.

This in turn impacts on the nature of sovereignty. The image of the autarchic self-governing community at the heart of a certain image of democracy is fading. It is not just a matter of territorial or geographical interdependence but of the nature of global capitalism, which in large part operates beyond and outside the jurisdiction of discrete states.¹³ This is not the same as saying that states are unimportant, or that they have no

¹¹ Matthew Flinders, *Defending Politics: Why Democracy Matters in the Twenty-First Century*, Oxford University Press, Oxford, 2012; Hay, op. cit.

¹² David Harvey, *The Condition of Postmodernity: An Inquiry into the Origins of Cultural Change*, Blackwell, Oxford, 1989; Ulrich Beck, *The Reinvention of Politics: Rethinking Modernity in the Global Social Order*, Mark Ritter (trans.), Polity Press, Cambridge, 1997; Jürgen Habermas, *The Postnational Constellation: Political Essays*, Max Pensky (trans. and ed.), Polity Press, Cambridge, 2001.

¹³ Crouch, op. cit.; Hay, op. cit.

power. What it means is that the fate of ordinary citizens is much less dependent on the decisions of national politicians and much more dependent on the decisions of a welter of transnational corporations, money markets, derivatives traders, international agencies and so on. All of these agencies exercise power. They all have an impact on what it is that states can do and must do under threat of sanction.

Globalisation has also impacted the integrity and plausibility of ‘the people’ as the subject of democratic deliberation and procedures.¹⁴ The idea of the people as an actor or agent in its own fortunes was always more myth than reality, but it at least held some plausibility in the minds of ordinary citizens in an era of relatively homogeneous ethnicities and nationalities. As transnational migration, decolonisation, and the diaspora effects of various political and economic processes speed up, this singular image of the people is undermined. Leaders stand Canute-like in the face of these forces, seeking ways of instilling ‘patriotism’, loyalty and a sense of national pride in their increasingly bemused or indifferent citizenry.

The end of representative politics

In the wake of these changes, it should be little surprise to find that the energies of the most politically active parts of the citizenry have moved away from a preoccupation with capturing power at the nation state level to enact a comprehensive program or manifesto—the rationale of party-based representative politics. Today’s activism and political initiatives are better encapsulated in terms of *contesting injustice*, whether it be issues around migration, climate change, sweatshops, animal rights, austerity or whatever. Alongside this changing disposition is the adoption of repertoires of activism that dispense with the party in favour of flatter or more ‘horizontal’ styles of interaction based on networks.¹⁵ This tendency, which has become increasingly evident over the past three or four decades, has been further catalysed by much commented upon developments in ICT and social media.¹⁶ In effect we are seeing a revolution in terms of the manner and style of political mobilisation away from people and parties that represent towards styles and forms of politics that seek to draw attention to and contest injustices.

¹⁴ Pierre Rosanvallon, *Counter-Democracy: Politics in an Age of Distrust*, Cambridge University Press, Cambridge, 2008.

¹⁵ Manuel Castells, *Networks of Outrage and Hope: Social Movements in the Internet Age*, Polity, Cambridge, 2012; Carole Cadwalladr, ‘Inside Avaaz—Can Online Activism Really Change the World?’, *The Observer*, 17 November 2013, <http://www.theguardian.com/technology/2013/nov/17/avaazonline-activism-can-it-change-the-world>; Josep-Lluís Mico and Andreu Casero-Ripolles, ‘Political Activism Online: Organization and Media Relations in the Case of 15m in Spain’, *Information, Communication & Society*, vol. 17, no. 7, 2014, pp. 858–71.

¹⁶ Clay Shirky, *Here Comes Everybody: The Power of Organizing without Organizations*. Penguin, New York, 2008; Symon Hill, *Digital Revolutions: Activism in the Internet Age*, New Internationalist, Oxford, 2013; Paul Mason, *Why It’s Still Kicking Off Everywhere: The New Global Revolutions*, Verso, London, 2013.

Under second or reflexive modernity, activists seek out styles and forms of intervention that make a direct or immediate impact in the political field. We are moving from a politics that defends or sustains collective identities towards ‘individualised collective action’.¹⁷ Flash politics, immediate politics, sit downs, protests and demonstrations—actions such as these can be coordinated using ICT as opposed to the infrastructure associated with a political party with permanent offices, a bureaucracy, leaders and a division of labour. But what is becoming evident is that the progressive ease of organising and connecting to others is taking us well beyond a piecemeal style of activism that is content to influence what representatives do or say, usually termed ‘participation’ in the political science literature. Recent events in the Middle East, Spain, Turkey, Iceland and Brazil reinforce the sense in which we are beginning to see the emergence of styles of activism that are *insurgent* as well as reforming or participatory. Indeed this ‘connective’ logic now allows for an almost *constituting* energy to emerge in which citizens act collectively to overhaul their own systems of governance, to bring power closer to the populace, to combat opaqueness in decision-making as in the ‘pots and pans revolution’ in Iceland.¹⁸ So ‘combating injustice’ need not imply an issue-based politics or ‘social movement’ style of politics. It can, where appropriate, lead to a form of politics that seeks an overturning of existing institutions and processes in favour of something more democratic—*¡Democracia Real Ya!*

As citizens become emboldened to take more matters into their own hands, so those who are elected to represent them come to appear less as representatives and more as ‘politicians’, less like one of ‘us’ and more as one of ‘them’, part of the governing apparatus. As the distance develops between a governing apparatus and citizens, so the latter seem to become emboldened to recuperate their own voice, bypassing the traditional structures in favour of ‘post-representative’ initiatives, street initiatives, and latterly pop-up parties on an ‘easy come, easy go’ basis. In Spain, for example, 490 new political parties have been created since 2011.¹⁹ The common denominator? They are almost all parties of protest, anti-party parties, post-political parties: Facebook or Twitter creations with low start-up costs. Just as the internet is undermining the old bricks and mortar retail model, so it is undermining the bricks and mortar *political* model. Politics is becoming much more a ‘pick-up’, DIY,

¹⁷ Michele Micheletti (ed.), *Political Virtue and Shopping: Individuals, Consumerism and Collective Action*, Palgrave, New York, 2003.

¹⁸ W. Lance Bennett and Alexandra Segerberg, ‘The Logic of Connective Action’, *Information, Communication & Society*, vol. 15, no. 5, April 2012, pp. 739–768.

¹⁹ Julie Cantalou, ‘The Spanish Slump—Political Crisis and the Need for Institutional Reform’, Friedrich Naumann Stiftung für die Freiheit, 17 June 2013, <https://fnf-europe.org/2013/06/17/the-spanish-slump-political-crisis-and-the-need-for-institutional-reform/>.

evanescent activity and much less a matter of choosing others to speak and act on our behalf.

Post-representative democracy?

How to characterise the present conjuncture? On the one hand, there is little threat to democracy either in normative terms or in terms of the ability of representative democratic systems to reproduce themselves. On the other hand, it is becoming clear that the classic party-based model of political representation is becoming exhausted. The represented increasingly feel less represented by the representatives. Politically active citizens increasingly want to speak and act in their own names and not just participate in little deliberative chambers, forums or assemblies designed to give them the impression of gaining ‘voice’. New tools, new repertoires of activism, engagement and mobilisation mean that citizens can organise beyond or outside the mainstream however defined.

Commentators such as Keane, Rosanvallon and Brito Vieira and Runciman have remarked in an offhand way that the present moment is ‘post-representative’, and I think that this captures well where we have got to.²⁰ We cannot live with representative democracy, but nor it seems are we ready to move beyond it. We live in a kind of in-between world. One political logic seems exhausted, but there seems little sense of appetite for an alternative to representative democracy. Political theorists peddle their wares (‘strong democracy’, ‘associative democracy’, ‘deliberative democracy’, et cetera) to an audience that is, by and large, oblivious to the representations of intellectuals no matter how well meaning. The mood is not contemplative or deliberative. It is angry and resentful. It seeks to punish politicians, but not to overturn them or to transform democracy itself. Iceland’s revolution did not banish politicians so much as seek to remind them of their obligations and duties.

Many of Spain’s initiatives are in the name of a ‘second transition’, shorthand for a better, more sensitive model of representation than the blunt electoral system currently on offer. We are, as Rosanvallon notes, in the grip of ‘counter democracy’, a kind of massing of the citizenry against their representatives in a stance of suspicion, disdain and remonstrance. But citizens are not seeking power for themselves—yet.

This is not, however, to say that we are stuck in a kind of closed loop of a necessarily destructive kind. Many of the key initiatives we see around us are, I think, democratising. They are seeking to bring citizens closer to decision-making, to the power makers, to the point where they can make an impact. Many of these initiatives contest the basic coordinates that inform and underpin representative democracy: the

²⁰ Monica Brito Vieira and David Runciman, *Representation*, Polity, Cambridge, 2008.

monopoly of power in the hands of a few, ‘the one per cent’; the secrecy and lack of transparency around how particular processes and institutions work; and the generalised sense of resentment about the direction in which global economic processes are unfolding.

‘Post-representative democracy’ may thus have the air of something transitional about it, but that does not mean that nothing is changing. On the contrary, the waning of the paradigm speaks to a certain recuperation of the sense of democracy as the affair of the *demos* themselves, not their representatives. It speaks to a recognition that noise, resonance, direct engagement on the streets, in the squares, outside parliaments is *part of* democratic life. As Ranciere points out, this sense of democracy being the affair of ‘anyone and everyone’ used to be held to be intrinsic to democracy—that is, before the guardians, technocrats and politicians took over.²¹ So this is less a crisis of democracy than a crisis of a particular iteration of *representative* democracy, a democracy of, by and for *politicians*. It is a crisis that may, ironically, be the condition of possibility for the return of some of those elements once held to be indispensable to democracy: dissensus, noise, politics and the direct involvement of *demos*, as opposed to those who would represent them.



Question — Today the High Court ruled that the changes to the voting system for the Senate are constitutional. I was wondering what you think the major parties will do to try to keep minor parties at bay. This was a reform to try to stop vote whisperers letting minor parties increase their representation in parliament. Do you think there are going to be other things the major parties try to do in the same vein?

Simon Tormey — Are monopolies interested in preserving monopolies? They most certainly are. I am not sure I completely understand the Australian political system after seven years here. I am really looking forward to looking at that ballot paper. How many numbers? Where does it go? Up above the line or below the line? The one minor party that I know will get my vote is the Australian Cyclists Party because I am fed up with being knocked off Sydney’s roads!

To go back to the serious point, we call these kinds of parties ‘cartel parties’ for a reason—because they have stitched up the political system. The pendulum move between centre right and centre left is, of course, highly convenient for them. It is no surprise to me, and I suspect it is no surprise to you, that they will, by hook or by

²¹ Jacques Ranciere, *Hatred of Democracy*, Steve Corcoran (trans.), Verso, London, 2006.

crook, make it very difficult for new political parties to proliferate. In Britain it is exactly the same thing—very difficult for small parties, third parties, or the Green party to break through. Why? The British first-past-the-post system more or less rules it out. The only way in which that minoritarian vigour can come through here is, it seems to me, in the Senate. I think it would be a danger and would be wrong to try to close down the sense of the Senate being a place where you do hear odd voices, different voices and idiosyncratic voices.

There is a problem about how many votes it takes in order to get that kind of representation. There will be people here who know an awful lot more about this than me, but the thought that a mere 2,000 votes can get you a seat in the Senate in a country where there are 15 million people voting does sound very disproportionate, if that is the case. If you are going to have representation, it needs to be proportional and it needs to be organised in a way which does not lead to a kind of *Looney Tunes* politics as well, because I think that is also a frustration.

Whatever criticisms you have of parliamentary systems, having some clarity on what it is that the government is going to do without reference to all the particularistic needs of tiny minority parties is, I think, a source of stability. That is a very unfashionable view but I think, given the scale and the nature of the problems that confront national governments, some ability to see them in action doing things and then to hold them accountable is of the essence of the political system. That does not always seem to be apparent in the Australian system.

Question — For transparency, I am a Greens candidate for the federal election. Speaking as someone who is out there talking to people, doorknocking and doing all the traditional things as well as social media, there really seems to be a space, if not a vacuum, for connecting with people. I wonder if you are able to comment on that because people really are wanting to connect.

Simon Tormey — Good luck to you. I think I am in one of the greenest constituencies of all in Balmain in Sydney. I look forward to seeing you on the streets. There are upsides and downsides here. What social media does is compress that sense of distance. If you see somebody's tweet, if you see someone's Facebook page, if you see the digital uploads of them in action, you think you have a little bit of a relationship there. What social media does is compress that space between us and representatives and that has an upside as well as a downside. The upside is clearly that you can engage your constituents, or your potential constituents, much more easily. You can put stuff out there. They can interact. They can tweet back, and I am sure they do. The downside is that we then engender a kind of illusion of proximity. This is something that Trump has done extremely well. It is almost that he is your friend, that he is your buddy, as he tweets out very pugnacious, provocative, and pungent

comments. He can position himself as one of us because he is connected, because he is making these kinds of pictures.

I think the dangers of populism actually are quite clear in ICT. I am very sceptical of the view that we should simply read ICT as a boon for democracy. It is also a boon for would-be demagogues and would-be monopolists of power, as I think Trump is. What he can do is say, 'That old order there, those political parties, they are not interested in connecting to you, they are not interested in hearing from you', and we know it is rubbish. Trump is not doing any of these tweets. He has an army of people he has paid for, as a billionaire, who are in a sense mobilising and manufacturing this kind of charismatic style of leadership. So there is an upside and a downside. I think we are in the very early phase of seeing how this is going to cash out.

If I were advising you on how to engage with your constituents, of course social media and ICT is going to be one of the ways you can extend your reach and get some echoes back as well. But you will also get a lunatic fringe. You will get that guy who tweets back on every tweet that you send out saying, 'You are talking rubbish. Drop it.' So you have to be a bit careful.

Question — From your description, we have at the moment one establishment form of representative government here in Parliament House, and another one out on the street. Is it appropriate or practical that there be leadership from this formal establishment to try to define a new social contract and its possible wiring diagram and its key aspects? Is that a role of leadership for this house?

Simon Torrey — I wish it were, but I think politicians like things as they are. There is this sense of the crisis, if you like, because politicians have been a bit slow in adapting to the need, the desire, the hunger of ordinary people to participate, to be part of decision-making and to be asked what they are thinking about things. Why? Because they are monopolists. If you are used to that sense of being the one in power, being the one who is accountable, that kind of noise from below can be a terrible distraction—'I am the one who has been elected to decide on development in Sydney, or in Canberra, not you guys.' The problem concerns the role of the politician. Is the politician just the avant-garde of the rest of the constituents, or is that person supposed to, in a sense, push the constituents away. This is actually an old debate in representative democracy. Edmund Burke wrote about this in reply to Thomas Paine in the 1780s: should a politician be a delegate or a representative? He said what marks out representative democracy is that we hear from the *demos* once every three or four years, not every day, not in a connected way, not in a participatory way, but you are the one who is accountable. In Spain there is a lot of interest in making politicians delegates—making them instantly recallable and enforcing laws such that they can

only stand once in an election so they do not become a kind of charismatic fulcrum for power and the people, the citizens, have a greater hold over them.

How much demand is there for participation, for extra engagement, for ordinary citizens to be involved or are people just too busy? We are here because we are enjoying the political discussion, but out there people are working, looking after children and so on. I think the answers are very contextual. In Spain everyone seems to be a politician and highly interested—taxi drivers will bore you to tears about the history of the Franco regime and so on. In Australia, what crisis? Yes, we do not have much trust, but the system operates, moves along, stuff gets done and people seem a bit happier here. It is a complex question.

Question — On the matter of the general citizen being involved, I wonder to what degree the capture of the political parties by professional politicians and staffers is an issue. I think there are cases not far from here where the governing committees of parties are staffed by a majority of MLAs and their staffers, which means the general person thinks, ‘If the matter is decided already, what is the point of the ordinary person getting involved?’ Do you have any comments on that?

Simon Torney — I do not think it is just staffers. I think those who work in this building, the lobbyists, the special interests, have a voice that we do not have. Why? Because we do not have money and we have not got resources and we have not got the kind of capital that interests politicians. So there is an inequality of voice; that is clearly the case and you have pointed to one particular instance of that. One of the issues about democracy is that, unless we hear more voices and unless more voices have a chance to participate, we will probably find either we are headed towards populism and towards the mediatisation of politics or we are going to have technocratic governance that operates behind our backs and without our input. That is not a good thing. These numbers are alarming at one level and I think we need to push back against that model of staffers or those kinds of monopolists propping up the cartel system. We need to be thinking a bit more about how we can hold politicians to account, not just once every three years or once every five years but on a daily basis. We need a vigorous press. We need a vigorous digitally-enabled voice, an echo chamber, for what people are thinking about. I think some of those developments are actually happening. I am encouraged by what I see in certain contexts, but in Australia I think we have got more work to do.

Question — You mentioned the greater online presence through social groups and the ridiculous ease of communication, and also figures like Donald Trump that represent a group that may not have had a voice before. This can be attributed to globalization and a new form of interconnectedness. Does globalization have a role in the decrease

of political interest as we are surrounded by global political issues rather than our own?

Simon Tormey — A very complex question that has stumped me completely! The global level actually is the thing that many of our young people are most concerned about—things like climate change, the erosion of species and global inequality. The problem is we do not really have developed institutions at the global level that help us to do anything other than to stimulate trade. We have this incredibly elaborate repertoire of mechanisms for freeing up markets, for capital flows and all the rest of it, but the politics has not followed the economics. I think this is really the kernel of your question. So much is going on at the global level and yet where are the global institutions which would permit that kind of conversation about how we get things to work much better? Has anyone heard from the UN recently? It seems quite extraordinary. For many decades that had the sense of a nascent global parliament but it seems to be completely moribund as an institution. In climate change talks there are subgroups of the UN which are acting and doing their work, but if you look at ISIS and global security issues, for example, I would have thought there would be a stronger and more resonant voice of the international community there. What is happening is that nation states are themselves trying to assert their own primacy—not just the US, but Russia, China and Europe—and this is creating a clamour which makes it very difficult for international global institutions to get any traction. I think it is for the next generation to push for that kind of international dimension, that global dimension. They do it. Some of the most powerful political communities are online communities—Change.org and Avaaz.org. GetUp! is an Australian thing but there are lots of online communities which are actually able to report some interesting successes across the globe. So I think there are tools being developed. I think voices are being heard, but there is an awful lot more to do and we need to think hard about how global governance is going to resolve some of the really major and terrible problems of the 21st century.

An Argument in Favour of Constitutional Reform*

Bede Harris

The research we do is inevitably affected by our life experience. I grew up in what was then Rhodesia, now Zimbabwe, and did my law degree in South Africa, where I began teaching constitutional law. Both countries were in the midst of conflict over their constitutional futures and debate on constitutional change was the norm, not only among politicians but in social life as well, at all levels of society.

I subsequently taught in New Zealand for five years. This was in the wake of the reformist tenure of Prime Minister Sir Geoffrey Palmer, which had seen the enactment of the Constitution Act 1986 and was followed by the enactment of a statutory bill of rights¹ and the adoption of proportional representation.²

I moved to Australia in 1997. In contrast to Southern Africa and New Zealand, constitutional debate in Australia—and here I am referring to debate on systemic, fundamental change—has been striking by its absence. So what I am going to do today is to take the licence, which I hope I am allowed as someone who was originally an outsider but who has taught and researched constitutional law in Australia for 19 years, to cast a critical eye over our institutions from the perspective of pure theory, taking an a-historic, blank sheet approach, and asking: if we could re-design the Commonwealth Constitution, how would we do it, and what would we adopt from other jurisdictions? I also approach this task from the position of the academic who has the luxury—in fact I would say the duty—of discussing reforms without regard to how such reforms might be achieved, a question which lies in the province of political actors. I do, however, offer some thoughts on issues of political practicality at the end of this paper.

I am going to discuss reforms in five key areas: parliamentary representation; parliamentary control over the executive; rights protection; federalism; and the republic, including codification of the reserve powers. I conclude with a discussion of the practicalities of reform and of the pressing need to enhance civics education.

* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra, on 24 June 2016.

¹ See the New Zealand Bill of Rights Act 1990.

² See the Electoral Act 1993 (NZ).

Representation

The quality of an electoral system must be measured by the extent to which it fulfils its purpose in a democracy, which is surely to produce results that accurately reflect the views of the voting population. One can thus say that an electoral system is democratic to a greater or lesser extent depending on how representative it is. Applying this criterion to the system for elections for the House of Representatives contained in the *Commonwealth Electoral Act 1918* one can say that, while falling within the spectrum of democratic systems, it falls far short of giving equal effect to every citizen's vote. It is nothing novel to state that the single-member electorate system is the most distorting available when compared to the range of systems on offer. The key factor in determining how many seats a party obtains is not the number of votes it obtains nationwide, but rather the accident of where voters live relative to electoral boundaries. Furthermore, this arbitrary system (i) always leads to parties receiving a different percentage of seats to that which their percentage share of the nationwide vote entitles them to, (ii) frequently leads to a party winning government without obtaining a majority of votes and (iii) sometimes even leads to a government winning a majority of seats with fewer votes than the major opposition party, as happened in Australia in 1954, 1961, 1969, 1990 and 1998.

So, for example, while 12,930,814 votes were cast in the 2007 election, the outcome was effectively decided by 8,772 voters in 11 electorates³, who would have handed victory to the Coalition instead of Labor if they had given their first preferences to the former—and this in an election after which the allocation of seats in parliament (83 to Labor and 65 to the Coalition) gave the appearance of a Labor landslide. In 2010 the margin was even closer—13,131,667 votes were cast, but had just 2,175 voters in two electorates⁴ voted for the Coalition instead of Labor, the Coalition would have won power. How can an electoral system possibly be considered representative of voter sentiment when the winning of government depends upon the arbitrary fact of the geographical location of a tiny number of voters?

Another result of systems using single-member electorates is that they inevitably lead to a never-ending transfer of power between two parties, and thus the establishment of a duopoly rather than a democracy. A reflection of popular dissatisfaction with this state of affairs is the fact that an ever-increasing number of voters are expressing their frustration with the major parties by directing their first preference votes to parties other than Labor or the Coalition. In the 2007 election 14.5 per cent of first preference

³ These electorates were: Bass, Bennelong, Braddon, Corangamite, Cowan, Deakin, Flynn, Hasluck, Robertson, Swan and Solomon.

⁴ The electorates of La Trobe and McEwen.

votes went to minor parties or independents⁵, but this increased to 18.2 per cent in 2010 and to 21 per cent in 2013—and this is despite the fact that a first preference vote cast other than for one of the major parties amounts, in most instances, to no more than a gesture before having to make a reluctant choice between parties that can actually win a seat but with which the voter may have no affinity whatsoever.

I would therefore argue that we should adopt a system of proportional representation and suggest the single transferrable vote (STV) system, with its multi-member electorates, best balances the requirements of overall proportionality and voter control over the identity of their representatives. This system has the advantage of already being used in the ACT and Tasmania.⁶ It is also used in countries such as Ireland and Malta. The key determinant of how representative the results produced by this system are is how many members are allocated to each electorate. A comparative analysis of election results from jurisdictions using STV indicates that one can state with a high degree of confidence that, if we had a system where each electorate returned at least seven members to parliament⁷, the possibility of a government coming to power with a minority of votes would be negligible.⁸ If this system were adopted, constitutional amendment would be required, as proportionality would be compromised unless the boundaries of the multi-member electorates could be drawn without regard to state boundaries, which would currently fall foul of s. 29 of the Constitution. I would also recommend that the size of the House of Representatives be increased, both in order to keep the new electorates to manageable size and in order to reduce the ratio

⁵ That is, to parties other than the Liberals, Labor and the various manifestations of the Nationals (Liberal Nationals, Nationals and Country Liberals). The calculation ignores informal votes.

⁶ I refer to those jurisdictions because they are the ones in which STV is used in houses in which government is formed. STV is also used for elections to the Senate and for state upper houses other than that of Tasmania.

⁷ Using the Droop quota method, the threshold for winning a seat in a seven-member electorate would be 12.5 per cent of the votes cast plus one.

⁸ The effect of the number of seats per electorate and the representivity of election results on government formation becomes clear when one contrasts Malta and Tasmania. In Malta, which uses five-seat electorates, a government has won power with less than a majority of votes six times (1921, 1927, 1981, 1987, 1996 and 2008) in 23 elections. Tasmania had seven-seat electorates between 1959 and 1986, during which period eight elections were held and no government won power with less than a majority of votes. From 1989 the number of seats per electorate was reduced to five, and in the eight elections held since then, governments were twice able to win power with a minority of votes (in 1982 and 1989). Thus, based on the available data, seven seats per electorate appears to be the threshold at which formation of government by parties who have less than a majority of nationwide votes is highly unlikely. See the discussion of Maltese election results at University of Malta, 'Malta Elections', <http://www.um.edu.mt/projects/maltaelections/elections/parliamentary>. See the Tasmanian Electoral Commission at <http://www.tec.tas.gov.au/>; a summary of Tasmanian election results since 1909 can be found at Tasmanian Parliamentary Library, 'House of Assembly Election Results 1909-2014', <http://www.parliament.tas.gov.au/tpl/Elections/ahares.htm>.

between voters and their elected representatives, which is currently significantly higher in Australia than is the case in comparable democracies.⁹

Of course, any proportional representation system would almost inevitably lead to coalition government, but the argument that coalition governments are inherently unstable is not supported by research evaluating government stability under different electoral systems across a wide range of jurisdictions¹⁰ and is, in any event, a pragmatic argument, not a principled one, and should not trump the fundamental principle that each voter's views should, as far as is reasonably practicable, have an effect upon the composition of the legislature.

Parliamentary control over the executive

Although in theory the doctrine of responsible government applies in Australia, the system is barely functional in so far as the ability of the opposition to scrutinise the executive is concerned. This is because there is nothing that either house of parliament can do to force the executive to provide the information necessary for that scrutiny.

This was revealed most starkly in 2002, when former Minister for Defence Peter Reith refused to appear before the Senate committee investigating the Children Overboard affair, and the cabinet also ordered that his staffers not comply with the committee's requests to attend.¹¹ At the time, the Coalition lacked a majority in the Senate, which meant that Labor, in conjunction with the minor parties, had sufficient numbers to compel Reith's attendance, and could have used their majority to initiate contempt proceedings against him. However, despite the fact that the Australian Democrats and Greens supported such steps, Labor refrained from using its Senate votes to exercise the contempt powers.¹² The most that ever happens when ministers refuse to provide evidence to committees is that they are subject to a motion of censure, and both major political blocs are careful when in opposition not to initiate contempt proceedings leading to significant penalties, such as suspension from parliament, a fine or imprisonment, that could be used against them once they are

⁹ At the 2010 elections the average number of voters in each House of Representatives electorate was 93,921, compared with 76,875 voters per electorate in Canada, 70,276 in the United Kingdom and 42,153 in New Zealand. For a full discussion of STV as it could be used in elections for the House of Representatives see Bede Harris, 'Does the Commonwealth Electoral Act Satisfy the Constitutional Requirement that Representatives be "Directly Chosen" by the People?', *Journal of Law and Politics*, vol. 9, no. 4, 2016, pp. 85–8.

¹⁰ For the results of a comprehensive survey analysing the relationship between electoral systems and durability of governments see David Farrell, *Electoral Systems: A Comparative Introduction*, Palgrave Macmillan, Basingstoke, 2001, pp. 194–6.

¹¹ See the Senate Select Committee on a Certain Maritime Incident, Report, October 2002, available at http://www.aph.gov.au/Senate/committee/maritime_incident_ctte/index.htm.

¹² See Megan Saunders, 'Truth is out there, somewhere', *The Australian*, 25 October 2002, p. 12.

back in power.¹³ This provides yet another example of the negative consequences for the Australian body politic of the Labor-Coalition duopoly.

The most striking recent example of ministerial defiance of legislative oversight occurred in 2013–14 when the then Minister for Immigration and Border Protection, Scott Morrison, refused to answer questions posed by a Senate committee on migration matters.¹⁴ Similarly, in February 2016 officials from the Department of Immigration and from Operation Sovereign Borders refused on public interest grounds to answer when a Senate committee asked whether the government had paid people smugglers to return asylum seekers to Indonesia.¹⁵ The fundamental problem with claims of public interest immunity is that there is no test—other than the government’s own assertion—for determining whether the public interest indeed justifies non-disclosure of information to parliament.

How then is this to be remedied? Clearly constitutional conventions have lost their binding force in Australia and thus it is no longer satisfactory to leave the workings of responsible government to the goodwill of ministers. The answer is therefore to replace these conventional rules with statutory provisions, which would compel executive subordination to legislative oversight, with penalties for non-compliance.¹⁶

Obviously provision would have to be made for genuine cases where the national interest militated against public disclosure—but this would not mean allowing the executive to claim immunity from providing information merely on its own assertion

¹³ For discussion of the political dimension of this issue see: Laurie Oakes, ‘Hypocritical oath’, *The Bulletin*, 13 March 2002, p. 17; Margo Kingston, ‘Labor backdown opens black hole of accountability’, *Sydney Morning Herald*, 1 August 2002, <http://www.smh.com.au/articles/2002/07/31/1027926912621.html>; Sarah Stephen, ‘Refugee drownings: Labor sabotages inquiry’, *Green Left Weekly*, 11 September 2002 <https://www.greenleft.org.au/node/26737>; and Margo Kingston, ‘Labor’s latest travesty’, *Sydney Morning Herald*, 23 October 2002, <http://www.smh.com.au/articles/2002/10/23/1034561546910.html>.

¹⁴ See Emma Griffiths, ‘Immigration Minister Scott Morrison defies Senate order to release information about Operation Sovereign Borders’, *ABC News*, 19 November 2013, <http://www.abc.net.au/news/2013-11-19/morrison-defies-senate-order-to-release-information/5102342>; and Joel Zander, ‘As it happened: Scott Morrison fronts Senate committee over asylum seeker policies’, *ABC News*, 31 January 2014 <http://www.abc.net.au/news/2014-01-31/scott-morrison-fronts-senate-committee-over-asylum-seeker-policy/5230098>.

¹⁵ Stephanie Anderson, ‘Senior officials refuse to answer questions on payments to people smugglers’, *ABC News*, 5 February 2016, <http://www.abc.net.au/news/2016-02-05/officials-refuse-to-answer-questions-on-people-smuggler-payments/7143162>.

¹⁶ In 1994 Senator Kernot of the Australian Democrats introduced in the Senate the Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill, which would have made it a criminal offence, prosecutable in the Federal Court at the instance of a house of parliament, to fail to comply with an order of a house or a committee. The bill would also have empowered the court to order compliance with the legislature’s request. The bill provided for a public interest immunity defence, with the onus being on the accused to prove that the public interest in not complying outweighed the need for open parliamentary inquiries. Courts could conduct in camera hearings to determine whether the defence had been established. Unsurprisingly, the bill was not proceeded with due to opposition by the major parties.

that the public interest requires it. Rather what is required is a set of rules under which (i) the default position is that there is a legal, not just political, duty on ministers to answer questions and provide such other evidence as is required by parliamentary committees, (ii) proceedings can be taken in the courts in cases of non-compliance, with an appropriate regime of penalties and (iii) the onus of making out a defence of public interest at those court proceedings, in camera if necessary, is cast upon ministers. It would be critical to the success of such a system that the right to initiate proceedings for non-compliance should vest not only in a house and or its committees as a whole, but should also vest in individual committee members. This would be a radical change from the current position.

Putting executive accountability to the legislature on a legal, rather than a conventional, footing, and making the application of penalties no longer vulnerable to political majorities, would have dramatic consequences for the doctrine of responsible government. The experience of the United States, where the legislative branch has far stronger coercive measures at its disposal to ensure executive compliance with requests for information, is instructive. Long-standing precedent gives Congress the right to obtain information from the executive¹⁷, and to have recourse to the courts to enforce subpoenas against members of the administration. This was most famously demonstrated in cases which came before the Supreme Court during the Nixon era.¹⁸ More usually, however, the two branches reach a political compromise¹⁹, and it is a quite normal feature of the political process for members of the executive, including members of the cabinet, to appear voluntarily before public hearings of congressional committees²⁰, or for information to be provided at a confidential committee hearing.²¹ The fact that the judicial branch is the ultimate determiner of the degree to which the executive is accountable has not led to the courts being confronted with policy questions that they are incapable of deciding—there is sufficient case law for the courts to engage with in determining whether a claim of executive privilege is valid. It is a matter of supreme irony that the legislative branch in the United States has far greater scrutiny power than is the case under the system of responsible government we have in Australia.

¹⁷ See *Anderson v Dunn* 19 US (6 Wheat.) 204 (1821) and *McGrain v Daugherty* 273 US 135 (1927).

¹⁸ See *United States v Nixon* 418 US 683 (1974) and *Nixon v Administrator of General Services* 433 US 425 (1977).

¹⁹ See Louis Fisher, 'Congressional access to information: using legislative will and leverage', *Duke Law Journal*, vol. 52, no. 2, 2002, p. 325; and William Marshall, 'The limits on Congress's authority to investigate the President', *University of Illinois Law Review*, no. 781, 2004, pp. 806–8.

²⁰ Fisher, *op. cit.*, pp. 394–401. Although an incumbent President has never been summonsed to appear before a congressional committee, President Ford agreed to do so voluntarily to answer questions relating to his pardoning of former President Nixon—see Mark Rozell, *Executive Privilege: The Dilemma of Secrecy and Democratic Accountability*, Johns Hopkins Press, Baltimore, 1994, p. 90.

²¹ *ibid.*, p. 150.

Rights protection

It is a truism to say that the purpose of a constitution is to allocate powers between institutions of the state and to define the powers of the state vis-à-vis the individual. Although our Constitution does the first, it does the second hardly at all, as it grants protection to only five express rights. Yet of course a constitution is the only document capable of protecting the individual from legislative power.

The usual justification advanced for the absence of a bill of rights from the Australian Constitution is that Australians prefer to put their trust in democratically elected representatives rather than in the courts. The classic enunciation of this by Robert Menzies was as follows:

There is a basic difference between the American system of government and the system of ‘responsible government’ which exists both in Great Britain and Australia ... With us, a Minister is not just a nominee of the head of the Government. He is and must be a Member of Parliament, elected as such, and answerable to Members of Parliament at every sitting ... Should a Minister do something that is thought to violate fundamental human freedom he can be promptly brought to account in Parliament.²²

Menzies’ comments reflect a glib fantasy: as already discussed, the executive is not subject to control by parliament—the strength of the party system and the way the rules of parliamentary privilege operate serve to make the government a virtual elective dictatorship. Furthermore, Menzies’ argument, which is still re-stated in various forms by opponents of a bill of rights, ignores the fact that it is parliament itself that poses the principal threat to rights. As Geoffrey Robertson states, a bill of rights:

... means justice for people whose particular plight would never be noticed by parliament, or prove interesting enough to be raised by newspapers or by a constituency MP. Far from undermining democracy by shifting power to unelected judges, it shifts power back to unelected citizens: democracy from its inception has relied on judges (‘unelected’ precisely so they can be independent of party politics) to protect the rights of citizens against governments that abuse power.²³

²² Robert Menzies, *Central Power in the Australian Commonwealth*, Cassell, London, 1967, p. 54. See also Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law*, UNSW Press, Sydney, 2009, pp. 34–5, 54–9.

²³ Geoffrey Robertson, *The Statute of Liberty: How Australians Can Take Back Their Rights*, Random House Australia, Sydney, 2009, p. 8.

Robertson's point is important. It is precisely because judges are unelected that the protection of rights should lie in their hands, as the issues they would be charged to determine, which in aggregate boil down to the protection of human dignity, are not ones which should be decided through the interplay of party political forces. Furthermore, few seem to have grasped the inconsistency inherent in the argument based upon democracy: democracy, in the sense of an entitlement to political participation can itself be justified only by reference to an external norm, namely the political equality of individuals and the corollary that each person has a right to participate in the law-making process. In other words, democracy is itself logically subordinate to, and dependant on, the concept of rights.

The absence of comprehensive rights protection from the Australian Constitution is all the more cynical, given that Australia is signatory to all the major human rights conventions—and you will search these documents in vain to find an asterisk directing the reader to a footnote which says, 'These rights do not apply to democracies.' There seems to be an attitude of exceptionalism at play in relation to fundamental rights that puts us at odds with the post-World War II international consensus that emerged in the wake of the Nuremberg trials, which rejected positivism and called for the universal recognition of fundamental rights by all legal systems. Given that our Constitution already grants express protection to five rights and that legislation inconsistent with those rights can be invalidated by the High Court, it cannot be said that the constitutionalisation of the full range of rights we have pledged to uphold internationally would be alien to Australian constitutionalism. Such a step, while expanding the range of rights protected, would certainly not confer any new function on the courts. However, if the existence of justiciable rights is offensive to constitutional principle, then surely opponents of a full bill of rights should be calling for the Constitution to be amended so as to remove such rights as it does protect. Yet calls to remove provisions such as s. 116, which protects freedom of religion, have been conspicuous by their absence, so the question needs to be asked: if freedom of religion is protected, why should that not be so in the case of other fundamental rights?

The absence of a full bill of rights leaves the individual vulnerable in the face of legislation which infringes fundamental freedoms. Let me give just a few examples. It puts Australia in the position where there is no express constitutional right to due process—it being a terrible irony that, in the very week of the 800th anniversary of Magna Carta last year, the principal concern of the government was the drafting of legislation to allow deprivation of citizenship without the need to go to court, the very

antithesis of due process promised by article 39 of Magna Carta.²⁴ The absence of constitutional protection of the right to privacy, in the sense of personal autonomy, means that there is no recognition that in relation to intimate personal choices—and here I am thinking specifically of same-sex marriage—the individual should be shielded from the prejudices of parliamentary majorities. Similarly, the fact that there is no constitutional prohibition of cruel and unusual punishment means that there is no limit to the harshness to which asylum seekers may be subjected, either on or offshore.

I cannot leave the issue of human rights without discussing the constitutional recognition of Indigenous people. It is scarcely credible that there are mainstream voices in 21st century Australia who are either openly antagonistic towards the inclusion in the Constitution of a right prohibiting racial discrimination²⁵ or who, while they may support such a right in theory, argue that its incorporation would frighten the conservative horses and thus lead to defeat at a referendum.²⁶ We are left in the truly bizarre position that the Constitution protects the right not to be discriminated against on the grounds of which state one resides in, yet does not offer protection against racist legislation. This is not the time to propitiate conservatives. What is needed is the same moral leadership as was in evidence during the 1967 referendum, which confronts the constitutional conservatives on this issue and overcomes their arguments. We must reject any approach which makes concessions bargaining away the rights of Indigenous people—and even before battle has been properly joined—in order to win conservative support for watered-down reform. Above all, we need to move away from the idea that consensus is the only basis for constitutional change. Sometimes change requires that its opponents be confronted head-on, and their arguments refuted in the public arena. A commitment to non-discrimination is certainly such an occasion.

²⁴ Eleanor Hall, ‘What can Tony Abbott learn from the Magna Carta?’, *The World Today*, 15 June 2015, <http://www.abc.net.au/news/2015-06-15/modern-australian-politicians-could-learn-from/6546728>.

²⁵ See, for example, press statements by Tony Abbott as reported in Anna Henderson, ‘Government renews reservations about race discrimination ban in constitution ahead of Indigenous recognition summit’ *ABC News*, 4 July 2015, <http://www.abc.net.au/news/2015-07-04/government-renews-reservations-about-race-discrimination-ban/6594726>; and by Cory Bernardi as reported in Anna Henderson, ‘Senator Cory Bernardi warns “divisive” Indigenous constitutional referendum “doomed to fail”’, *ABC News*, 21 May 2015, <http://www.abc.net.au/news/2015-05-21/senator-warns-against-'divisive'-indigenous-referendum/6485538>.

²⁶ See, for example, Frank Brennan, *No Small Change: The Road to Recognition for Indigenous Australia*, University of Queensland Press, St Lucia, 2015, pp. 6-7, 220, 244-7 and 270-1; and ‘Frank Brennan on abuse within the Catholic church, and constitutional recognition of Indigenous Australians’, *ABC RN Breakfast*, 19 May 2015, http://mpegmedia.abc.net.au/rn/podcast/2015/05/bst_20150519_0806.mp3, accessed 23 June 2016.

Federalism

Seen at its best, the adoption of federalism in preference to unitary government was the necessary price of creating Australia as a nation. At its worst it can be seen as a base compromise pandering to colonial jealousies, which saddled the country with an unnecessarily complex and expensive form of government and, although I hesitate to say it given where I am speaking today, a second chamber which has never performed its designated function as a states' house.

If the federal system is looked at with cold, a-historical objectivity one must conclude that it is difficult to believe that a country with a population the equivalent of a major city in many other countries should have nine governments. The economic cost of federalism is enormous: as long ago as 2002 it was estimated that, at an absolute minimum, the existence of the federal system drained the economy of \$40 billion per year²⁷, a figure which would now be much higher. This covers obvious costs such as running state and territory governments, costs to the Commonwealth of interacting with the states and compliance costs to business. It excludes intangible costs in terms of time and inconvenience—think of simple matters such as car registration or trades licensing—experienced by anyone who has moved interstate.

Furthermore, this cost is not balanced by any benefit. It would be idle to pretend that US Supreme Court Justice Louis Brandeis's famous statement that federalism creates circumstances where a 'state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country' operates in any real sense in Australia.²⁸ It cannot be said that Australia presents a vibrant diversity of social dioramas. The other supposed major benefit of federalism, is that it provides protection against tyranny by diffusing power.²⁹ But federalism does not affect *what things* government may do to individuals, only *which government may do them*. As I have argued above, only a bill of rights can do that.

De-federalisation would obviously remove a key rationale for the existence of a second chamber. Yet this would not mean a diminution of legislative scrutiny over the executive, because the enhancement of the powers of committee members recommended earlier in this paper would enable members of committees of the House of Representatives to subject the government to more scrutiny than even the Senate can today. Furthermore, the adoption of proportional representation for the House of

²⁷ Mark Drummond, *Costing Constitutional Change: Estimates of the Financial Benefits of New States, Regional Governments, Unification and Related Reforms*, PhD thesis, University of Canberra, 2007, p. 442.

²⁸ *New State Ice Company v Liebmann* 285 US 262, 311 (1932).

²⁹ See the discussion of federalism in the dissenting judgment of Kirby J in *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1, 222-9.

Representatives would make anomalous the continued existence of an upper chamber elected under an inherently disproportionate allocation of an equal number of senators to each state irrespective of population.

Finally on this topic, there is already a degree of public appetite for the abandonment of federalism. A 2014 survey on public attitudes by the Griffith University Centre for Governance and Public Policy found that 71 per cent of respondents favoured changing the current system (among whom there were differing preferences for the allocation of functions to national, regional and local governments).³⁰ This is consistent with a survey commissioned by the public lobbying group Beyond Federation that same year, which found that 78 per cent of respondents favoured having a single set of laws for the country.³¹ It therefore seems that de-federalisation is a reform proposal which would be well-received by voters. I leave consideration of this issue by posing the following question: if we were writing the Constitution *de novo*, would we really create this nine-government system again? And if the answer to that is 'no', then why would we now not abandon it?

The republic and codification of the reserve powers

I have left the issue of a republic until last because, although it is the most frequently discussed constitutional reform, it is in my view the least important. This is not to say that issues of symbolism are without any importance. I remain committed to the view that a severing of the constitutional link between the monarchy and Australia would serve to signal Australia's separate identity on the world stage, and would ensure that there is no office under the Constitution to which Australians may not aspire.

However, of far greater importance than this, in my view, is codification of the conventions regulating the use of the reserve powers, a step which should be taken irrespective of whether we retain the link with the crown or abandon it. This issue is of course linked to that of a republic in so far as significant political capital is made by monarchists out of the supposed risk that an Australian president would abuse the reserve powers by departing from the conventions which govern their use. This problem must therefore be addressed if there is to be any chance of a republic, particularly one involving a popularly elected president, which opinion polls indicate is the preferred model. Yet, to repeat what I said at the outset, codification is necessary even in the absence of a move to a republic. It remains a puzzle as to why,

³⁰ Griffith University Centre for Governance and Public Policy, *Australian constitutional values survey: results release 1*, October 2014, https://www.griffith.edu.au/__data/assets/pdf_file/0015/653100/Constitutional-Values-Survey-Oct-2014Results-2.pdf.

³¹ Galaxy Research, *State government study*, report prepared for Beyond Federation, May 2014, <http://members.webone.com.au/~markld/PubPol/GSR/Polls/Galaxy%20State%20Government%20Study%20May%202014.pdf>.

in the wake of the 1975 constitutional crisis, no attempt was made to do this in order to remove uncertainty in relation to the circumstances in which the powers should be exercised.

There is no shortage of examples from the international Commonwealth which could be drawn upon. Several Commonwealth countries have maintained the office of governor-general but have codified the conventions.³² The same is true of others that have become republics with a figurehead president exercising the powers formerly exercised by a governor-general.³³ Finally, one can point to Germany and Ireland, republics whose constitutions are based on parliamentary government and contain codified rules almost identical to those which operate by convention in Australia.³⁴ I would therefore argue that codification of the conventions would be beneficial in itself as well as being a necessary corollary of a move to a republic.

Prospects for reform and the need to enhance civics education

Turning finally to the question which I deferred at the start of this paper: what are the prospects for constitutional reform? In answer to this I would make three key points.

First, public opinion in Australia reveals a paradox of extreme conservatism in relation to constitutional change, coupled with disenchantment with, and disengagement from, the political process. Yet there seems to be a failure to recognise that, unless people become accepting of constitutional reform, none of the shortcomings which are the source of disillusionment with the political process can be addressed.

Second, history supposedly shows that successful constitutional amendment requires bipartisan endorsement by Labor and the Coalition. This has a number of invidious consequences: only the most uncontentious amendments—which in reality means those which have the least impact—have a chance of passing at referendum. The perceived need for bipartisan support means that the major political parties enjoy a de facto stranglehold over reform. Furthermore, since the major parties are unlikely to endorse changes that alter the balance of power in the Constitution in a direction that is adverse to their own interests, the capacity they have to derail constitutional reform perpetuates the political status quo. Why do the public allow this to continue, given

³² See, for example, the Constitution of Barbados 1966, arts 61, 65, and 66; the Constitution of Bahamas 1973 arts 73, 74 and 66; the Constitution of Grenada 1973 arts 52 and 58; and the Constitution of Jamaica 1962 arts 64, 70 and 71.

³³ See, for example, the Constitution of Dominica 1978 arts 59, 60 and 63; the Constitution of Malta 1964 arts 76, 79, 80 and 81 and the Constitution of Mauritius 1968 arts 57, 59 and 60.

³⁴ See Constitution of Ireland 1937 arts 13.1.1 and 28.10, and the Constitution of the Federal Republic of Germany 1949 arts 63 and 68.

their disillusionment with the political process in general and the major political parties in particular? Much of the answer to this lies, in my opinion, in the fact that a lack of civics education puts voters at a significant disadvantage when evaluating constitutional reform proposals, making them easy prey for politicians who exploit ignorance about constitutional matters and stoke groundless fears about the effect that constitutional change would have. In my view this means since most of the necessary reforms are antithetical to the interests of the major parties, true reform will happen in spite of them, not because of them, and that the only hope of achieving real reform lies in mass mobilisation of public opinion to an extent which puts the major parties under irresistible pressure to put reform to the people.

Third, it follows from the first two points that the key to constitutional reform lies in harnessing prevailing public disenchantment with the political order to whichever constitutional reform measure has sufficient populist appeal to overcome the voters' notorious suspicion of constitutional change. In my view, a campaign advocating the adoption of proportional representation might have the greatest chance of success. It has the advantage that its case can be based squarely on the concept of fairness and would be able to draw upon rising levels of dissatisfaction with the major parties, who are so obviously and unfairly advantaged by the current electoral system.

Leaving aside this immediate strategy, it is clear that, in the long term, constitutional reform depends upon having a citizenry sufficiently knowledgeable about the current Constitution and its shortcomings to be able to critique it. Here the deficiencies in civics education need to be considered. The Commonwealth syllabus *Discovering Democracy*³⁵, made available in 1997, and the Civics and Citizenship subject contained in the new *Australian Curriculum*, published during the period 2011–13³⁶, do a good job at explaining the Constitution as it is, but fail to critique the existing constitutional order. We desperately need a new model of civics education, which enables students to become both informed and critical.

Finally, academic lawyers, who one would normally expect to be bold in their critique of public institutions and innovative in suggesting alternatives but who have in general not done so, also need to discuss broad constitutional reform from the perspective of principle, leaving aside, at least initially, consideration of the politics involved in changing the Constitution. Public resistance to constitutional change is

³⁵ Education Services Australia, *Discovering Democracy*, 1998, <http://www.civicsandcitizenship.edu.au/cce>. See also Stacey Hattensen and Robyn Platt, *Australians All!: Discovering Democracy Australian Readers – Lower Primary*, Curriculum Corporation, Carlton South, 2001.

³⁶ Australian Curriculum, Assessment and Reporting Authority, '7-10 Civics and Citizenship', 2015, <http://www.australiancurriculum.edu.au/humanities-and-social-sciences/civics-and-citizenship/curriculum/7-10?layout=1>.

seen as being so ingrained that academic writers rarely venture into this area, presumably believing that anything that is truly significant is doomed to failure. This approach sacrifices principle for pragmatics and ignores the fact that meaningful reform rarely occurs by following public opinion. Radical reform is, by its nature, controversial, and so the role of the advocate must of necessity be that of leading, rather than following. We ought not to be daunted by the apparent difficulty of the task confronting those of us who seek progressive constitutional change in Australia today.



Question — I am provoked by many issues, but I am going to focus on one and in fact take issue with one of your propositions: there is nothing that either house of the parliament, or committees of the parliament, can do to compel the disclosure of information. I would put it to you that that is simply wrong. Let me reminisce: as a former Commonwealth officer I have been telephoned on more than one occasion to bring my toothbrush because I might be committed to Goulburn jail if I refuse to answer some questions. Also as a Commonwealth officer I have on more than one occasion provided legal advice that the committee of the parliament did have the power to compel an answer to a question and that it was a matter for the political judgment of the committee whether it wished to compel that. My understanding is that both sides of politics, on the basis of reciprocity, don't exercise that power because on another occasion they will be on the other side.

Your solution was that this should go to the courts. Now there is a threshold question: Would this be an advisory opinion or would it be a matter? Would it be something for the courts? There is also the question of how it would go to the courts. Would it be a referral from the committee? If the members of the committee are so reluctant themselves to compel someone to answer a question, why would they be less reluctant to refer this to a court when the ultimate conclusion would be one they are wishing to avoid?

Bede Harris — That is a very good question and it really serves to emphasise the importance of the very final point I made in relation to my suggested process. Yes, a public servant can be compelled to attend a committee meeting, but if that public servant's minister tells them not to then it becomes a matter for the minister and the minister will usually attend in the place of the public servant who declines to attend. The point is that, because of this reciprocity, the big stick of proceedings for refusal to answer questions is not used. I see this reciprocity as a great evil and it was

demonstrated clearly in the children overboard case. Neither Labor nor the Coalition would want to create a precedent such that a minister could be dragged before parliament. As in the old case of Fitzpatrick and Browne from the 1950s, a breach of parliamentary privilege exposes you to detention in a dungeon, which I presume we have somewhere in Parliament House—

Rosemary Laing — False!

Bede Harris — or the ACT watch-house.

Rosemary Laing — Yes.

Bede Harris — It is precisely for that reason that standing to initiate such proceedings must be given to individual members of committees. So it is truly revolutionary what I am suggesting. I am saying the jurisdiction to initiate proceedings for contempt should not vest in a committee of the house or in the house itself; the individual member should initiate those proceedings. The immediate effect of that would be ministerial compliance in 99 per cent of the cases and it is only in the cases where there is genuine, provable national interest in not complying, for which a case can be made out to a court, that there would be non-compliance. It would change the whole dynamic to one of there being a presumed need to comply, failing which there would be a penalty, and that would change the mindset of ministers.

There was a bill put forward in 1994 by Cheryl Kernot, which proposed exactly this sort of measure. Of course it got nowhere because of the opposition of the major parties. You can read *Odgers' Australian Senate Practice* where Harry Evans says that, under the common law, there is an obligation to attend. But for every right there has to be a remedy and if the remedy is never used against recalcitrant ministers, because ultimately you have to get the cooperation of the major parties to use it, then there is no remedy. That is why I am advocating such revolutionary change.

The legislation which I propose would establish an obligation—that is, a minister would be, under a Commonwealth statute, obliged to answer questions. If you look at cases from the New South Wales Parliament, like *Egan v Chadwick*, there it is said that under the system of responsible government the houses have an appropriate right to scrutinise members of the executive. That I think would give rise to the interest, the standing, of the individual committee member, who had failed to have their question answered, to get that question answered and, if it isn't, to bring the matter to court, not for an advisory opinion, which of course the courts can't give, but for a definitive binding opinion.

Question — I have lived in four countries. I was born in Canada. I lived for three years in Scotland, which is irrelevant. I lived in New Zealand from 1960 to 1965 and I have lived in Australia since then. In each of these three countries we have indigenous people—Indians in Canada, Maori in New Zealand, and the Aborigines here. In New Zealand there was the Treaty of Waitangi with the British many years ago, which is yet to be ratified by the New Zealand Parliament. It seems to me that we are very biased against indigenous people, even though in each case, Canada, New Zealand and Australia, they were the first people in those countries. I am a pale face in Canada, a pakeha in New Zealand and a white man in Australia, which is a close as we can get. Does this not show that we have a bias against indigenous people?

Bede Harris — I certainly think that there is unfinished constitutional business in relation to the recognition of Indigenous people. As we know, there were a number of recommendations by the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples. I think that removing racially discriminatory provisions in the Constitution is an important starting point. I think, as I have said in my paper, that you have to have a right to non-discrimination. I would also think, and I said this myself in a submission to that panel, that you need to have something in the Constitution which recognises the cultural rights of Indigenous people. There is actually a very good model for this in section 19 of the Charter of Human Rights and Responsibilities in Victoria. Unfortunately it is not justiciable, but the phraseology of it is an excellent template which could be used to ensure redress for past wrongs and protection for the future for the rights of Indigenous people. I have also written elsewhere about recognition of Indigenous law. When I went to university in South Africa we had to study what was called ‘customary law’ because it is still part of the law of the country and the courts, right up to the top court in the country, will hear cases involving customary law which might have arisen in a headman’s court in a village. But in Australia currently there is no recognition of Indigenous law and it is one of the things that I am very interested in progressing.

Question — More than half a century ago, I came across the words ‘politics purges the system’. This place has plenty of politics—the politics of the ivory tower, imperfect; the politics of the courts, imperfect; the politics of the variety of state legislatures, imperfect. The whole range of imperfections conspire against each other but somehow we muddle through to what turns out to be, despite the Constitution, a pretty jolly good outcome. If I might make comparisons with many of the other countries in which I have lived or indeed visited, it is not too bad. So why don’t we leave things be?

Bede Harris — Because I think that the good is the enemy of the best. ‘She’ll be right. If it ain’t broke, don’t fix it’: this is phraseology that I just do not think is

acceptable if there are defects in the Constitution. Yes, it lumbers along. Let's take the example of the conventions. The principal convention that I am thinking of is that the Senate ought not to block money supply. That was one of the contentious issues in the 1975 crisis that still is not resolved. We could have the same events as happened in 1975. Many academics say, 'The solution to that is: just don't press the issue.' It is like saying, 'Buy this car but do not drive it over 70 kilometres per hour or the wheels will come off.' I think what we have got to do is aim for the best we can have, not just for that which is barely acceptable. We have got to set the bar higher. I would not even go so far as to say the system works. In relation to ministerial accountability, it patently does not work. In relation to the electoral system, it does not give everyone's vote an impact upon the outcome in the House of Representatives. If I were a voter for a minor party in a safe Labor or Coalition electorate, I would feel embittered going to the polls year in, year out knowing that my vote has no effect whatsoever. I do not think that is a functional system. I think that is a system where problems are suppressed and I think we need to confront them and deal with them.

Question — One wonders about Ricky Muir in Victoria with 457 votes.

Bede Harris — The electoral system I am suggesting would, because of the size of the electorates, lead to different outcomes. It is not for me to say Ricky Muir should not be in the Senate. It is whether or not there is an adequate level of representation of the voters. I am looking at the voters' power. That is the critical issue for me and having 2,000 voters on one side of an imaginary line and 2,000 on a different side and that being critical to the outcome of who forms government is just not fair.

Question — I am not sure how you form your opinion that people would be ready to change the federal system. I came to Canberra in the 60s and in those days Canberra was pretty well the only place where you had a mixture of people from all the states. Having come from a smaller state, what struck me after a few months of being exposed to people from everywhere was that the Victorians, the Queenslanders, the South Australians, the Tasmanians and the Western Australians, when you asked them what they were, all said: Victorians, Queenslanders, South Australians, Tasmanians and Western Australians. If you asked people from New South Wales, they said they were Australians. Having gone back to my home state of South Australia quite often over the years, people have very strong state identities, which go right back to colonial days, in all the outlying states. While I think we could reform the federal system, I just don't think it is at all realistic to think we could do away with it altogether.

I still see the difference today. If you are with a group of people who were brought up in New South Wales, they tend to still think of themselves fundamentally as

Australians. Although it has weakened, I think there is still a very strong feeling in all the other states. I think perhaps you are being a little idealistic. I also note that you are from a university based in New South Wales.

Bede Harris — I admit quite candidly that I am being idealistic and I do not underestimate the difficulty in these changes. As to the basis for my assertion, it was those surveys done in 2013, where people were asked: How many levels of government do you think there should be? Which levels should there be? Should there be one with general law-making powers which delegates powers to local government? Of course states have and always will maintain a strong identity in their residents. There is no problem with that and those identities can carry on for sporting purposes or for anything else. All I am saying is: do we want to waste \$40 billion a year on having them as levels of government? I do not see the rationale for doing that. The identities can be preserved. They will not disappear. But from a political point of view, I question their ongoing relevance.

Question — My question is based on the fact of having lived in Canberra and being politically interested for most of my life and now living in regional New South Wales. Does the recent hubbub about the amalgamation of councils in New South Wales, and some of the violent reactions to it in some areas, indicate to you that this notion of changing boundaries, of changing the way systems work, is going to be a much tougher job than you would anticipate from the political analytical level rather than at the ground level? I am also from an electorate that has just changed boundaries, where people have no idea what their new electorate is and no idea who the candidates are and they are not particularly interested. I just wonder how you would see that fitting into—I actually agree with what you are saying—an idealistic view. I come to your final issue: how do you practically implement it?

Bede Harris — I think that is important. Raising local government is very interesting because these surveys showed that there was quite a degree of support for the concept of a single national government enacting laws and delegating powers to local and regional governments, which people would then continue to elect as they do now but there would not be any question of those governments' laws being superior or the Commonwealth's legislative power being constrained. The Commonwealth would have plenary powers and then you would have local or regional governments. There was a degree of support for strengthening the functions that were allocated to local and regional governments in exchange, if you like, for getting rid of the states. I think that often people identify very strongly with local governments—you are quite right, the amalgamation issue has demonstrated that—and that might in fact be a positive in a de-federalisation campaign. So, yes, it would be difficult, but I think that would be an important part of it.

Rosemary Laing — I would just like to throw one thing in at this point. You started your lecture on this theme and we keep coming back to it. It is the simple fact of geography. Geography matters and I think it was one of the triumphs of our constitution writers to recognise the significance of geography. In a huge country, in terms of square miles and geographical area, with a relatively small population, federalism was the model that seemed to meet the demands of the idea that some states were larger than others and you would have the population majority represented in the House of Representatives in numerous seats but you would maintain that equality across the nation, including recognition of minorities, by having the Senate as a house in which the partners in the federation were represented equally. I think that there is a snowflake's chance in hell of ever letting go that idea of the states being equal partners in the federation. It is based largely on geography, different communities of interest, different economic, social, physical and industrial conditions in the different parts of our great, big diverse nation.

Bede Harris — I suppose I have always approached constitutional law by looking at the smallest unit, which is the individual, and to me there is something offensive in the fact that, if I lived in and was a registered voter in Tasmania and I got on a plane and took up a job in Sydney, my effective voting power in the Senate would be one thirteenth of what it was in Tasmania. That is the first point. On the second point about communities of identity, surely it is the case that the owner of a small mine in Western Australia has more in common with the owner of a small mine in Queensland than they do with a person who owns a mansion in Mosman Park, Perth. In other words, I think the communities of interest in society now, compared to 1901, are more economic based, they may be ethnic based, rather than geographically based. I concede to you of course the difficulty in this project. What I am trying to do is shine a bright light of principle on these issues.

Reconciliation Action Plans— Creating Shared Value*

Leah Armstrong

Kapu batainga—greetings to you all in the language of my ancestors from the island of Boigu in the Torres Strait. As is the custom, I wish to pay my respects to the original owners of this land, the Ngunnawal people, and to elders past and present. In doing so, I acknowledge their continuing connection and contribution to this land. The acknowledgement of the traditional owners of this land is an essential part of the changes that we have seen in contemporary Australia as part of our national efforts for reconciliation. And in the spirit of reconciliation I acknowledge the non-Indigenous guests here today.

The context of my speech draws on my experience as a pragmatic practitioner with more than 25 years involvement in the reconciliation movement. At a local level, I was involved from the early 90s in Newcastle with Yarnteen Aboriginal and Torres Strait Islanders Corporation, which was engaged by the Council for Aboriginal Reconciliation to conduct community engagement and reconciliation education programs. Yarnteen's vision was to become economically independent and full free agents in our own development. A key foundation of our success was building respectful relationships between non-Indigenous Australians and Aboriginal and Torres Strait Islander people. Then, at a national level, as the CEO of Reconciliation Australia from 2010 to 2014, I was closely involved in the development, promotion and evaluation of reconciliation action plans (RAPs) as a framework for change. The program grew significantly during this period from 150 to over 500 RAPs.

Today reconciliation is being actively talked about, but reconciliation can mean different things to different people. It can be a very frustrating process and many have walked away from it in search of simple solutions or a 'silver bullet' that promises an end to inequality and suffering.

At its core reconciliation is about building respectful relationships between Aboriginal and Torres Strait Islander people and other Australians to enable us to work together to close the gaps, and to achieve a shared sense of fairness and justice. Reconciliation has no meaning if it is not aimed at achieving equality in life expectancy, education, employment and all the important, measurable areas of disadvantage. It has no meaning while some of us continue to experience racism and do not receive the same

* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra, on 22 July 2016.

treatment before the law as the majority of Australians. We cannot think of Australia as reconciled while there continues to be such profound disparity between us.

Fifteen years after the Council for Aboriginal Reconciliation presented the *Australian Declaration Towards Reconciliation*, Reconciliation Australia has released their inaugural *The State of Reconciliation in Australia* report.¹ The research examined reconciliation in Australia and internationally and identified five critical dimensions that together represent a comprehensive picture of reconciliation:

Race relations

All Australians understand and value Aboriginal and Torres Strait Islander and non-Indigenous cultures, rights and experiences, which results in stronger relationships based on trust and respect and that are free of racism.

Equality and equity

Aboriginal and Torres Strait Islander peoples participate equally in a range of life opportunities and the unique rights of Aboriginal and Torres Strait Islander peoples are recognised and upheld.

Institutional integrity

The active support of reconciliation by the nation's political, business and community structures.

Unity

An Australian society that values and recognises Aboriginal and Torres Strait Islander cultures and heritage as a proud part of a shared national identity.

Historical acceptance

All Australians understand and accept the wrongs of the past and the impact of these wrongs. Australia makes amends for the wrongs of the past and ensures these wrongs are never repeated.²

The report states clearly that reconciliation is no longer seen as a single issue or agenda. The concept of reconciliation has become a holistic one that encompasses rights as well as so-called symbolic and practical approaches.

¹ Reconciliation Australia, *The State of Reconciliation in Australia*, 2016, <https://www.reconciliation.org.au/the-state-of-reconciliation-in-australia-report/>.

² *ibid.*, p.19.

Australia has developed a strong foundation for reconciliation, but the report acknowledges the mixed results across the dimensions and that we have a long way to go. It highlights that 86 per cent of Australians believe the relationship between Aboriginal and Torres Strait Islander people and other Australians is important, but Aboriginal and Torres Strait Islander people still experience high levels of racial prejudice and discrimination.³

Reconciliation has raised broader questions about our national identity and the place of Aboriginal and Torres Strait Islander histories, cultures and rights in our nation's story. Most Australians—72 per cent—believe Aboriginal and Torres Strait Islander cultures are important to Australia's identity but only 30 per cent are knowledgeable about our histories and cultures.⁴ Ninety-four per cent of Australians agree that the wrongs towards Aboriginal and Torres Strait Islander people occurred as a result of European settlement. However, Australians are divided on the nature and extent of the effect of past wrongs and have varying views on forgiveness and attitudes to 'moving on'.⁵ On the national political scale, reconciliation appears to be at an all-time high with multi-partisan support. However, progress in closing the gap on Indigenous disadvantage is slow and in some measures is going backwards.

The suffering is far from over and the gaps remain, but 25 years after the modern movement began we are seeing real progress and record potential to make more. The positive progress in our nation's reconciliation journey is the goodwill coupled with the practical measures being taken in workplaces and businesses across Australia.

Whilst the efforts of various governments on the policy front are mixed, broader support for reconciliation in the business and community sectors has grown significantly over the past 10 years. Today there are over 650 business or community organisations with RAPs and a further 600 schools and early childhood learning centres are involved in RAPs. These businesses and schools are creating environments that foster a higher level of knowledge and pride in Aboriginal and Torres Strait Islander histories, cultures and contributions to increase respect, reduce prejudice and strengthen relationships between the wider Australian community and Aboriginal and Torres Strait Islander peoples.

Reconciliation action plans—a strategy for creating shared value

Reconciliation action plans were set up to mark the 40th anniversary of the 1967 referendum and began with eight organisations. Yarnteem was the only Indigenous

³ *ibid.*, p. 21.

⁴ *ibid.*, p. 9.

⁵ *ibid.*, p. 10.

organisation among the trailblazer organisations, which included the ANZ bank, BHP Billiton and Oxfam. Now over 1,000 organisations are involved in the RAP program, which covers 20 per cent of the national workforce and is growing by the day.

The RAP program is one of the largest of its kind in Australia and possibly the world. Reconciliation Australia gathers data from the RAP community annually and there is strong evidence that RAPs are making a significant contribution to closing the gaps in education, employment and health. The 2015 data indicate that RAP organisations:

- employ over 35,000 Aboriginal and Torres Strait Islander people;
- provided cultural awareness training to 262,000 employees;
- provided \$77.7 million for educational scholarships;
- provided \$100 million in pro bono support to Aboriginal and Torres Strait Islander communities;
- formed over 3,900 partnerships with Aboriginal and Torres Strait Islander organisations; and
- bought goods and services worth \$32 million from Aboriginal and Torres Strait Islander Supply Nation certified businesses.⁶

This increase in corporate Australia investing in First Australians has businesses more confidently citing both social and business benefits to give context for investments relating to closing the gap. Boardroom discussion on these matters has shifted from philanthropic perspectives that emerge when times are good, to longer term sustainable activities which are outcome focused and benefit companies in several ways.

As Aboriginal and Torres Strait Islander organisations accumulate greater assets, more students graduate from university, the demand for local labour forces in remote regions increases, and government policies strengthen procurement with Aboriginal and Torres Strait Islander businesses and increase employment targets, the Australian corporate sector is looking to strategies that deliver ‘shared value’.

The concept of ‘creating shared value’, as defined by Professor Michael Porter and Mark Kramer⁷, involves creating economic value in a way that also creates value for society by addressing its needs and challenges. Shared value is not social responsibility or philanthropy but a new way to achieve economic success. It is not on the margin of what companies do but at the centre. It defines the policies and practices

⁶ Reconciliation Australia, *The RAP Impact Measurement Report 2015*, February 2016, <https://www.reconciliation.org.au/wp-content/uploads/2016/02/RAP-Impact-Measurement-Report-2015.pdf>.

⁷ Michael Porter and Mark Kramer, ‘Creating Shared Value’, *Harvard Business Review*, January–February 2011, vol. 89, nos 1–2, pp. 62–77.

that enhance the competitiveness of a company while simultaneously advancing the economic and social conditions in the communities in which it operates.

Porter and Kramer identified three ways in which shared value can be created:

- Reconceiving products and markets—defining markets in terms of unmet needs or social ills and developing profitable products or services that remedy these conditions.
- Redefining productivity in the value chain—increasing the productivity of the company or its suppliers by addressing the social and environmental constraints in its value chain.
- Local cluster development—strengthening the competitive context in key regions where the company operates in ways that contribute to the company’s growth and productivity.⁸

Creating shared value goes beyond corporate social responsibility in guiding the investments of companies in their communities. Corporate social responsibility focuses mostly on reputation and has only a limited connection to the business, making it hard to justify and maintain over the long run. Creating shared value is integral to a company’s profitability and competitive position. It has a profit imperative. It leverages the unique resources and expertise of the company to create economic value by creating social value.

Shared value creation is about being good, not just looking good

A reconciliation action plan provides a framework and plan for companies to articulate their shared value strategy. The goal of a RAP is to turn good intentions into measurable actions that support Aboriginal and Torres Strait Islander people achieve equality in all aspects of life—a goal which benefits all Australians.

The RAP provides a framework which covers the activities that we know can make a difference:

- **Relationships**—good relationships are based on trust, understanding, communication and mutual respect.
- **Respect**—respecting the special contribution of Aboriginal and Torres Strait Islander peoples to Australia.
- **Opportunities**—working together to ensure Indigenous children have the same life opportunities as other children in this prosperous country.

⁸ *ibid.*, pp. 67–73.

But a RAP is most successful when it is supported by a strong business case. When directors and CEOs of RAP companies are able to identify and articulate the business benefits to engaging in reconciliation, we see sustainable outcomes. Similar to ‘shared value’, there are four key areas which underpin the business case.

Access to new and improved market share and employing a workforce that is representative of the community

Organisations that are developing new markets and better penetrating existing markets by more fully meeting the needs of the fastest growing part of the Australian population help to develop trust and better engage Indigenous customers.

For example, National Australia Bank (NAB) launched its first reconciliation action plan in 2008 and has made significant commitments in promoting financial inclusion by: providing greater access to financial products and services; providing access to opportunities that lead to real jobs and meaningful careers in banking; and building partnerships that enable Indigenous businesses to grow and prosper. By investing in these areas, NAB recognises that greater financial inclusion, increased personal and household income and growing Indigenous business and organisational wealth will lead to greater interaction with financial services and position NAB as a banker of choice for Indigenous Australians.

Workforce efficiency

Attracting, motivating and developing talented local staff connected to local communities is efficient and effective. This overcomes costs and challenges associated with recruiting, transporting and accommodating staff from other locations and the higher turnover rates of these positions.

As part of its commitment to increasing the participation of Indigenous people in its business, Broadspectrum, formerly Transfield, launched its first RAP in 2009. It has learnt the value of community engagement and the impact of meaningful employment at the local level. By supporting local people, Broadspectrum has generated a positive reputation among the communities it works in. Its business model is based on long-term relationships, a value it takes to any community it engages with. As a business, a local workforce has clear financial benefits, but in addition it is supporting the social footprint of the community.

Staff recruitment, engagement and satisfaction

Generation Y clearly have a greater connection to social and corporate responsibility and make this a day-to-day part of their lives. Graduates are increasingly aware of and interested in the social responsibility of their employer and want the opportunity to play a meaningful role through their workplace. Maintaining staff wellbeing and satisfaction by providing opportunities to engage with community projects is a key workplace attraction.

KPMG is deeply respected by its Indigenous partners and the business community when it comes to reconciliation. It recognises there is an important value proposition that it can offer to attract new graduates and retain employees and it wants to develop leaders who have had ‘out of the box’ experiences. Participation in mentoring programs, honorary work and secondments enable staff to progress their own professional and personal development. KPMG supports leadership potential, skills transfer, performance, confidence and maturity, which aligns strongly with its global values and behaviours.

Improving supply chain diversity

Purchasing choices are, and will increasingly be, influenced by organisation reputation and community orientation. Indigenous procurement is a key action in reconciliation action plans. The Australian Taxation Office (ATO) realised a number of years ago that it could leverage its purchasing power to create a positive social impact for Indigenous business owners and communities. The concept was clear: by purchasing from Indigenous businesses the ATO can grow the personal wealth of Indigenous owners and employees, build capacity and stoke innovation in their supply chain. Since 2014 the ATO has progressively developed its supplier diversity strategy and in 2016 has procured over \$26 million in goods and services from Aboriginal and Torres Strait Islander businesses.

RAPs are also offering Aboriginal and Torres Strait Islander organisations and people new ways of understanding and engaging with reconciliation as advisers, co-mentors, training providers and enterprise partners, as well as benefitting from greater numbers of more carefully considered employment and professional development opportunities.

The State of Reconciliation in Australia report highlights that businesses are not just creating employment opportunities for Aboriginal and Torres Strait Islander workers and shared value for the companies, they are creating cultural change through awareness raising and leadership. They are leading change in attitudes, remoulding

the culture in thousands of Australian workplaces and increasing the understanding of Aboriginal and Torres Strait Islander peoples' history and culture. They are actively breaking down racist stereotypes and helping to create workplaces that are supportive and encouraging of Aboriginal and Torres Strait Islander employees.

Reconciliation Australia's survey of employees in RAP organisations found that, compared to the general community, Aboriginal and Torres Strait Islander workers and other employees in RAP organisations: have much higher levels of trust between each other than the general community; are far less prejudiced towards each other; and have greater pride in Aboriginal and Torres Strait Islander cultures.⁹ But as we have experienced over the past two years with the general community's outcry over the Indigenous war dance goal celebration by Indigenous role model and leader Adam Goodes, Australian of the Year 2012 and decorated AFL player, and the UNSW Indigenous terminology guide preferring the word 'invasion' to 'settlement', we have a long way to go in changing attitudes and building a nation that respects Indigenous culture and accepts our history.

How can governments create shared value?

Porter and Kramer suggest that governments and non-profit organisations would also be able to 'leverage the power of market-based competition in addressing social problems'. Shared value offers a strategic opportunity to form exciting and innovative multi-stakeholder partnerships between government, business and civil society that are effective, efficient, and impactful.

They found that government can play five key roles in accelerating the adoption and implementation of shared value:

1. Acting as a knowledge broker—investing in social research, analysing best practices for solving problems and strengthening technical research that complements companies and community efforts.
2. Convening key players—a valuable first step for government in encouraging the identification and development of shared value opportunities is to convene key players.
3. Serving as an operating partner—partnering with companies in the implementation of shared value strategies by adjusting existing programs and co-ordinating different government programs.
4. Changing the risk/reward profile—where investment risks may appear too uncertain for companies, government could consider different tools, i.e. loans, tax breaks or subsidies to improve the risk/reward profile.

⁹ *RAP Impact Measurement Report*, op. cit., p. 2.

5. Creating a supportive regulatory environment—more nuanced regulations may be necessary so as not to limit the potential of shared value creation.

Social Ventures Australia also suggest governments need to recognise that there are multiple opportunities to encourage companies to address social issues ranging from employment to affordable housing across all sectors and industries. This requires policies that help shape a more conducive environment for change to be sustainable and scalable. This has been demonstrated through the *Commonwealth Indigenous Procurement Policy*.¹⁰

Governments themselves are huge purchasers of services and by building a shared value component into their requirements they can encourage companies to move in this way. The federal government launched the revised Indigenous procurement policy (IPP) in July 2015. The primary purpose of the policy is to ‘stimulate Indigenous entrepreneurship and business development, providing Indigenous Australians with more opportunities to participate in the economy.’¹¹

The IPP allows Commonwealth buyers to purchase directly from Indigenous small to medium enterprises for contracts of any size and value using the Indigenous business exemption. This provides Indigenous businesses with a big advantage: they do not need to complete costly tender processes. Indigenous businesses must still demonstrate value for money, but this can be done through simpler processes.

The policy has three key components: a target for purchasing from Indigenous enterprises—three per cent by 2020—a mandatory set-aside to direct some Commonwealth contracts to Indigenous enterprises and minimum Indigenous participation requirements for certain Commonwealth contracts.

Since beginning in July 2015, Commonwealth agencies in 11 months have exceed their target of 0.5 per cent and awarded 993 contracts to 282 Indigenous businesses with a total value of \$195.8 million. This is more than 31 times the value of Commonwealth procurement with Indigenous businesses in 2012–13, which was \$6.2 million.¹²

¹⁰ Department of the Prime Minister and Cabinet, *Commonwealth Indigenous Procurement Policy*, July 2015, <https://www.dpmc.gov.au/resource-centre/government/commonwealth-indigenous-procurement-policy>.

¹¹ *ibid.*, p. 6.

¹² Department of the Prime Minister and Cabinet, ‘Indigenous Procurement Policy (IPP)’, <http://www.dpmc.gov.au/indigenous-affairs/economic-development/indigenous-procurement-policy-ipp>.

One of the leading Commonwealth agencies to embrace the IPP is the Department of Defence. The Department of Defence has been working with Indigenous contractors for some years but the policy has enabled them to use an exemption under the IPP to sign a \$6 million contract, a first for an Australian government construction contract, with Pacific Services Group Holdings, an Indigenous business, as the head contractor for the works, which will refurbish existing marine infrastructure and buildings at HMAS Waterhen in Sydney.

The IPP is a good news exception in Indigenous policy and the flow-on effect that is now being witnessed with state and territory governments and the corporate sector adopting similar policies will only accelerate the impact. The policy is creating shared value through government diversifying its supply chain. This brings innovation and more profitable Indigenous businesses, which are 100 times more likely to employ Indigenous people, thereby increasing tax revenue and reducing reliance on government social services.

A key partner in the policy implementation is Supply Nation, a national not-for-profit organisation established to accelerate supplier diversity in Australia and grow a prosperous Indigenous business sector. Supply Nation's goal is to integrate Indigenous small and medium enterprises into the supply chains of Australian corporations and government agencies. Today Supply Nation has over 1,000 registered and certified Indigenous businesses and 230 government and corporate members.

Supply Nation works on a national, global, cross-sectoral scale in a manner that is driven by corporate and government buyers. Supply Nation has out-performed its Global-Link peers—Canadian Aboriginal and Minority Supplier Council, Minority Supplier Development United Kingdom, South African Supplier Diversity Council, and Minority Supplier Development China.

In 2015 Supply Nation released *The Sleeping Giant: a Social Return on Investment Report on Supply Nation Certified Suppliers*.¹³ The researchers found that every certified supplier owner profiled uses their business as a vehicle to drive change for their family and wider community. Owners and employees of certified supplier businesses spoke of their increased confidence, autonomy and aspirations. They emphasised their commitment to making their businesses work for the wider community. All of these Indigenous business owners expressed their pride in being an example of strength and independence for the next generation. Business owners invest

¹³ Supply Nation, *The Sleeping Giant: a Social Return on Investment Report on Supply Nation Certified Suppliers*, report prepared by Robin Burton and Emma Tomkinson, Supply Nation, September 2015, http://www.supplynation.org.au/resources/Social_Return_on_Investment_report.

in their children's education, act as mentors for their employees and other businesses, and are positive role models in the community—factors they themselves attribute directly to owning their own business.

Some of the report's key findings for Indigenous businesses were:

- For every dollar of revenue, Indigenous businesses create \$4.41 of economic and social value.
- Indigenous businesses employ more than 30 times the proportion of Indigenous people than other businesses.
- Indigenous-owned businesses strengthen their Indigenous employees' connection to culture.
- Indigenous owners, employees and communities are proud of Indigenous businesses.
- Owners of Indigenous businesses reinvest revenue in their communities.¹⁴

Supply Nation, Commonwealth agencies through the Indigenous procurement policy, and corporate Australia are demonstrating what can be achieved through a shared value approach. We need more examples of this policy approach. What will be important going forward is identifying the policies that are the most effective in achieving the intended result of social and economic value. One such policy is the Indigenous advancement strategy.

In response to desperate situations well-intentioned people are seeking solutions by highlighting the dysfunction and dependency within Indigenous communities and, as a consequence, there is an overwhelming negative image. These negative images often convey only part of the truth, but they are not regarded as part of the truth; they are regarded as the whole truth.

Once accepted as the truth about communities, this 'deficit model' determines how problems are to be addressed. It begins by focusing on a community's deficiencies and problems. It is by far the path most travelled by governments and it commands the vast majority of our financial and human resources. In my mind this approach has been the inappropriate base for the current policy framework on welfare reform for the past 10 years.

The current policy framework, focuses on solutions that are:

¹⁴ *ibid.*, p. 7.

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- Prescriptive—based on problems and deficits with a directive, reactive or interventionist focus from government.
 - Punitive—action and implementation is driven by a ‘stick’ approach including compliance audits, statutory reviews and quarantining of welfare payments.
 - Policing—the role of government is policing and surveillance of people and outcomes, rather than being a partner in the performance process.

As a result, many disadvantaged communities are now environments of service where behaviours are affected because residents come to believe that their wellbeing depends upon being a client. They begin to see themselves as people with special needs that can only be met by outsiders.

There is an alternative path, which insists on establishing a clear commitment to discovering a community’s capacities, assets and opportunities—that is, to locate all the available local assets, begin connecting them with one another in ways that multiply their power and effectiveness, and begin harnessing local institutions and decision-making authority for local development purposes. This requires government to look for opportunities to harness the creativity, perseverance and resources of the community and private sector to create shared value.

DFAT overseas aid program—creating shared value through partnership

This approach is recognised by the Department of Foreign Affairs and Trade in its policy approach to engaging the private sector in foreign aid and development. The recent statement by the Minister for Foreign Affairs, *Creating shared value through partnership*, demonstrates her intention to amplify the impact of Australia’s aid program by moving away from aid grants to leveraging the ‘assets, connections, creativity and expertise’ of the private sector in such a way that it will generate business returns.¹⁵

The program works to solve complex development problems across a number of priorities: agriculture, fisheries and water; building resilience; education and health; effective governance; gender equality; and infrastructure, trade facilitation and international competitiveness. Their value proposition is to offer businesses the:

- Ability to convene, broker and influence—they have considerable networks and credibility to assist businesses.

¹⁵ Department of Foreign Affairs and Trade, *Creating shared value through partnership: Ministerial statement on engaging the private sector in aid and development*, August 2015, p. 4, <http://dfat.gov.au/about-us/publications/aid/Documents/creating-shared-value-through-partnership.pdf>.

- Deep knowledge of the business, political and regulatory environment in developing countries.
- Support in creating a more attractive business operating environment—policy reform and investments are specifically related to improving the investment environment in the countries where they work.
- Catalytic funding—they have the capability to provide catalytic funding to encourage and support businesses.¹⁶

Government and community groups will need to constantly reassess how they can optimise what they do to contribute to the creation of shared value. This requires aligned interests, a common direction and an environment that is conducive to advancing everyone's efforts.

RAPs are already providing a framework for this approach with community and corporate businesses already creating shared value. There are already 20 companies that have achieved the highest Elevate RAP status, which is awarded by RA when companies demonstrate significant investment and thought leadership.

Governments need to capitalise on this and become partners in the outcome. An area which offers significant opportunities for creating shared value is early childhood education. The Commonwealth has set a new Closing the Gap target of 95 per cent of all Indigenous four-year-olds enrolled in early childhood education by 2025. Evidence shows that quality early childhood education prepares a child for school, has a positive impact on attendance and provides a solid foundation for learning and achieving at school and beyond. This is particularly important to vulnerable Aboriginal and Torres Strait Islander children.

The government is aiming to invest \$40 billion in childcare support through the Jobs for Families childcare package, which includes targeted support for vulnerable children and families. In addition, a further \$10 million is being invested for integrated early childhood, maternal and child health and family support services with a number of disadvantaged communities.

According to the Secretariat of National Aboriginal and Islander Child Care (SNAICC), the Jobs for Families childcare package may not achieve its intended outcome for more than 19,000 Aboriginal and Torres Strait Islander children and there is strong evidence that supports the importance of Aboriginal and Torres Strait Islander community control to outcomes in service delivery. SNAICC states that

¹⁶ *ibid.*, p. 5.

‘‘What works’ is community engagement, ownership and control over particular programs and interventions.’¹⁷

SNAICC advocates that Indigenous early childhood education centres:

... support the wellbeing of the most vulnerable children and families in the community ... They are holistic and responsive to child and family needs, including integrated language development, speech and hearing supports, as well as broader health, family support, capacity building and early intervention. They are Indigenous led and support local employment and community up-skilling.¹⁸

Corporate Australia also recognises the importance of early childhood education, with Australia’s largest oil and gas company, Woodside, announcing a partnership with the University of Western Australia’s Centre for Social Impact to invest \$20 million over 10 years in early childhood development in communities where Woodside operates. In doing this they are investing to reduce vulnerability and increase resilience and capacity in communities now in order to foster robust and sustainable workforces in communities from 2025, and beyond. The initiative partners with early childhood experts to improve health, nutrition, safety, and education for children aged 0–8 years. Woodside have launched their 2016 Elevate RAP and committed to improving early childhood outcomes for Indigenous Australian children and families through the Woodside Development Fund.

No single individual, program, organisation, institution, company or government can bring about large-scale social improvement alone. The alignment of the three sectors’ interests, with a commitment to building strong relationships and partnerships, respecting each partner’s role and matching strengths and capabilities and efforts to enable the local Indigenous community to be the owners and drivers of their services would deliver educational opportunities and outcomes greater than would be otherwise achieved without collaboration, delivering shared value for all.

Conclusion

Reconciliation can seem a big process and many Australians do not know how to take action. But it is through the small everyday acts that all Australians can get involved. It can involve actions by individuals, such as attending an Indigenous cultural event,

¹⁷ Secretariat of National Aboriginal and Islander Child Care, *The Jobs for Families Child Care Package: Unintended consequences and policy alternatives for Aboriginal and Torres Strait Islander children*, February 2015, p. [3], http://www.snaicc.org.au/wp-content/uploads/2016/02/Factsheet-The_Jobs_for_Families_Child_Care_Package-Edit_ES.pdf.

¹⁸ *ibid.*

acknowledging traditional owners, standing up against racism, reading a book by an Indigenous author, or actions by big business, such as purchasing products from Indigenous-owned businesses or employing Indigenous people.

When reconciliation becomes a natural process, which is not spoken about but is displayed daily within every action by individuals and groups, then we can achieve greater equality. When we work together, shoulder to shoulder, we bring a greater understanding of each other.

When I reflect on what reconciliation is for me, it is more than a process or a movement, it is a philosophy. It is about accepting difference—culture, experience, views and opinions—building respectful relationships and working towards a just society for all. It is an essential nation-building effort. It encourages us to be our better selves.



Rosemary Laing — Thank you very much Leah. It is such an impressive story. I think it is so uplifting to have an alternative model to the really negative, depressive welfare model that you described really well and called the deficit model. I would like to float one idea for you to comment on: it is such a big picture, such large aspirations, but action starts on the ground with that first step and I think that one of the important concepts of the reconciliation action plans is the idea of a RAP champion. You need perhaps those individuals with vision and commitment to take those first steps. I wonder if you care to comment about that concept of a RAP champion and how important they might be in this whole process?

Ms Armstrong — As I outlined, RAPs are really about institutional change but reconciliation needs to live in the hearts and minds of every Australian. Individuals can take those very small steps, so the big picture does not have to be so scary. I think that is what we need to break down—yes, reconciliation is a big-picture, nation-building agenda, but it takes the individual acts of every individual Australian. So for RAPs in an institutional context, yes, it does require someone to take a leading or champion role, and that generally has to be long term as well. Once they get it at the board level and the CEO level, they have to commit. It has to come from the top as well. We mostly see resistance in institutions not so much at the top or the bottom of the organisation but actually in the middle. That is where the resistance is because it requires them to think differently, to behave differently and perhaps to go out and do things differently. Where there is success, you have the CEO and the board

completely committed and they have set actual performance measures on their management so that they are made accountable for RAP outcomes.

Question — Thank you Leah for your presentation. It is really inspiring to have a strong first nations woman such as yourself talk in Parliament House of all places and be very honest. I would also like to acknowledge the traditional owners of the land on which I am speaking today. I work in the Department of Foreign Affairs and Trade as the manager of the Aboriginal and Torres Strait Islander public diplomacy program and part of that program is that we try to foster greater international understanding of indigenous peoples both in Australia and externally. I have found that for a lot of Australians there is very little knowledge and understanding of our history, of our culture, of what we have been through and of how to move forward. So in some ways we are no longer preaching to the choir, but preaching to those who need to be converted. You noted today that there is a variety of government policies and programs, such as the Indigenous procurement strategy, that are certainly innovative and are things that we may have not thought about 10 years ago that are making substantive change within communities and are actually empowering Indigenous peoples to take this forward. But without the commitment of not just organisations but also the people within them there is potential for those to fall by the wayside and to be a temporary movement. I think what you are invested in is to have long-term sustainable change and not the revolving door of policy that has happened even while I have been alive.

My question to you is: with the Indigenous procurement policy being quite an innovative measure, do you think that Australia should start considering what 10 years ago may have been quite controversial? I note that in places like Finland, Norway and other Nordic countries you have indigenous parliaments that advise government. In our own backyard we have New Zealand with parliamentary seats set aside for indigenous peoples. Do you think policies like these, which I suppose you could say are positive discrimination policies, should really start to replace the deficit model we currently sit under?

Ms Armstrong — If you look at the supplier diversity movement in the US, which we have actually adopted the IPP from, it is a legislated affirmative action policy in the US to assist African American, Native American and Hispanic minorities. It is a policy that has been there for over 40 years and it has driven great wealth creation in those communities. I believe that there are mechanisms like that affirmative action legislation that can drive greater benefits and impacts. Certainly there are other mechanisms. The example that you have given of having strong representative voices in parliament is certainly a part of the reconciliation movement. In the last election we got quite a number of Indigenous politicians. So we can progress down that path of

getting more voices in parliament and also have mechanisms outside of parliament where we can have the Indigenous voice being strongly promoted.

Question — I would be interested to know what Reconciliation Australia has in mind or thinks about creating a treaty. In other parts of the world treaties do exist, but on the other hand many of those treaties—for example, the Treaty of Waitangi in New Zealand—were originally imposed on the local people by the invading government. So the situation in Australia now is very different. If Arthur Philip had tried to have a treaty in 1788, at best he would only have had it with the Eora people of the Sydney region. It is much more complicated than that and there are 200 years of history in the middle. So is there a process now that we can find that might create a genuine treaty between people who were here for so many tens of thousands of years before the rest of the people like me turned up? Is there a way that Reconciliation Australia can see the establishment of a treaty?

Ms Armstrong — I cannot speak on behalf of Reconciliation Australia as I am no longer there, but I do know that, as part of their *State of Reconciliation in Australia* report, they do support a process for agreement making between Indigenous peoples and governments. They definitely do support the ongoing discussion and conversation around agreement-making or treaties. In fact it is one of the indicators that was presented by the Council for Aboriginal Reconciliation in their *Roadmap for Reconciliation* that there be a process towards agreement and treaty making. They definitely do support the conversation and people should be talking about agreement making and treaties in whatever form they take.

Question — I work at the Department of Human Services, more commonly known as Centrelink. We are in a way the facilitators of the traditional welfare model. I work in the reconciliation space and you are bang on correct: we have our very high-level executives on board and we have a ground layer of people on board, but it is that middle layer that we really struggle to facilitate reconciliation with, particularly in the management relationships we find. We have a staffing level of approximately 35,000. The majority of our staff are not Canberra-based; they are out servicing customers. My question is: how do we do a better job of making RAPs less corporate? It is a corporate plan for us and I think that is probably one of the major triggers for people to say, ‘No, it is from Canberra, it is corporate.’ How do we make it more accessible on the ground?

Ms Armstrong — It is a common issue that you have the head office in the major cities develop the corporate plan and the actions but there is very little awareness and understanding out in the regions. It is not just government agencies; it happens with major corporations as well. I guess the successful ones have actually been able to

break down the RAPs and give responsibilities to those regions for certain actions that match each particular region. Corporate sees it from the top as a holistic thing, but it is about asking how you can make these actions come to life in your region or where you live and work and about giving direction and responsibility out to those people in the regions.

Question — Thank you very much for your very interesting talk. That leads on to my question: how many of us are here to hear you talk? I think there really isn't enough publicity at a very general level about the successes you are having. We constantly hear of the negative things and it just seems to me that there isn't a place for more discussion on success and, in some places, lack of success in the general community. Is there an effort being made in that respect?

Ms Armstrong — The foundation of what Reconciliation Australia tries to do is promote the positive to get people engaged. They don't want to sugar-coat the bad and the areas that need support but, as I said, there is some amazing stuff happening out there. The entrepreneurship that is coming through Indigenous people, the numbers of graduates out of university—lawyers and doctors. In fact there is a group called CareerTrackers that provides internships for Indigenous students. It is signing up 10-year agreements with corporate Australia to take hundreds of Indigenous university students on because they see the talent that is coming out of these universities and that Indigenous university students are bringing different perspectives. And there are other programs in schools.

It is a difficult thing to get out through the noise of mainstream media, where it is all about highlighting the deficit side and the problems. Social media is probably the best approach that Reconciliation Australia has taken to get in good news stories. They also run a program called the Indigenous Governance Awards, which has been running for 10 years. BHP Billiton funds the awards, which highlight good governance in Indigenous organisations and how these organisations, against a backdrop of changing government policy and changing programs, are actually governing quite well and incorporating Indigenous cultural perspectives in the way they deliver services. But you never get to hear or see those things. They are doing amazing stuff. It is an ongoing challenge and we constantly try to highlight the success rather than continuing to focus on the deficit.

The Pursuit of State Interests in the Senate

Paula Waring

Introduction

On the face of it, there should be little expectation for the modern Senate to operate as a states' house, with a particular responsibility for working in the interests of the states within the Australian federation. The Australian Parliament is a national parliament which inquires, debates and legislates on national issues arising from the federal powers granted to it under the Constitution. While the composition of the Senate is structured to reflect the federation, with equal representation of each of the states, for the most part the modern parliament is dominated by political party machines that keep a firm grip on votes in both houses.

Among senators, in some quarters, cynicism about a states focus for the Senate abounds:

I always get concerned when senators come in here and start arguing the 'states house' argument. It is like what they say about the last refuge of a scoundrel: it is used when it suits; we suddenly become a states house.¹

Other senators have seen and continue to see the defence of their state as an important representational role:

The Senate is the states house, and part of a senator's job is to raise matters of importance to the states and to defend their status within a federated Commonwealth.²

The representation role of senators is a complex interplay of state, regional, party, national and philosophical interests. While the relationship of senators to their constituents is more remote and diffused than that of members of the House of Representatives, a substantial proportion of senators still consider themselves to primarily represent a defined geographical area.³ As Senator Richard Colbeck advised

¹ Senate debates, 5 December 2002, p. 7258 (Senator Chris Evans).

² Senate debates, 26 November 1996, p. 6041 (Senator Boswell).

³ Scott Brenton, *What Lies Beneath: The Work of Senators and Members in the Australian Parliament*, Department of Parliamentary Services, Canberra, 2010, p. 78. Forty-two percent of senators thought that they primarily represented either a defined geographical area or that area through a party (or vice versa).

the Senate in defence of the concerns of Tasmanian farmers in 2009, it ‘does not always have to be about politics’; it can be about ‘trying to do the right thing and getting the government to do the right thing’. Senators, he noted:

should use the mechanisms that exist in this parliament to stand up for the things that [they] believe in and to try and achieve outcomes ... that is what we are here to do. It is an important part of the process of being a member of this place ... This is not about trying to destroy; this is trying to alert the government that there needs to be a proper way of dealing with this.⁴

This paper explores how these parliamentary mechanisms exist in the procedures of the Senate and some of the ways in which they have worked in practice as a vehicle for the expression or achievement of state interests.

Voting in the Senate

The bloc vote

The longstanding notion expressed in the federation debates of the Senate’s representational role as the ‘states’ house’ has brought with it the expectation, even among senators themselves, that senators from different parties would vote together as representatives of their states:

If I had a belief for this chamber when I first came, it was that it would be more of the states’ house, as it was supposed to be. I have to say I think the biggest problem with this chamber is that it has become a representation of political parties. I think we fool ourselves. We say, ‘The Senate is the states’ house.’ I have never ever seen a vote in this place based along state lines and that is a shame.⁵

The myth of the lost opportunity of the bloc vote has persisted throughout the life of the Senate. Some commentators⁶ have used the fact that the Senate usually votes on party lines to argue that the Senate does not fulfil its function as envisaged by the federation founders ‘to resist, in the legislative stage, proposals threatening to invade

⁴ Senate debates, 17 September 2009, p. 6849 (Senator Richard Colbeck).

⁵ Senate debates, 21 March 2013, p. 2399 (Senator Joyce).

⁶ Greg McIntosh, ‘The Senate: states’ house or party house?’, *Current Affairs Bulletin*, March 1989, pp. 25–7; L.F. Crisp as quoted in Stanley Bach, ‘Crisp, the Senate, and the Constitution’, *Australian Journal of Politics and History*, vol. 54, no. 4, 2008, pp. 545–61.

and violate the domain of rights reserved to the States'.⁷ Others have pointed to constitutional convention delegates such as Alfred Deakin, John Macrossan, Sir John Downer and Sir John Winthrop Hackett who foresaw the dominance of political parties or a national will that would diminish the importance of the states.⁸

Certainly we need to go back a long way to find a classic example of a bloc vote, where a state's senators from government and opposition parties sided together to attempt to bring about a legislative change or other action in the Senate that favoured their state.

On 3 June 1952, all ten senators from Tasmania (five Labor and five Liberal) voted together to support an amendment by Liberal Senator Reginald Wright to the Land Tax Assessment Bill 1952, which had been seen to unfairly burden Tasmanian taxpayers. The amendment was carried with the support of the opposition, 26 votes to 24. The victory, however, was short-lived. When the House disagreed with the amendments and returned the bill the following day, the Tasmanian Liberal senators voted to no longer insist on the amendment, amid protests from the opposition that Wright had fallen back 'into line at the beck and call of the Government Whip'. Ultimately, though, the disquiet within the government ranks prevailed and a bill to abolish Commonwealth land tax and repeal the Land Tax Assessment Act was passed the following year.⁹

Similarly, on 29 March 1977, with the Liberal-Country Party in government and a Liberal-Country Party majority in the Senate, four Tasmanian Liberals, together with Tasmanian independent Senator Brian Harradine, voted with the opposition to support Senator Wright's second reading amendment to the Apple and Pear Stabilization Amendment Bill 1977. The amendment expressed the view that the government support available to apple growers who received below-average export prices should be increased from a maximum level of \$2 a box to \$3. Tasmanian fruit growers were the major beneficiaries of the scheme. The vote was won 31 votes to 28, with Liberal Senator Brian Archer the only Tasmanian to oppose the amendment. The victory,

⁷ John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth*, Angus & Robertson, Sydney, 1901, p. 414.

⁸ John M. Williams, *The Australian Constitution: A Documentary History*, Melbourne University Press, Carlton, Vic., 2005, p. 289; John Uhr, 'The Australian Senate model', *Canadian Parliamentary Review*, Spring 2009, p. 29; Parliament of Australia, Joint Committee on Constitutional Review, Report, November 1959, PP 108/1959, p. 13; Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution*, Cambridge University Press, Cambridge, 2009, pp. 196–99.

⁹ Senate debates, 3 June 1952, pp. 1213–21, 29 October 1952, pp. 3803–5, 26 February 1953, p. 338; *Sydney Morning Herald*, 5 June 1952, p. 3.

however, was only symbolic as second reading amendments have no legislative effect.¹⁰

Bloc votes involving senators from one state without the support of the opposition are doomed to failure. All Tasmanian senators voted together in October 1953 to (unsuccessfully) oppose a motion to adjourn debate on berry fruits, an industry of particular importance in their home state.¹¹ In September 1954 all Tasmanian senators, concerned about the effect of the Sugar Agreement Bill 1954 on manufacturing industries using sugar in their state, voted to refer the bill to a select committee. The motion failed when it attracted support from only nine other senators, with the majority of the government and opposition opposing the motion.

Crossing the floor

While examples of all or most of the senators from a particular state voting together on a state issue are undoubtedly rare, examples of an individual or a small group of senators from a variety of states crossing the floor on a matter that affects those states are more common. Coalition senators frequently crossed the floor during the period of conservative government from the late 1950s to the early 1980s and have continued to employ that course of action on occasion since then.

Where Acts and actions of the Commonwealth have had an impact on federalism, senators have been quick to jump to the defence of states' rights¹² and crossing the floor has been a means of making a decisive protest. Four Liberal senators crossed the floor in 1954 to support Senator John Gorton's motion to form a select committee to inquire into how duties collected on petrol were apportioned among the states.¹³ In 1973 the Seas and Submerged Lands Bill was opposed by nine Liberal and Country Party senators who were concerned by the principle of the parliament asserting sovereign power over the off-shore areas of Australia without the agreement of the federal and state governments or a referendum of the people.¹⁴ For Queensland senator Ian Wood, despite his support for uranium mining, the lack of consultation by the federal government with the state governments on atomic energy legislation was the deciding factor in him crossing the floor in 1978 to support a Labor second reading amendment that the bills not be proceeded with 'until after full and proper consultation with the states'.¹⁵

¹⁰ Senate debates, 29 March 1977, pp. 593–5.

¹¹ Senate debates, 21 October 1953, pp. 882–96.

¹² Brian Galligan, 'Parliament's development of federalism' in G. Lindell and R. Bennett (eds), *Parliament: The Vision in Hindsight*, Federation Press, Annandale, NSW, 2001, p. 19.

¹³ Senate debates, 28 October 1954, pp. 1110, 1116.

¹⁴ Senate debates, 27 November 1973, pp. 2135, 2156.

¹⁵ Senate debates, 24 May 1978, pp. 1787–8, 1792.

Other floor crossings were motivated by seeking benefits of a regional nature such as the efforts by senators in 1956 to secure tax concessions for Queenstown, King Island and the Furneaux Group in Tasmania¹⁶ or Queensland senator Woods' support for an amendment to the Queensland Beef Cattle Roads Agreement Bill in 1966 which would add a road to the works program in the vicinity of his home town of Mackay.¹⁷

Individuals who repeatedly engaged in floor crossing needed to be willing to suffer the possible consequences for their career. ACT Senator Gary Humphries crossed the floor on three occasions between 2006 and 2009 to defend the rights of the Australian Capital Territory to legislate on same-sex marriages and other matters without interference from the federal government.¹⁸ Senator Wright's campaign to ensure that concessions for the sugar industry did not impact on Tasmanian fruit producers resulted in him crossing the floor in 1956 and 1962, co-opting a number of Liberal and minor party colleagues to his cause.¹⁹ Queensland senator Neville Bonner's concern for oil drilling on the Great Barrier Reef was the motivation for his failure to support his government's Petroleum (Submerged Lands—Miscellaneous Amendments) Bill 1981.²⁰ All three senators experienced difficulties with their party, and while attributing their political fortunes to their history of floor crossing would be an oversimplification, it is notable that Humphries and Bonner lost preselection and Bonner and Wright eventually left their party in protest.²¹

Minor parties and independents

The election of senators through proportional representation since 1949 has resulted in a rise in numbers of independents and minor party senators in the Senate. When the Senate does not have a government majority—which since 1949 has been the case for around 70 per cent of the time—and the major parties disagree on legislation, minor party and independent senators can combine forces with the opposition to amend or reject legislation.

In September and October 2009 Tasmanian Greens senator Bob Brown and Tasmanian opposition senator Eric Abetz had 'a meeting of minds' when they joined forces to propose an amendment to the Access to Justice (Civil Litigation Reforms)

¹⁶ Senate debates, 1 November 1956, pp. 1155–62.

¹⁷ Senate debates, 1 September 1966, pp. 289–90.

¹⁸ Senate debates, 15 June 2006, p. 53, 8 February 2007, p. 22, 26 November 2009, p. 8964.

¹⁹ Senate debates, 31 October 1956, pp. 1079, 1083, 9 May 1962, pp. 1244–46.

²⁰ Senate debates, 2 June 1981, pp. 2461–9.

²¹ Ann Millar and Geoffrey Browne (eds), *The Biographical Dictionary of the Australian Senate*, vol. 3, 1962–1983, UNSW Press, Sydney, 2010, pp. 141, 362–3; *Canberra Times*, 24 February 2013, p. 6.

Amendment Bill 2009 to ensure that the position of Federal Court Registrar would be retained in Hobart. The senators objected to plans to move the registrar's functions to Melbourne that would 'leave Tasmania as the only state in the Federation which does not have a registrar'. A House amendment removing the requirement that the registrar be full-time was later agreed to in the Senate.²²

The threat that minor parties and independents might side with the opposition gives them considerable leverage in negotiations with the government—leverage that has been turned in some instances towards furthering state interests.

Independent Tasmanian senator Brian Harradine has been one of the most effective state advocates to date. Indications of Harradine's commitment to the rights of small states became apparent in his first speech when he moved an amendment to the address-in-reply to the Governor-General's speech declaring that the Fraser Government obtain the approval of the less populous states before implementing its 'new federalism' policies. Harradine went on, by his own reckoning, to secure \$353 million for environmental, technological and other programs in Tasmania in negotiations with the Howard Government over the legislation for the partial sale of Telstra in 1996 and 1999.²³ Earlier, in 1993, as part of negotiations with the Keating Government to secure passage of budget measures, Harradine obtained a \$2 million per year increase in subsidies for Bass Strait shipping.²⁴ In 2003 and 2004 Harradine and three other independent and minor party senators, Shayne Murphy (Ind., Tas.), Meg Lees (Australian Progressive Alliance, SA) and Len Harris (Pauline Hanson's One Nation, Qld), all won concessions for their states in return for their support of higher education and health legislation.²⁵ But then, as Harradine stated in his valedictory speech to the Senate, as an independent he 'had the luxury of always being able to put Tasmania first'.²⁶

Similarly, in February 2009 when the opposition refused to support the economic stimulus package proposed by the Rudd Government to combat the global financial crisis, independent South Australian senator Nick Xenophon was able to negotiate \$900 million in fast-tracked funds for water buy-backs and water-saving projects for the Murray–Darling Basin in exchange for his vote. Senator Xenophon noted, 'This is

²² Senate debates, 27 October 2009, pp. 7217–19, 7224–6. See also Senate debates, 16 September 2009, pp. 6762–9.

²³ Brian Harradine, 'Senator Harradine will not recontest seat', Media release, 29 June 2004; Senate debates, 25 February 1976, pp. 239–43, 29 October 2003, p. 17092.

²⁴ Statement by the Prime Minister, the Hon. P.J. Keating: the Budget, 19 October 1993.

²⁵ *West Australian*, 11 March 2004, p. 7; *Australian Financial Review*, 12 March 2004, p. 26; Senate debates, 4 Dec. 2003, p. 19399–400 (Len Harris was paired), 11 Mar. 2004, p. 21410 (Harradine paired).

²⁶ Senate debates, 21 June 2005, p. 91.

a good result for the river, it's a good result for South Australia, it's been done in the national interest and South Australia will benefit from it'.²⁷

Procedural mechanisms

The procedures for the operation of the Senate, as laid down in the standing orders, provide a number of opportunities for senators to pursue state interests. Many of these procedures allow senators to influence the Senate while working within the confines of a party system, long before matters come to the finality of a vote on legislation.

Orders for the production of documents

Orders for the production of documents are formal directions by the Senate for ministers to table government documents of interest. The documents both inform the Senate in its decision making and are a form of accountability, placing documents used or created by the government on the public record.

When the government does not have a majority in the Senate, orders for the production of documents moved by senators are rarely opposed by the Senate. The Senate has in fact shown a great deal of tolerance for orders for documents of a state or local nature. The vote on the September 2014 order for documents on the funding for the Toowoomba Bypass road project, for instance, received the support of the opposition and the 17 members of the politically and geographically diverse 18-member cross bench that were present in the chamber at the time.²⁸

However, the success of the Senate in actually obtaining the documents from such orders has been mixed. The ministerial response to the order for documents on the Toowoomba Bypass project is typical for many active infrastructure projects:

the responsible minister tabled several relevant documents but in relation to detailed financial or commercial information about the project, made an implied public interest immunity claim on grounds of potential prejudice

²⁷ *Advertiser* (Adel.), 14 February 2009, p. 6.

²⁸ Other orders of a state or local nature given by the Senate include documents on tree clearing in Queensland (2000), the monitoring of genetically-engineered crops in Tasmania (2001), the funding or other support for the Nathan Dam on the Fitzroy River in Queensland (2002), the Basslink project to link the Tasmanian and national electricity grids (2003), a proposed pulp mill in Tasmania (2005), the Coorong and Lower Lakes in South Australia (2008), irrigation in northern Victoria (2009), harvesting requirements for Tasmanian forests under intergovernmental agreements (2011), the WestConnex Motorway project in New South Wales (2013), the East West Link tollway in Victoria (2014) and the Perth Freight Link tunnel (2016).

to the final outcomes of the project which was at a sensitive commercial stage.²⁹

Even when orders for the production of documents are unsuccessful, they can provide a mechanism for debate on issues of public interest. On 17 July 2014 the Senate sought information on the successful tenderer for the manufacture of boots for the Australian Defence Force, requesting specifically the margin between the winning tenderer and the next closest competition. The order was made in response to news reports that a longstanding South Australian boot manufacturer had been overlooked in favour of cheaper imported boots from Indonesia. The minister partially complied with the order, citing potential commercial harm as the reason for more information not being provided. Following a motion by an opposition senator ‘that the Senate take note of the document’, the minister’s response was debated. Two senators were able to argue that by using local suppliers and factoring in broader benefits to the community in government procurement rules, both the interests of South Australia and the nation would be served.³⁰

Committee inquiries

There has been a long tradition of Senate select committees (committees set up to undertake a particular inquiry) inquiring into matters with a single state or regional focus, commencing with the first select committee into steamship communication between the mainland and Tasmania established within months of federation in 1901.³¹ In more recent times, two notable inquiries have sought to consider matters that fall firmly within state jurisdictions: the 1996 inquiry into the actions of the Victorian Government in granting a casino licence to Crown Casino Ltd and the 2014 inquiry into aspects of the Queensland Government administration. In addition, a number of select committee inquiries have considered matters of importance to more than one state such as the 1987 inquiry into the consequences of Commonwealth legislation restructuring the regional commercial television industry³², and inquiries

²⁹ Department of the Senate, *Procedural Information Bulletin for the Sitting Period 22 September–2 October 2014*, no. 286, 3 October 2014, p. 4.

³⁰ *Advertiser* (Adel.), 14 July 2014, p. 1; *Journals of the Senate*, 17 July 2014, p. 1241; Senate debates, 26 August 2014, pp. 5605–6.

³¹ Rosemary Laing, ‘The Senate committee system: historical perspectives’, *Papers on Parliament*, no. 55, February 2011, p. 159. For a complete list of Senate select committees in 1901–84 see appendix 2 of Laing’s article. Select committees from 1985 are listed in the appendices of *Odgers’ Australian Senate Practice*. State-specific select committee inquiries include the closing down of Fitzroy Dock in Sydney by the Defence Department (1913), the relocation of the post office in Balfour, Tasmania (1917), future demand and supply of electricity for Tasmania (1982), the retrenchment of 400 workers by the Mount Lyell Mining and Railway Company in Tasmania (1976) and aircraft noise at Kingsford Smith Airport in Sydney (1995).

³² Senate Select Committee on Television Equalisation, *Television Equalisation*, PP 106/87.

into state government financial management (2008)³³ and the reform of the Australian federation (2011)³⁴.

Senate standing committees, which have a continuing responsibility beyond the life of a parliament, have also considered state matters such as the 2007 Rural and Regional Affairs and Transport Committee inquiry into options for additional water supplies for South East Queensland. In 2014 five Victorian and South Australian senators from the opposition and cross benches successfully initiated an Economics Committee inquiry into the automotive industry in Australia, an area of particular interest to these two states.³⁵ A Community Affairs Legislation Committee hearing on 5 May 1998 was remarkable for the attendance of state health ministers engaged in a dispute with the Commonwealth over health funding in the Health Legislation Amendment (Health Care Agreements) Bill 1998.³⁶

Tasmanian senator Brian Harradine made five attempts spanning over a decade to introduce a standing committee on treaties comprised of one senator from each state.³⁷ His particular concern was the effect that treaties agreed to by the federal government, and the federal government's use of the external affairs power under section 51(xxix) of the Constitution, would have on the legislative powers and responsibilities of the Australian states. Finally, after a report on the matter by the Legal and Constitutional Affairs Committee in 1995 and several unsuccessful private senators' bills to involve parliament in treaty-making, a joint committee on treaties was established in May 1996.³⁸

Senate inquiries have benefited from receiving diverse views on the implications of federal policies for regional centres not only by virtue of the diversity and geographical make-up of the participating senators, but also by the views expressed through interstate hearings and an Australia-wide submissions process. The 2008 select committee into housing affordability, while investigating issues more widely across Australia, became aware of more specific housing problems faced in a number of regions. As a result, its report paid particular attention to mining towns, 'sea change' regions, Western Australia's Pilbara region and Western Sydney. The committee also scheduled a public hearing in Karratha in order to hear about and see at first hand the housing conditions in that city.

³³ Senate Select Committee on State Government Financial Management, report, PP 336/08.

³⁴ Senate Select Committee on Reform of the Australian Federation, *Australia's Federation: An Agenda for Reform*, PP 167/11.

³⁵ Senate debates, 25 November 2014, p. 9213.

³⁶ PP 145/98.

³⁷ Senate debates, 23 August 1983, p. 8, 21 February 1985, pp. 19–20, 12 October 1988, pp. 1187–8, 8 May 1990, pp. 18–20, 4 May 1993, pp. 26–7.

³⁸ Senate Standing Committee on Legal and Constitutional Affairs References Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, 1995, PP 474/95.

Inquiries that fail to adequately take into consideration the geographical diversity of Australia have attracted criticism, such as this assessment of the joint select committee inquiring into the clean energy bills in 2011:

We saw that with this legislation, of such sweeping effect, the parliamentary inquiry into it did not get outside the Melbourne-Sydney-Canberra triangle. It is just outrageous. If any part of this parliament should be outraged, of course, it should be the Australian Senate. It should be the place in which the states, with their equal representation, deserve to have a fair say heard—where the smaller states, the more distant states and the more disparate regions are meant to get their voices heard. Yet they were silenced throughout that inquiry process.³⁹

Examination of the budget

An important role of the parliament (under section 96 of the Constitution) is to approve revenue proposals and determine in which states that expenditure should occur. Payments to the states, which are not part of the normal operational expenses of the government, can be amended by the Senate. In Senate estimates hearings, senators examine the budget and the ways the executive government spends money appropriated by the parliament. The hearings provide non-government senators with an unparalleled opportunity to interrogate government officials over the administration of government programs and monitor the fairness of the distribution of revenue. In May 2014, for instance, non-government senators used the Legal and Constitutional Affairs Committee estimates hearings to quiz the Australian Federal Police Commissioner on Hobart airport security following the proposed removal of all AFP officers.⁴⁰ In June 2014 senators examined the take-up and efficacy of a wage subsidy scheme offered to Tasmanian employers who engaged long-term unemployed Tasmanians.⁴¹

Information gleaned by senators at estimates hearings can be repurposed in other Senate procedures. A question without notice in March 2013 on funds for Riverland communities along the Murray River asked by a South Australian independent senator had its origin in a response given by an official to the Environment and Communications Legislation Committee hearings the previous month.⁴²

³⁹ Senate debates, 12 October 2011, p. 7234 (Senator Birmingham).

⁴⁰ Legal and Constitutional Affairs Committee Legislation Committee Hansard, 26 May 2014, pp. 23–30.

⁴¹ Education and Employment Legislation Committee Hansard, 1 June 2014, pp. 144–53.

⁴² Senate debates, 20 March 2013, p. 2195; Environment and Communications Committee Legislation Committee Hansard, 12 February 2013, p. 52.

Private senators' bills

One indication of the dominance of major political parties in parliament is that it is rare for legislation that is introduced into the Senate by members of parliament who are not ministers to become law. Many lapse in the Senate, such as the bill introduced in 2010 by two South Australian senators to increase the powers of the Murray–Daring Basin Authority to manage the basin's resources in extreme crisis.⁴³ Others pass the Senate only to fail in the House.

In 2011 the Territories Self-Government Legislation Amendment (Disallowance and Amendment of Laws) Bill 2011 was passed by both houses—only the 13th private senators' bill to receive assent since 1901. The bill had implications for the Australian federation, strengthening the powers of the territories by removing the executive government's ability to disallow or recommend amendments to laws made by territory legislative assemblies. Instead 'any disallowance or amendment of an ACT law should be by legislation of the Parliament as a whole'.⁴⁴

While territory rights were at the forefront of debate on this bill, it was not proposed by a territory senator but was an Australian Greens bill motivated by the federal government's attempts to override territory legislation on euthanasia and civil unions. Conversely, in 2000 the Senate passed a bill co-sponsored by the Greens, Labor and the Democrats which sought to overturn a Northern Territory law for the mandatory sentencing of juvenile offenders. In this case it was the House of Representatives that did not pass the law due to states and territory rights considerations.⁴⁵

Threats to introduce private senators' bills, like threats to cross the floor, can be used by senators to signal their strong concerns about the policies of their party. In May 2006, New South Wales government senator Bill Heffernan was reported to be 'taking advice' on the introduction of a private senator's bill forcing a higher proportion of federal government ownership of Snowy Hydro. The proposed private senator's bill was part of a grassroots campaign to oppose the Commonwealth, New South Wales and Victorian governments' intention to privatise the public company. Nine days later, amid growing community opposition, the Prime Minister reversed the Commonwealth government support for the sale.⁴⁶

⁴³ Senate debates, 18 March 2010, p. 2162; *Advertiser* (Adel.), 19 March 2010, p. 20.

⁴⁴ Senate debates, 29 September 2010, pp. 302–3 (Senator Brown).

⁴⁵ *Mercury* (Hobart), 15 March 2000.

⁴⁶ *Australian Financial Review*, 24 May 2006, p. 1; *West Australian*, 3 June 2006, p. 6.

Disallowance motions

Legislative instruments such as regulations, ordinances, determinations, rules and orders are used to provide much of the detail required for an Act of parliament to function. Unlike Acts, legislative instruments can become law without the direct approval of parliament. Both houses of parliament have the power to disallow a legislative instrument. While the Regulations and Ordinances Committee undertakes most of the formal monitoring of legislative instruments in the Senate, any individual senator may also move a motion for disallowance. Due to the detailed nature of the instruments, disallowance motions quite commonly concern issues at a state and local level. Some examples include:

- On 22 August 2012 a Tasmanian Greens senator moved a disallowance motion against a determination that set the small pelagic fishery allowable catch quota. The motion was aimed at stopping a ‘super’ trawler FV *Margiris* (later *Abel Tasman*) from operating in Australian waters. While the disallowance motion did not pass the Senate, it brought about three hours of debate. The issue generated a high level of community concern in Tasmania and legislation to achieve the same end was introduced by the government the following month.⁴⁷
- On 17 November 2009 two Queensland opposition senators opposed a proclamation for the creation of the Coral Sea Conservation Zone east of the Great Barrier Reef. The senators were concerned at the lack of public consultation and the loss of fisheries that they feared would adversely affect the Cairns region. The vote was tied and so failed.⁴⁸
- On 17 September 2009, a Tasmanian senator moved a motion for disallowance on behalf of Tasmanian farmers concerned at the inclusion of lowland native grasslands in the list of threatened Tasmanian ecological communities. The vote hinged on independent South Australian senator Nick Xenophon who extracted concessions from the government to partially address the farmers’ concerns in return for his vote.⁴⁹

⁴⁷ Senate debates, 22 August 2012, pp. 6155–6, 10 September 2012, p. 6423, 17 September 2012, p. 7013.

⁴⁸ Senate debates, 17 November 2009, pp. 8040–54.

⁴⁹ Senate debates, 17 September 2009, pp. 6835–50.

Questions to ministers

Question time, the most publicly visible of parliament's proceedings, serves many different purposes when employed in the service of states and territories. For government senators, the use of prearranged questions along the lines of 'Will the minister update the Senate on how the government is delivering choice and flexibility for the vocational education and training students in our home state of South Australia?' enables them to promote achievements on behalf of their state constituencies.

For the opposition, the directing of questions to ministers in question time has long been used as a means of exposing disquiet in government ranks over state issues. In 2014 the share of the goods and services tax received by Western Australia and the widely held view in that state that its success during the mining boom was subsidising the poorer states in the federation had become 'the most important issue to Western Australia—full stop; no ifs no buts'.⁵⁰ Questions directed at Western Australian government ministers by non-government senators exposed the tensions in the government between the expectations of the home state and the realities of governing for the nation.⁵¹ Open warfare broke out between Western Australia and Tasmania with the Minister for Defence and senator for Western Australian declaring:

For 16 years Tasmania have been nothing more than a passenger. Tasmania have been a mendicant state. On their west coast, they have fabulous mineral reserves. Will they touch them? No! They want their state to be a national park. We do not agree with that, and we do not want to pay for it either.⁵²

Questions on notice allow senators to ask more comprehensive questions and receive more detailed answers, such as the nine-part question on staffing of Bureau of Meteorology offices in north Queensland asked by Senator Macdonald in 2012 and the six-part question on funding for the Marine and Tropical Sciences Research Facility in north Queensland he asked in 2010.⁵³ Data requested by senators that is broken down by state and territory, such as the question from Senator Johnston in 2012 about defence reserves training days and budgets, allows senators to make comparative assessments of federal government expenditures in each jurisdiction.⁵⁴

⁵⁰ Senate debates, 4 September 2014, p. 6515; 'Coalition clash on GST carve up', *Australian Financial Review*, 2 September 2014 (online edition); Peter van Onselen, 'Liberals let down the west', *Sunday Times* (Perth), 20 April 2014, p. 52.

⁵¹ Senate debates, 15 July 2014, p. 4939, 25 March 2015, p. 2345.

⁵² Senate debates, 27 August 2014, p. 5747 (Senator Johnston).

⁵³ Senate debates, 9 February 2012, p. 736, 11 May 2010, p. 2534.

⁵⁴ Senate debates, 30 October 2012, p. 8530.

The standing orders also provide opportunities for senators to pursue questions on notice that have not received replies. In August 2012 Senator McKenzie questioned the Attorney-General on federal government rejections of applications for clean-up and recovery grants from Victorian communities affected by floods in 2011. After 30 days had elapsed the senator sought an explanation and moved a motion that the Senate take note of the Attorney-General's failure to reply to the question. In debating the motion she expanded on what she saw as the federal government's tardiness in delivering its 50 per cent contribution to disaster relief funding.⁵⁵

Party discipline can inhibit both government and opposition senators from raising issues that may be of concern for their states where they are seen as contrary to their party's political interests. Brenton Prosser and Richard Denniss note that marginal (independent and minor party) senators may provide a solution to airing public concerns while maintaining an appearance of party unity:

It is not uncommon for a member of a major party to contact a crossbench marginal member ... For marginal members in the Senate, often the request for help comes from a minister in a state or territory parliament.

Bound by Cabinet solidarity, they cannot speak out on an issue, so they call on the federal marginal member to speak out and represent citizens from the state they represent. Sometimes the issue is in [an] area for which they are portfolio minister, so they offer more than a request or advice. While they rarely divulge information, they can suggest the right questions to ask.⁵⁶

Minor party senators have extensively used question time to question ministers on state representational matters from the particular problems facing dairy farmers in Queensland, unemployment in Tasmania, inequitable road funding by the federal government for South Australia, disparities among the states in the amounts private health funds pay to private hospitals and, on occasion, pursuing matters on behalf of individual constituents.⁵⁷

⁵⁵ Senate debates, 30 October 2012, p. 8412, 19 November 2012, p. 9098.

⁵⁶ Brenton Prosser and Richard Denniss, *Minority Policy: Rethinking Governance When Parliament Matters*, Melbourne University Press, Calton, Vic., 2015, p. 190.

⁵⁷ Senate debates, 28 August 2014, p. 5899 (Senator Lazarus), 8 July 2014, p. 4353 (Senator Lambie), 4 December 2013, p. 832 (Senator Xenophon), 18 June 2014, p. 3262 (Senator Xenophon), 20 March 2013, p. 2195 (Senator Xenophon), 13 May 2015 p. 2999 (Senator Lazarus), 16 September 2009, p. 6724 (Senator Xenophon).

Debate on motions

Senators can debate motions or formal proposals put to the Senate calling for an action or expressing the will of the Senate. Debates on motions allow senators to deliberate on a matter before a decision is made.

In 2011 a Greens senator moved a motion relating to sightings of bilbies at the site of the proposed James Price Point gas hub in the West Kimberley region of Western Australia. It called for an immediate halt to land clearing until the nature and extent of the bilby colony had been investigated. The debate that followed was an everyday example of state interests being contested in the Senate, with senators in turn discussing their views on the relative importance of the project to Western Australia, the nation, local Indigenous communities and the need for protection of an endangered species.⁵⁸

An urgency motion proposed in 2013 on Australia's commitment to the automotive industry canvassed many national issues such as the efficacy of government subsidisation of the industry and philosophical points of difference on investment in industries supporting fossil fuels versus renewables. However, the debate also ranged over the impact of plant closures on jobs and the economy in South Australia and Victoria and, as all good representation should, offered the perspective from the ground:

I appreciate the social impact. I grew up not far from the Holden plant in Adelaide. I went to school in the neighbouring town. My parents still live there. I know that part of Adelaide well. I know that right now, even with Holden operating, it has youth unemployment in excess of 40 per cent and that, if Holden were to close, a terrible situation in that part of Adelaide would only get worse.⁵⁹

In short, national issues are debated within the broader context of the state and local.

Debate on other matters

The Senate standing orders allow matters to be debated without a motion before the chair in procedures known as matters of public importance (SO 75), senators' statements (SO 57) and debates following the question for the adjournment of the Senate (SO 53). Such debates provide an opportunity for senators to speak on topics of their own choosing and inform the Senate and the public on issues of interest. If a

⁵⁸ Senate debates, 18 August 2011, pp. 4810–13.

⁵⁹ Senate debates, 10 December 2013, p. 1305 (Senator Birmingham).

senator has something to say about inaction on Indigenous housing, women's issues on the NSW Central Coast, the banana industry in Queensland or cattle grazing in Victoria, the adjournment debates or senators' statements are frequently the place.

The 60- or 90-minute debate afforded by proposals for matters of public importance are usually politically charged sessions, but on occasion are a chance to express diverse views on matters with a state focus. Examples include state and federal government environmental policies for Victoria (25 November 2014), the development of northern Australia (24 February 2010), the Queensland government response to an oil and chemical spill on the south-east coast (16–17 March 2009) and policy failures of the NSW government (8 September 2009).

Case study: Future Submarine Project, 2014–15

In 2014 the politically sensitive future submarine project came to the attention of the Senate. The need to replace the ageing Collins Class submarines, which were constructed by the Australian Submarine Corporation at Osborne, near Port Adelaide, coincided with concerns, particularly from South Australian senators, about the decline of the manufacturing sector and associated job losses.

Both government and non-government senators from South Australia expressed support for the work to build the new submarines to be undertaken in Adelaide.⁶⁰ After the June 2014 visit of the Japanese prime minister to Australia, there were concerns that an earlier government undertaking to this effect, articulated by the Opposition Defence Spokesman Senator David Johnston before the 2013 election, would be reversed and that the project would go offshore to Japan.

Non-government senators employed a cascade of procedural mechanisms in the Senate to obtain information on the government's intent for the future submarine project and to assess the merits of its policy.

On 25 June 2014 the Senate referred an inquiry into the future sustainability of Australia's shipbuilding industry to the Senate Economics References Committee. The inquiry's second report, on the acquisition of Australia's future submarines, was tabled in the Senate on 17 November. As part of its deliberations, the committee received 26 submissions, held five public hearings and conducted site visits in Melbourne and Adelaide. The committee's recommendations supported a competitive tender and considered the 'military-off-the-shelf' option inadequate. Additional

⁶⁰ Senate debates, 6 March 2014, p. 1091 (Senator Farrell), p. 1096 (Senator Fawcett); 11 February 2015, pp. 435–6 (Senator Edwards).

comments were also made by Senator Xenophon who specifically recommended that the submarines be built in South Australia.

Senators used Senate estimates hearings throughout 2014–15 to extensively question the Defence Minister and officials from the Defence Materiel Organisation on submarine design requirements, progress on the future submarine project, and the competitive evaluation process.⁶¹

In a further bid to obtain information, an order for the production of documents requesting the economic modelling report for the submarine tender process was approved by the Senate on 17 November 2014. The minister's response, tabled in the Senate on 24 November, indicated that the report was at a draft stage and would be provided once it had been finalised and considered by the government, subject to any public interest immunity considerations.

Between June and December 2014 Opposition senators used question time in the Senate to relentlessly interrogate the Defence Minister, Senator Johnston. The questions were largely aimed at political point scoring, and in particular to embarrass the minister over the change in policy from the comments he had made in May 2013, but also to attempt to uncover the government's intentions for procuring the submarines. Information gleaned at the Senate inquiry was put to the minister for response at question time.⁶² Opposition senators frequently used motions to take note of answers given by the Defence Minister to further debate the issues at hand.

On 25 November in reply to a question without notice, the Defence Minister commented that he 'wouldn't trust [the ASC] to build a canoe', a comment that was widely reported in the media.⁶³ The following day the minister made a statement to the Senate regretting any offence taken by workers at ASC at his 'rhetorical flourish'. This was followed by a 90-minute debate in the Senate. The Opposition continued the pressure later that day in question time, culminating in a censure motion against the minister which was again debated extensively and carried with the support of the majority of minor parties and independents.⁶⁴ While the censure motion carried no formal consequences, the Defence Minister was later replaced in a ministerial reshuffle on 23 December.

The procedures of the Senate also provided senators with a range of opportunities for debate in which they could emphasise what they considered to be the likely

⁶¹ Supplementary Budget Estimates, Defence, transcript, 22 October 2014; Additional Budget Estimates, Defence, 25 February 2015; Budget Estimates, Defence, transcript, 1 June 2015.

⁶² Senate debates, 28 October 2014, p. 7886.

⁶³ Senate debates, 25 November 2014, p. 9200.

⁶⁴ Senate debates, 25 November 2014, pp. 9376–9410.

implications for South Australia. South Australian senator Anne McEwen used the adjournment debates to goad the South Australian Liberal senators ‘to stand with the rest of the South Australian senators, with the Labor senators on this side of the chamber’ to support shipbuilding in South Australia.⁶⁵ Two motions for a matter of urgency were agreed to in the Senate: one concerning the government ‘refusing to commit to building twelve future submarines’ was agreed to on 17 June 2014 and debated by eight senators while another on the need for the government ‘to keep its pre-election promise to design and build Australia’s Future Submarine Fleet in Adelaide’ was debated by nine senators and carried on 3 September. On 24 September a proposal for a matter of public importance engaged nine speakers on much the same topic.

The debate on future submarines saw some creative use of Senate procedures. On 1 December 2014 the Senate agreed to an Opposition motion to bring forward debate on the Omnibus Repeal Day (Spring 2014) Bill 2014, a bill intended to clean up the statute books by removing obsolete Acts and provisions. The Senate then amended the *Public Governance, Performance and Accountability Act 2013* requiring the submarine replacement project to be determined by open competitive tender. When the House, which disagreed with the amendments, returned the bill some eight months later, a substitute amendment, also placing requirements on the submarine tender process, was again passed by the Senate.⁶⁶

On 9 February 2015 the Senate passed a motion noting and concurring with a South Australian House of Assembly motion condemning the new Minister for Defence. Government senators were also able to use procedures of the Senate to present alternative views, such as by providing answers to questions on actions the government was taking to support Australia’s shipbuilding industry.⁶⁷ The dissenting report by government senators in the Economics References Committee report, while stating ‘we want to see the Future Submarine contract awarded to Australian shipbuilders’, qualified the statement on the grounds of what they saw as the greater need for quality and value for money.⁶⁸ South Australian interests were not mentioned directly. South Australian government senators trod a delicate path between their state and party affiliations, using adjournment debates and statements by senators in the

⁶⁵ Senate debates, 17 June 2014, p. 3162.

⁶⁶ *Procedural Information Bulletin*, no. 288, 5 December 2014, pp. 1–2; *Journals of the Senate*, 2 December 2014, pp. 1933–5, 19 August 2015, pp. 2984–5.

⁶⁷ For example, Bernardi to Johnston, Senate debates, 26 November 2014, pp. 9366–7.

⁶⁸ Senate Economics References Committee, *Future of Australia’s Naval Shipbuilding Industry: Future Submarines*, November 2014, p. 83.

Senate to signal to their home state that they were not unsympathetic to the involvement of Australian companies in the future submarine replacement project.⁶⁹

However the greatest influence on government policy made by government senators occurred outside the Senate when South Australian senator Sean Edwards tied his vote on the Liberal Party leadership in February 2015 to the submarine project, securing the agreement of the Prime Minister that Australian shipbuilders be able to compete for the submarine project on merit.⁷⁰

Equal state representation in the Senate

While the procedures and practices of the Senate can and do support the pursuit of states interests, the rigidity of the party system in Australia gives cause for most Senate observers to stop short of describing it as the states' house:

It is often said that this is a states' house. It is a term that I have not been comfortable with because it is a house for the people assembled by the states. It is still a people's house but it is people assembled by the communities in a geographic sense, as defined by the states.⁷¹

Brian Galligan in his essay 'Parliament's Development of Federalism' posits the question 'What is the point of over-representing smaller States in the Senate if the Senate does not usually represent State interests?' Equal representation in the Senate, he notes, ensures a different composition of national representation in each chamber and both of the houses have to agree, resulting in 'sifting and reviewing' of 'national interest and outcomes':

If the issue is one of national interest, the national view will be weighted in favour of smaller State public and party opinion. That view might well be the same as in larger States, but ... [i]f there are aspects of the national policy that affect smaller States, then those interests can be more readily factored in.⁷²

Galligan maintains that to expect the Senate to have a particular federal role and for legislative outcomes that favour the state interests is to misunderstand federalism.

⁶⁹ Senate debates, 1 October 2014, pp. 7458–61 (Senator Fawcett), 26 Nov 2014, pp. 9457–9 (Senator Fawcett).

⁷⁰ Senate debates, 11 February 2015, pp. 435–7 (Senator Edwards); *Sunday Mail* (Adelaide), 8 February 2015, p. 12; Marian Wilkinson and Karen Michelmore, 'House of cards', *Four Corners*, 16 March 2015.

⁷¹ Senate debates, 27 June 2012, p. 4660 (Senator Ryan).

⁷² Galligan, *op. cit.*, p. 15.

Instead both houses have roles that are part federal and part national. He argues that the federal character of the Senate is ‘not to represent State interests per se, but to over-represent smaller State populations in national decision-making’.⁷³ Harry Evans states that the Senate ensures the geographical distribution of the legislative majority, making it impossible to pass laws with the approval of the representatives of only a minority of states. He notes that this is also reflected in the Constitution where alterations require approval by a majority of voters in a majority of states as well as an overall national majority.⁷⁴

In many senators’ minds, it is the equal representation of the states in the party rooms rather than the parliament which has the greatest influence on policy⁷⁵:

if an issue comes up about transport, I can bet my bottom dollar that the Tasmanians will be on their feet. If an issue comes up about gold tax, I know that the Western Australians and some of the Victorians will be on their feet. I know that if it is an issue about some other area that relates particularly to a state, those senators will support the House of Representatives members from those states and argue vehemently in the party room.⁷⁶

Senator Kay Patterson related an incident illustrating the importance of geographical representation when in the early 1990s the Labor government decided to merge all small rural nursing homes that were less than 250 kilometres apart. The issue particularly affected Victoria but at that time there were no Labor representatives of House of Representatives seats in rural Victoria. On Senator Patterson’s telling:

When I heard about this decision I went into orbit. I could not believe it ... I talked to my colleagues from the other states about it. Guess what? They were not concerned. Why were they not concerned? The answer is that there are hardly any small rural nursing homes in the other states ... Rural Victoria was not represented in the government of the day. The only way it could be represented in the Labor caucus room was by Labor senators. I think that that speaks for itself.⁷⁷

In 1994 Senator Abetz argued that no party has benefited ‘in a disproportionate way because of the equality of the states within the Senate’. Instead, the equality ensures

⁷³ *ibid.*

⁷⁴ Harry Evans, ‘The role of the Senate’, *Papers on Parliament*, no. 52, December 2009, pp. 93–4.

⁷⁵ Senate debates, 29 September 1954, pp. 593–4 (Senator McLeay).

⁷⁶ Senate debates, 17 March 1994, p. 1883 (Senator Patterson).

⁷⁷ *ibid.*, p. 1884.

‘that all parties have a real input from all the states so that issues that uniquely affect a state such as Tasmania are able to be put forward in the Liberal, Labor and [minor] party rooms’.⁷⁸ Or, put another way, ‘no political party can afford to neglect any state’.⁷⁹

Conclusion

The equal representation of the states in the Senate provides a structural safeguard whereby the larger states cannot numerically dominate the smaller states. While the Senate is not and may never have been a states’ house, the party control of voting in the Senate has not extinguished the pursuit of state interests. For individual senators there is an inherent tension in their state, national and party affiliations. However, in a myriad of great and small ways senators do attend to state interests as the need arises, performing their roles recognised since federation to ‘maintain and protect their constitutional rights against attempted invasions, and to give them every facility for the advocacy of their peculiar and special interests, as well as for the ventilation and consideration of their grievances’.⁸⁰ The procedures and practices of the Senate, as they have evolved for over a hundred years, continue to support senators in this endeavour.

⁷⁸ *ibid*, p. 1881 (Senator Abetz).

⁷⁹ Evans, ‘Role of the Senate’, p. 95.

⁸⁰ Quick and Garran, *op. cit.*, p. 414.

