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The Role of Government and Parliament in the Decision to Go to War*

Brendan Nelson

Private Jake Kovco—age 33
Captain Mark Bingley—age 35
SAS Trooper Josh Porter—age 28
Trooper David ‘Poppy’ Pearce—age 41
SAS Sergeant Matthew Locke—age 33
Private Luke Worsley—age 26
SAS Signaller Sean McCarthy—age 25
Lance Corporal Jason Marks—age 27

These eight men died as a direct result of decisions I made, supported or administered during my tenure as Australia’s Minister for Defence.

For me, those at a ministerial level with whom I served, those ministers who came before me and for those that have followed, the issues we are about to explore are anything but academic hypotheticals.

They are real. They are very real.

Those decisions, carried most heavily by prime ministers, are also ones from which enemy combatants will be killed. They, like Australia’s own defence personnel, have families who love them and give meaning to their lives, whatever the misguided, distorted and perverse nature of their cause.

When Her Majesty, Queen Elizabeth II visited Australia in October 2011, I was watching the news broadcast of her visit to Canberra in my Brussels office on BBC World News.

The British journalist concluded his ‘package’ on the front steps of Parliament House. Looking down ANZAC Parade he said, ‘There is something the Australians have right. Looking from the seat of government here, in the direct line of sight is the Australian War Memorial. It reminds Australia’s politicians that some of their decisions come at a very high price’.

* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra, on 12 September 2014.

The Australian War Memorial was the vision of Charles Bean, Australia's official First World War historian. Bean landed with the Australian Imperial Force (AIF) at Gallipoli on 25 April and stayed with them—at the front, right through until the war's end.

In Pozières, France, in 1916 Australia sustained 23,000 casualties in six weeks. It was here, in late July, that Bean recorded the following in his diary:

Many a man lying out there at Pozieres and in the low scrub of Gallipoli, with his poor tired senses barely working through the fever of his brain, has thought in his last moments...well...well, it's over. But in Australia—they will be proud of this.

A mortally wounded Australian later asked of Bean, 'Will they remember me in Australia?'

And so it was, in discussion with others, Bean resolved that at the war's end, he would build the finest memorial and museum to the men of the AIF and nurses. He returned to Australia to convince the government to pass an Act to give effect to his idea. The men fighting and dying in France, Belgium and Sinai–Palestine would know that at war's end, they would be remembered.

The political capital of our nation resides within this, our national parliament. But the War Memorial is custodian of its soul.

The visiting Chief of the Turkish Air force last year pointed to one of the names in bronze where Australian have fought and died over one hundred years. He asked, 'Why were Australians there?'

I replied, 'General—that is a very important question. In answering it, your journey of discovery will lead you to an understanding of who we are and what makes us tick as Australians'.

Our destiny as a people is determined not by the economic indices with which we are so understandably obsessed, but our values and our beliefs, the way we relate to one another and see our place in the world. We are defined most by our heroes and villains, triumphs and failures, the way in which as a people we have faced the adversities before us.

Federation in 1901 was the culmination of more than a generation of debate amongst our forebears in the colonies as to whether we wanted to be governed as one.

But beyond the nation's rich Indigenous history, pioneering efforts of those who came on the First Fleet and immigrants who joined them in the nineteenth century, we were yet to have our 'story'.

The cataclysm that unfolded from late 1914 changed us.

Formation of the Australian Imperial Forces, overseas deployment of Australians in an Australian uniform with an Australian flag and all that would follow militarily in parallel with the deep divisions that emerged domestically, gave birth to our greater sense of who we are.

Every nation has its own story. This is ours.

Much of it is embedded in the service and sacrifice of 2 million men and women who have worn—and who now wear—the uniform of the Royal Australian Navy, Army and Royal Australian Air Force. So too, the decisions our governments have made to deploy those uniformed Australians are integral to that story.

A history of Australian Government decisions for war

Perhaps the two most significant powers vested in government are to deny freedom of its citizens and to deploy its defence forces for war.

Since federation, neither the Australian Constitution nor defence legislation has required the government to gain parliamentary approval to deploy forces overseas. Nor in the rare cases that it has occurred, has the government *had* to consult parliament in its decision to declare war.

It would be reasonable to expect this to be explicitly stated in Australia's Constitution. Section 51 of the Australian Constitution empowers the Australian Parliament to pass laws in relation to 'naval and military defence'. Section 68 entrusts the Governor-General, as representative of the monarch, with commander-in-chief of Australian forces, although in practice this is purely titular.

There is no explicit statement in the Constitution setting out specifically who should commit Australia to war.

Paradoxically perhaps, the answer does lie in the Constitution.

Finding it requires the context of understanding that our Constitution is a document framed in the nineteenth century according to British conventions and practices.

For centuries in Britain, the power to declare war was one of the royal prerogatives, entirely a matter for the Crown. Under the Australian Constitution, former royal prerogatives—including the power to make war, deploy troops and declare peace—are part of the executive power of the Commonwealth.

Executive power is recognised in section 61 of the Constitution. It vests executive power in the Queen and permits its exercise by the Governor-General on the Queen's behalf.

The Governor-General acts on advice of ministers in accordance with the principle of responsible government. That principle is at the very heart of British and Australian constitutional arrangements. It is one which requires the 'Crown' to act on the advice of ministers who are in turn members of, and responsible to, the parliament.

Contemporary practice is that decisions to go to war are ultimately matters for the prime minister and cabinet, involving directly neither the Governor-General nor Federal Executive Council.

Although the government is not legally required to consult parliament when declaring war or deploying forces overseas, on most occasions the prime minister or defence minister has informed parliament of cabinet's decision through a ministerial statement or tabled papers. This invariably is followed by debate and vote on a motion.

The newly elected Howard Government established the National Security Committee (NSC) of cabinet in 1996. This body has since assumed pre-eminence in the decision-making process.

It is the NSC that considers, debates and resolves to commit Australian defence personnel to domestic or overseas deployments. The full cabinet then considers the advice and recommendation of the NSC. Once a position is adopted, the Opposition leader, members of the full government executive and its back bench are briefed.

Since 1985 the Australian Democrats, firstly, and more recently the Australian Greens, have attempted to remove the exclusive power of the government to commit Australia to war.

Attempts have been made to repeal section 50C of the *Defence Act 1903*, which allows the deployment of Australian troops overseas, replacing it with a requirement for both houses of parliament to approve a declaration of war and commitment of troops.

While the power to make war, deploy troops and declare peace are essential elements of the executive power of the Commonwealth, it is open to any government to put such matters to the parliament for debate. The Hawke Government did just this in January 1991.

Both Canada and New Zealand have similar constitutional arrangements in place to Australia.

The Clark Labour Government offered to supply New Zealand SAS troops to the United States within days of the attacks on 11 September 2001.

The decision was not referred to parliament until 3 October 2001. Prime Minister Clark emphasised that although the government did not need the approval of parliament, she brought the matter to a vote because she ‘wanted the troops to know ... they had the full support of MPs’.

Although the legal position in the United Kingdom remains unchanged from that of royal prerogative exercisable by ministers, it is standard practice for governments to keep parliament well informed of decisions to use force and the progress of campaigns.

Since 2003, and Britain joining the coalition that would forcibly topple Saddam Hussein, there have been calls for the royal prerogative, including the monarch’s war powers, to be codified and subject to parliamentary scrutiny.

A precedent for military action being subject to parliamentary approval was set in 2013. The Cameron Government sought in-principle support from the House of Commons for United Kingdom military action against the Syrian government of Bashar al-Assad. The government motion was defeated.

Prime Minister Cameron, speaking in the House, subsequently ruled out any involvement by the United Kingdom in military action against Syria. When Opposition leader Edward Miliband asked by point of order for the prime minister to rule out use of the royal prerogative for the UK to enjoin any military action before another vote in the House of Commons, the prime minister responded:

I can give that assurance. Let me say that the House has not voted for either motion tonight. I strongly believe in the need for a tough response to the use of chemical weapons, but I also believe in respecting the will of this House of Commons. It is very clear tonight that, while the House has not passed a motion, the British Parliament, reflecting the views of the

British people, does not want to see British military action. I get that, and the Government will act accordingly.¹

The Constitution of the United States grants to Congress the power to declare war, to raise and support armies, and to provide and maintain a navy (Article 1, section 8, clause 11). The president is made the Commander in Chief of the armed forces (Article 2, section 2, clause 1).

The *War Powers Resolution 1973* (also known as the War Powers Act) provides for the president to consult, report and terminate deployment of armed forces with the approval of Congress.

Presidents have not always followed this Act. Courts have failed to uphold its legality, the US Supreme Court especially has been reluctant to take on cases which deal with it, regarding it as a political rather than judicial issue.

In 2003 the district court's Judge Tauro rejected the contention that the president *must* have congressional authority to order American forces into combat. He concluded, 'Case law makes clear that the Congress does not have the exclusive right to determine whether or not the United States engages in war'. This decision was upheld in an appeal later that year to the First US Circuit Court of Appeals.

The North Atlantic Treaty Organisation (NATO) arising from the Washington Declaration of 1949 has two essential articles which govern its founding principle of mutual defence.

On 12 September 2001, NATO invoked Article 5 for the first and only time in its history in response to the attacks on the United States the day before. Article 5 provides for individual and mutual self-defence and is consistent with Article 51 of the Charter of the United Nations.

First World War

A combination of diplomatic miscalculations, brinkmanship and bluff by statesmen and military leaders gradually escalated a minor conflict in the Balkans into a large scale European war. Any opportunity for mediation was lost when on 28 July 1914, Austria–Hungary declared war on Serbia. Russia mobilised against Germany and Austria–Hungary the following day. Germany mobilised its armies on 31 July. On 3 August Germany commenced its invasion of Belgium so that it could attack Russia's ally, France.

¹ House of Commons debates, 29 August 2013, column 1555.

At 11pm on 4 August 1914 (English time), the British cabinet of Prime Minister Herbert Asquith declared war on Germany as a consequence of its invasion of neutral Belgium and France, and of Germany's failure to respond to the ultimatum by Britain for it to withdraw its forces.

Although Britain was the only major power to debate in parliament its entry into the war, the British Government did not consult Australia or any other dominions and colonies about the decision to declare war. Legally, as part of the British Empire, Australia was at war immediately upon the British Government's declaration of war.

Modern day assertions that Australia was 'fighting other peoples' wars', reflects a failure to understand the nature of the British Empire at the time and how Australians regarded their own nation. They saw themselves as 'Australian Britons' and cherished their ties to the Empire through almost every thread of society.

In July 1914 Australia was in the midst of a double dissolution election campaign. The Liberal Party led by Prime Minister Joseph Cook was seeking to remove the Labor Party Senate majority frustrating the government's agenda.

Andrew Fisher, leader of the Labor Opposition, announced to an election meeting in Colac, Victoria on 31 July, that Australia should stand beside Britain and 'defend her to our last man and our last shilling'.² Prime Minister Cook told a campaign gathering in Horsham that, 'all our resources in Australia are in the Empire and for the Empire, and for the preservation and security of the Empire'.³

The Governor-General, Sir Ronald Munro Ferguson, had adopted an interventionist posture in relation to his role. That same day he sent a telegram to Cook asking, 'Would it not be well, in view of the latest news from Europe, that ministers should meet in order that the Imperial government may know what support to expect from Australia?'⁴

Four days later on 3 August, Cook convened his cabinet in Melbourne. He subsequently advised the British Government that if Britain went to war Australia would place the Royal Australian Navy vessels under British Admiralty control and send a land force of 20,000 men 'of any suggested composition to any destination desired by the Home Government'.

² *Argus* (Melbourne), 1 August 1914.

³ *ibid.*

⁴ *Canberra Times*, 5 August 2014.

The parliament did not sit until 8 October. There was no ministerial statement to parliament. The Governor-General in his opening address said:

You have been called together at the earliest moment after the return of the writs to deal with matters of great national importance, many of them arising out of the calamitous war in which the Empire has been compelled to engage ... It has been necessary to anticipate Parliamentary approval of expenditure urgently required for war purposes. A Bill covering all such unauthorized expenditure will be submitted for your consideration at the earliest possible moment.⁵

The motion was moved 'That the Address be agreed to by the House'. It was resolved in the affirmative without division.

Second World War

In September 1939, the Australian Government did not consider it had a choice over whether or not to go to war against Germany. Prime Minister Robert Menzies simply declared that since Britain was at war, so too was Australia. And so from 3 September a state of war existed between the Commonwealth of Australia and Germany. The only formal act was a notice in the *Gazette* requesting that the British Government inform the German Government that Australia would be associated with Britain in the war.

Parliament met on 6 September 1939. Prime Minister Menzies tabled a White Paper and delivered a ministerial statement on the war in Europe. The paper contained the text of documents exchanged between Britain and Germany. The motion 'That the paper be printed' was debated in both houses.

In his statement, Menzies said 'However long this conflict may last, I do not seek a muzzled Opposition. Our institutions of parliament, and of liberal thought, free speech, and free criticism, must go on'.⁶

In his response, Opposition leader John Curtin expressed disappointment that Menzies had not outlined 'the intentions of the Government in respect of the defence of this Commonwealth, and of the general principles upon which it proposed to be influenced in framing its programme'.⁷

⁵ Senate debates, 8 October 1914, p. 7.

⁶ House of Representatives debates, 6 September 1939, p. 36.

⁷ *ibid.*

Curtin added a statement endorsed by his Labor caucus demanding that to provide maximum protection of the democratic rights of Australians, 'it is essential that the Parliament of the Commonwealth should remain in session'.⁸

Debate in the House was adjourned. The motion was passed in the Senate on the voices without division.

In December 1941 Prime Minister John Curtin's Labor government pursued a constitutional innovation whereby Australia made a declaration of war independent of Britain. With the declaration of war on Bulgaria in January 1942, the Australian Government implied that a British dominion could remain neutral even if a state of war existed between Britain and another nation.

Korean War

United Nations Security Council resolutions were approved on 25 and 27 June 1950. They had recommended that 'Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area'.⁹

Having already placed 'an Australian naval force ... at the disposal of the United States authorities on behalf of the Security Council' and similarly 'the Royal Australian Air Force fighter squadron stationed in Japan', Prime Minister Robert Menzies delivered a statement to parliament on 6 July 1950.¹⁰ Ben Chifley, Leader of the Opposition, supported the motion, there being no division in either house.

Vietnam

The commitment of Australian forces to the conflict in Vietnam was a gradual process of escalation in the context of Cold War concern over regional security and 'communist expansion'.

As Cold War tensions escalated during the 1960s, the Vietnam conflict assumed disproportionate strategic influence. Vietnam became the focal point for a supreme struggle between the communist bloc, the United States and allied nations.

Australia's gradual military involvement in South Vietnam was based less on ideology than on two pragmatic principles.

⁸ *ibid.*, p. 37.

⁹ UN Security Council, *Resolution 83 (1950) of 27 June 1950*, S/RES/83(1950).

¹⁰ House of Representatives debates, 6 July 1950, p. 4837.

First, the government sent forces to support the emergent independent state in South Vietnam to frustrate communist expansion through aggression and subversion in South-East Asia. The ‘domino theory’ was evoked.

Second, by supporting the United States in Vietnam, Australia was held to be ‘paying the premium’ on an insurance policy. The Australian Government sought both to maintain a strong American presence in South-East Asia and to ensure American support of Australia’s own security.

On 24 May 1962, the Minister for Defence, Athol Townley, issued a press release announcing that Australia was sending a group of military instructors to South Vietnam in response to a request from its government.

There was no statement to parliament.

Three years later, on 29 April 1965, Prime Minister Robert Menzies noted that in a ministerial statement on foreign affairs on 23 March 1965, the Minister for External Affairs had ‘devoted a large part of his statement to Vietnam’.¹¹ Menzies advised the House that a request had been received from the government of South Vietnam for further military assistance. In response, the government had decided ‘in principle some time ago’ that it would be willing to do so if such a request had come.¹² A positive response was regarded as necessary for collaboration with the United States.

In response, Leader of the Opposition Arthur Calwell said, ‘we oppose the Government’s decision to send 800 men to fight in Vietnam. We oppose it firmly and completely’.¹³ The House divided along party lines.

The ensuing five years would see early overwhelming public support for the war and Australia’s involvement in it transform into that of a deeply divided nation. Opposition to the war and conscription of young Australians sadly extended to political attacks on Australia’s military personnel. The latter is not a mistake the nation will make again.

Gulf War

When the president of Ba’athist Iraq, Saddam Hussein, sanctioned an invasion of Kuwait on 2 August 1990, global condemnation ensued. The United Nations Security Council moved quickly to approve a trade embargo against Iraq. A large, US-led

¹¹ House of Representatives debates, 29 April 1965, p. 1060.

¹² *ibid.*

¹³ House of Representatives debates, 4 May 1965, p. 1102.

multinational taskforce was assembled to block Iraq's access to the Persian Gulf and the Gulf of Oman to enforce the embargo.

The UN Security Council set a deadline for Iraqi forces to withdraw from Kuwait by 15 January 1991. When this was not met, the 40,000 troops from 30 countries assembled in Saudi Arabia launched air attacks on Iraqi targets.

Prime Minister Bob Hawke announced on 10 August 1990 cabinet's decision that day to commit Australia. Australia would deploy naval ships in support of the blockade and later a small number of intelligence and medical personnel.

Prime Minister Hawke was keen to inform parliament and for it to 'sign on' to the government's decision.

On 21 August 1990, in a ministerial statement to the House, he said:

I want to take this first opportunity available to me to inform the House of the view the Government has taken of the situation which has arisen in the Middle East over the past three weeks and of the measures we have adopted to meet that situation.¹⁴

The statement was supported by the John Hewson led Opposition.

The motion was agreed without division.

On 4 December, Prime Minister Bob Hawke delivered a ministerial statement on the Gulf crisis. In it he expressed strong support for the United Nations Security Council Resolution 678, drawing attention to its request for all nations to provide appropriate support for actions taken under it.

Parliament was recalled on 21–22 January 1991 to specifically debate the Gulf War. Whilst refusing to allow questions of him or of ministers in the House, Prime Minister Hawke said this:

The decision to commit Australian armed forces to combat is of course one that constitutionally is the prerogative of the Executive. It is fitting, however, that I place on parliamentary record the train of events behind this decision.¹⁵

¹⁴ House of Representatives debates, 21 August 1990, p. 1118.

¹⁵ House of Representatives debates, 21 January 1991, p. 3.

The motion moved by the prime minister was strongly supported by the Opposition. It sought support for the United Nations and Resolution 678. But it also expressed ‘its full confidence in, and support for, Australian forces serving with the UN-sanctioned multi-national forces in the Gulf’.¹⁶

At least one lesson had been learned from Vietnam.

Afghanistan

On 11 September 2001, four civilian airliners were hijacked and used as weapons against targets in New York and Washington DC—principally the World Trade Centre and the Pentagon. Almost 3,000 innocent civilians, including 10 Australians, were murdered that day.

These heinous events had been planned and executed by Al-Qa’ida, led by Osama bin Laden working from Afghanistan. It was the culmination of similar, smaller scale, terrorist attacks against mainly US interests over a decade.

Prime Minister John Howard was in Washington when the attacks occurred. He was witness to the terror, fear, chaos, immediate consequences and response. He announced his intention at a press conference in the afternoon of 12 September to support a US military response, even though no request had yet been made.

He later acknowledged that this commitment was made without consultation, but in the belief that he would have the support of cabinet, the Opposition leader, and the Australian people.¹⁷

The National Security Committee first met on 12 September in Canberra, chaired by John Anderson as Acting Prime Minister. John Howard spoke to Alexander Downer on 13 September by phone from Air Force Two en route to Hawaii to discuss Australia’s response. In outlining US thinking, Howard stated that retaliation was ‘virtually inevitable’.¹⁸

NATO invoked its Article 5 mutual defence clause that day in support of the US.

¹⁶ *ibid.*, p. 2.

¹⁷ Karen Middleton, *An unwinnable war: Australia in Afghanistan*, Melbourne University Press, Carlton, 2011, pp. 29–30.

¹⁸ *ibid.*, p. 31.

Invoking ANZUS as justification was raised by Downer with Howard during this phone call pursuant to an earlier discussion with Australia's ambassador to the US, Michael Thawley.¹⁹

Cabinet endorsed invoking ANZUS on 14 September with Howard back in Australia. Opposition leader Kim Beazley supported it. United Nations Security Council Resolution 1373, passed on 28 September, denounced the 9/11 attacks and affirmed the collective right of self-defence along with the use of 'all means' to combat threats by terrorists.²⁰

Prime Minister Howard announced cabinet's decision for a military commitment and deployment on 4 October.

The first parliamentary sitting day after the 9/11 attacks was 17 September. Routine business was suspended in both houses. The same motion was introduced into both houses. Beyond condolences, it also proposed that 9/11 constituted an attack against the United States within the meaning of Articles IV and V of the ANZUS Treaty. As such, Australia was committed to support US-led action against those responsible.

Although there was no dissent, some called for a 'tolerant, measured, discriminate and just response'. Some Democrats and Greens senators supported a change to the motion away from what they regarded as an open-ended military commitment to the US.

On 25 September 2001, the *Age* newspaper reported a poll in which 77 per cent of Australian supported the US-led war against terrorism.

Iraq 2003–09

The United States was in no mood for appeasement after the September 11 attacks. Indeed, protection of the United States homeland, its people, interests and values was foremost in the thinking of its political class and leadership.

In its simplest form, 'who and what represented the next possible, significant threat?'

The regime of Saddam Hussein had used chemical and biological weapons against Iranian and Kurdish civilians both during and after the Iran–Iraq war (1980–88). It had also pursued an extensive biological and nuclear weapons program throughout the 1980s. In 1988, faced with diminishing Iraqi cooperation, the United States had called

¹⁹ *ibid.*, p. 32.

²⁰ UN Security Council, *Resolution 1373 (2001) of 28 September 2001*, S/RES/1373 (2001).

for the withdrawal of all UN weapons inspectors. This was despite its belief that Iraq still possessed large hidden stockpiles of ‘weapons of mass destruction’ (WMD) and that Hussein was trying to procure more.

By 2003 in the post-9/11 world, the US was also of the belief that Hussein was harbouring and supporting Al-Qa’ida.

Passed in November 2002, UN Resolution 1441 outlined breaches by Saddam Hussein of a succession of UN resolutions—among them its refusal to grant unrestricted access to UN weapons inspectors. The resolution offered Iraq its last chance to comply with its disarmament obligations. It failed to do so.

On 8 March 2003 John Howard moved a motion condemning Iraq’s refusal to abide by UN Security Council resolutions and endorsing the government’s decision to commit Australian Defence Force elements to the international coalition of military forces.

Opposition leader Simon Crean said that ‘Labor opposes your commitment to war. We will argue against it and we will call for the troops to be returned’.²¹

On 13 March 2003, Prime Minister John Howard addressed the National Press Club and said in part:

if the world fails to deal once and for all with the problem of Iraq and its possession of weapons of mass destruction, it will have given a green light to the further proliferation of these weapons and ... undo 30 years of hard international work ... designed to enforce ... conventions on chemical weapons [and] the Nuclear Non-Proliferation Treaty.²²

Australia committed a small yet highly effective military force of all three service arms to the coalition invasion of Iraq.

Within three weeks of the invasion, coalition forces seized Baghdad and overthrew Hussein’s corrupt and brutal dictatorship. WMD were not found.

The real struggle was about to begin and for Australia, six years’ contribution to security, counter-insurgency and nation building.

²¹ House of Representatives debates, 18 March 2003, p. 12512.

²² *Sydney Morning Herald*, 13 March 2003.

Personal reflections and observations

I have reached the conclusion that peace is not a natural state of affairs.

It is something towards which we must constantly work, making sacrifices and compromises in the pursuit of a peaceful regional and world order.

A visitor to the Australian War Memorial asked me last year why we do not tell Australians what the nation does to avoid war. Good question.

A museum for both democracy and Australian diplomacy could serve such a purpose.

The R.G. Casey building houses the Department of Foreign Affairs and Trade (DFAT). Its corridors, theatres and meeting rooms are adorned with photographs of Australian prime ministers, foreign ministers and diplomats at key moments in our nation's history, prosecuting Australia's interests. These are often the stories of a nation working to avoid war and shaping peace. They need to be told.

Giving Australians an insight into and understanding of what the nation's leaders and diplomats have done to maintain peace and prevent conflict is no less worthy than that of telling our experience of war.

I am also reminded each day at the Australian War Memorial that in the end there are some truths by which we live that are worth fighting to defend.

Proponents of the parliament making the decision for the nation going to war assume and frequently assert that a parliamentary decision is more likely to reflect public opinion. It is assumed that the executive is removed from public opinion and as such, the momentous decision to go to war should be one made 'closer to the people' who elect their representatives. It also assumes that the popular view is correct and should prevail—informed or not.

One of the most difficult and important tasks before a member of parliament is to know the difference between what is popular and what is right. Some parliamentarians regard themselves not as representatives in the mould of Edmund Burke, but as delegates.

I well recall in debate of the bill to overturn the Northern Territory's euthanasia legislation, the then Member for Cowan told the House that he found the issue very hard, so he had surveyed his electorate. As the majority supported euthanasia, he would vote in accordance with their opinion.

The parliament, with some notable exceptions, is a reflection of the society from which its members come. Men and women come from all walks of life, bringing with them the experiences that have layered their lives, differing intellect, prejudices, interests and capacity to understand.

Some wars enjoy broad popular support—at least at first. Others do not.

These decisions are never taken lightly by those who make them. But they are informed with the best intelligence, military, strategic and diplomatic advice that can be offered.

Would the House of Representatives make the decision where the government has a majority? Would the Senate also vote, and what then of it having a different view from the House?

By definition a divided parliament means the Opposition opposing involvement in a particular war.

If the key instruments of authority were vested in the parliament and one deeply divided, the impact on deploying defence personnel, enemy propaganda and sustaining morale for the operation would be dramatic.

The truth of it is that when these decisions are made, very careful consideration is given to every aspect of the proposed operation by those in the executive of government. The prime minister, defence and foreign ministers are integral, carefully weighing up the many issues.

Where lies Australia's national interest? What are the likely consequences of involvement in this conflict? What are the geopolitical and geostrategic risks? What is the attitude to this proposed deployment of the international community and of Australia's key allies? What will be the human and economic costs? What is our objective and how likely is that to be achieved and at what cost? What are the precedents and experiences of history upon which we can draw? What will be the disposition of members of the outer ministry and back bench? Will the Opposition leader support this? Where will the Australian public line up on this and how much information can we safely make available to them?

The prime minister and key ministers know, along with their back bench, that they will have to explain and defend their decisions extensively once made. They know that parliamentary question time is likely to be dominated with probing into what will

become increasingly difficult questions. They know that the media will relentlessly scrutinise, probe and question.

And of course, they also know that at some point there will be parents, widows, widowers and children whose questions will be hardest to answer. If you are not clear in your own mind why lives were lost in a particular cause, it will never be clear in theirs.

In the end, from my own experience, after all the advice from the Australian Security Intelligence Organisation, DFAT, Defence Intelligence Organisation, Office of National Assessments, Australian Secret Intelligence Service, Defence Chiefs and other agencies, it comes down to this—‘what is the right thing to do?’

Afghanistan was the right thing to do.

Three thousand civilians had been murdered on 11 September 2001 in an attack on the US mainland. Australia activated the provisions of the ANZUS Alliance to do what would be needed. A little over a year later 88 Australians were among those murdered in Bali by three men who had trained with Al-Qa’ida under the protection of the Taliban.

Beyond that though, it is clear that our generation is facing a resurgent totalitarianism in the form of Islamic extremism, having hijacked the good name of Islam to build a violent political utopia.

But the other reason is that it is the ‘right thing to do’. It would be delusional and irresponsible to think we should leave this to a handful of other countries. To do so would violate all this nation has stood for in its short history.

In hindsight though, we were disadvantaged going into a NATO-led war without having a relationship with NATO. But NATO suffered also because it did not know how to effectively engage a non-NATO member turning up to fight with political will, military capability and financial commitment.

As Australia’s first ambassador to NATO, my job was to ‘get us to the table’, to ensure that not only were we shaping decisions, but also making them. The low point had been NATO’s refusal to allow Kevin Rudd as prime minister to join the Afghanistan discussion at the NATO leaders’ summit at Bucharest in 2008.

At one NATO meeting prior to the Chicago 2012 leaders’ summit, I said to representatives of the 50 countries around the table and to NATO’s military

leadership that we were ‘bloody angry’. I said very forcefully, ‘Australia is the ninth largest overall military contributor. We have the third largest Special Forces contingent. We are one of the largest funders of the Afghan National Security Forces and of development assistance. We are fighting in the south and have sustained significant casualties. And yet you still don’t get it—you are making decisions without involving us.’

When asked later that day by the NATO Secretary General’s office of my instructions from Canberra, I was able to say that I had been advised to ‘Keep sticking it into the bastards’!

With the negotiation and signing of NATO’s first High Level Political Declaration with a non-NATO member by its Secretary General and Australia’s prime minister in 2012, this will never happen again. Australia now enjoys enhanced partner status with NATO. The benefits are already being seen in the context of events in Ukraine.

Although I was not a member of the National Security Committee in 2003, I was a cabinet minister when faced with the decision to join the ‘coalition of the willing’ in Iraq. I supported it.

I knew it was a momentous decision and I was also aware of my limited understanding of the complexities of the seventh century caliphate and how removing Saddam Hussein might play out both in Iraq and the region.

But for me, here was a man who had been responsible on average for over 70,000 deaths a year for 15 years—many by brutal torture including through two wars. This was after an attack on the US that had killed more people than had the Japanese attack on Pearl Harbour in 1941. The US was not prepared to wait for a second tragedy, possibly sponsored by a rogue nation state.

We knew Saddam Hussein had had WMD and had used them. But because of his refusal to cooperate with the UN weapons inspectors, we did not know if he still had them.

Australia had both a Republican US president and a British Labour prime minister committed to removing Hussein, effectively asking of us—‘which side are you on?’

Based on what we knew at that time, it was the right thing to do. Saddam Hussein in hindsight was not an immediate threat, but he was an inevitable one.

The events that followed were as much responsible for the ensuing decade in Iraq as the removal itself—dismantling the Iraqi army, de-Ba’athification of the public service and the use of US contractors to provide services were among early errors.

I have found over the years and in the many roles in which I have served, that in the end you have to make your own decisions. In doing so, you seek and listen to the advice of experts in the particular field in which you are working.

But I have also learned something about experts, from my leadership of the medical profession until now. They tend to see the world through a straw.

In the end, you have to apply intellectual rigor to the process of exercising judgement in the very best interests of those whom you lead and represent.

During election campaigns we often hear our political leaders seeking the office of prime minister, ask the question, ‘who do you trust?’ It will be specifically directed at a particular field of policy—interest rates, security, health or education.

But it is the most important question for every Australian to ask of him or herself before voting.

Although candidates and parties have policies, election commitments and manifestos, in the end we are choosing a person—a prime minister, to exercise judgement on our behalf and that of our nation over three years.

It is not for the known we choose a prime minister—but the unknown.

The decision to go to war is the most important any nation will make. It cannot be one that could be held hostage to populism in any form.

Looking back over our history, in my view all our governments have made the right decision. It was right at the time based on all the information available to them, having regard for Australia’s geopolitical circumstances and best interests.

It is equally clear that when regarded as being in the national interests, our governments have gone to considerable lengths to involve the parliament.

In hindsight, it is easy to contest a number of those decisions. Hindsight is a wonderful thing of course—my kids have it.

But I am also confident that if the parliament had been fully responsible for making these decisions over more than a century, we would be a different nation today with a different view of itself and its place in the world.

In the end, someone has to be held responsible for decisions. That should be the government and its prime minister of the day.

Whatever the view any one of us adopts for the decisions made to go to war, to Bean's 'man lying out there at Pozières and the low scrub of Gallipoli' who in his last moments has thought, 'well...well, it's over. But in Australia—they will be proud of this', I say—we all say—'Yes we are'.



Question — I was just wondering what you think are the best indicators for being able to trust a future prime minister? I remember someone once told me that they look at the relationship between a future prime minister and their wife, and I thought that was quite interesting. That is the most important relationship in their life and that should be some determining factor. I would be interested to see if you had any thoughts on what you think are the best indicators for trusting a future PM.

Brendan Nelson — Well, it's like everything in life—we all make judgements, and I think there are subtle but powerful factors that influence our judgements about others. In relation to a wife I presume you are referring to what could be a husband or a partner in the case of former Prime Minister Gillard.

But I think one of the things that we have seen over our history is that our prime ministers are generally people who have spent fifteen to twenty years in public life. We have had an opportunity to get a picture of them. It is very hard to make judgements about people you have never met; in fact, one of the pieces of advice I give to young people is never pass an opinion on someone you have not met. But it is very hard to make judgements of people that we see in glimpses on the media whether television, radio or print and so on. But I think over a long period of time we see them reacting to circumstances, some of which they anticipate and some of which they do not. We also see how they interact with other people—not just heads of state or VIPs, but how they interact with the everyday person, the respect and reverence that they show for other people.

We need people who are clearly intelligent, and as Australians we want our prime ministers to be intelligent people, but we don't want them to make us feel stupid in the

process. We also like people who have a sense of humour, who take their job seriously but not themselves. We like to see them making others feel respect for themselves. We like to see them having the capacity to articulate a vision of who we are and where we want to go and what the outcomes will be for our nation, even if they are things on which we might not necessarily agree. We need to see people that are prepared to work very hard.

I can tell you two things from my own experience. I stood for preselection for the Liberal Party in the seat of Bradfield on Sydney's upper north shore in May 1995. It was character-building. And at the end of my speech to an audience of some 200, one of the questions I got from one of the Liberal Party members was, 'Dr Nelson, if you are chosen as our candidate for Bradfield and you are elected, will you put the interests of the Liberal Party first or will you put the interests of Australia first?' And I said, 'Well, that's easy. I will put Australia's interests first every time'. And it is a matter of record that I was successful.

The other experience I had, which I regard as a wonderful quality—the first name that I mentioned out of those eight men was Private Jake Kovco, and you would recall that he died in circumstances that were unusual at his base in Baghdad as a part of the security detachment. And then we went through the dreadful business where unfortunately the incorrect body had been sent back to Australia. As Defence Minister, when I looked at the family, who were Australian battlers in the traditional sense of it—they were at Sale—I thought 'I'll take the plane down and pick them all up, and take them into Melbourne' because their son's, their husband's, their father's body was coming into Melbourne just after midnight.

And of course, as you now know, just before I left Canberra I received this phone call to say that the wrong body had been put on the plane. I won't tell you what went through my mind. So I said to the Chief of Army, 'Well, there's only one thing for it, you and I are getting on that plane and we are going down there, and even though I've had nothing to do with this directly, I'm going to have to tell them this'.

It was a very, very difficult conversation, shall I say, with Mrs Kovco, Jake Kovco's now widow. And I called John Howard. He was sound asleep at the Lodge. You can only imagine the stresses on a prime minister. I woke him up and I told him that Mrs Kovco wanted to speak to him and he took the call. I have heard some pretty rough language in my time, but the one side of the conversation I got was very aggressive. When Mrs Kovco had finished, John Howard came back on the phone and he said, 'Brendan, can I speak to you whilst you're away from the family?' And I thought, 'Oh, here we go'. So I stepped out onto the tarmac at the RAAF base at Sale, and he said, 'Brendan, that was the right thing to do'. He said, 'If you need to call me

any time through the night, you do so'. He said, 'This is really hard, but you are doing the right thing, and I appreciate it, and you have my support'.

Now, whatever you think—and everybody will have their own views about John Howard as prime minister—from my point of view, whatever side we might have them from, I want that kind of person in the Lodge when a minister takes the call about those kinds of things.

Question — For how long will we be obliged to pay the premium on our insurance with America?

Brendan Nelson — I am now very privileged. I am the Director of the Australian War Memorial. There is not a day goes by in this country when we should not publicly or privately give thanks for American sacrifice in the Pacific from 1942. Britain let us down twice in the twentieth century. After the fall of Singapore we knew we could not rely on Britain anymore for our security, and we had to look across the Pacific. And when Britain joined the common market in the early seventies, that was another kick in the guts. And the Americans lost over 200,000 people in the Pacific: 103,000 dead, half the bodies never found. In my very strong view, the American presence in the Western Pacific since the end of the Second World War has been a critically important part of the security and stability of the region, and the bedrock for prosperity of the nations in the broader Asia-Pacific.

I know the average Australian could be forgiven for thinking, 'Well, Australia always does what America thinks it ought to do'. I can only say to you, I have been part of very robust conversations with my former counterparts. I have been party to conversations that have involved prime ministers and presidents. And whatever you may see publicly, I can assure you that there are very healthy discussions under the surface.

By the way, whilst it was certainly the case during the Cold War era, I do not regard, as it was regarded in the sixties, what Australia does as paying an insurance premium in terms of its relationship with the United States. If you think about the nations in the world that are deeply committed to political, religious and economic freedoms, the coexistence of faith and reason, a free academic inquiry and a free press. Whatever its faults, which are many, the United States is arguably the champion of that, along with many of those nations in Europe and I would also include our own. So, there is one thing I think we need to be more concerned about than American military adventurism, and that is US isolationism.

Pulling the Trigger: The 1914 Double Dissolution Election and Its Legacy*

Helen Irving

It is not a small thing to exercise a constitutional power for the first time. Yet, in June 1914, when Prime Minister Joseph Cook advised the Governor-General, Sir Ronald Munro Ferguson, to simultaneously dissolve both of the Commonwealth houses of parliament, following the procedure set out in section 57 of the Constitution, he did so with a surprising confidence, even bravado, which seemed to belie the fact of novelty and experiment.

In 1914, the Constitution was still very young, not quite in its infancy, but not yet fully grown, and far from fully tested. Many sections had been tried out for the first time in the decade since the inauguration of the Commonwealth, on New Year's Day, 1901. Constitutional novelty was an unavoidable feature of the era. But section 57 was not just an untried provision. It was unprecedented, indeed unique, in the history of bicameral legislatures. The problem it was intended to resolve—deadlocks between two legislative houses—was not unfamiliar; indeed, it was well-known in Australian colonial history and easy to characterise. But there was nothing familiar about the backdrop to the deadlocks that were anticipated to arise between the House of Representatives and the Senate, and little to guide the specific design of section 57.

There was also nothing straightforward about the evolution of the section. Section 57 was adopted after one of the lengthiest and most tortuous debates in the Federal Convention of 1897–98 at which the bill that became the Constitution of the Commonwealth of Australia was drafted. Numerous complicated formulae were tried out, multiple amendments were proposed, and the vote was repeatedly taken, but just as soon as it appeared that something had been settled, another iteration was suggested and the debate began again.

Indeed, at its peak, the debate on what emerged as section 57 occupies four hundred pages of the official record of the Convention debates. Just one week before the Convention finally wound up, in March 1898, the delegates finally agreed on its wording. Even then, as we shall see, it wasn't finished.

The Australian Commonwealth is built around two great institutional principles: representation of the people of the nation in a system of British parliamentary

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government, and equal representation of the states in a system of American-style federalism. These two principles find their expression respectively in the House of Representatives and the Senate. They work together, in a lopsided, power-sharing arrangement, complementary but constantly in tension: an asymmetrical symmetry, we might say.

What we see in section 57 is a reflection of this arrangement. It captures the multiple interests that were at stake in the project of federating Australia's self-governing colonies into one 'indissoluble federal Commonwealth'. It displays, in particular, the tensions. The section provides for the resolution of otherwise unresolvable disagreements—deadlocks—between the houses of parliament via an election in which all seats of the House of Representatives and all Senate places are simultaneously re-contested. In the normal course of constitutional business, only half the Senate is elected every three years, and a half-Senate election may, but does not have to, occur at the same time as an election for the House of Representatives.

Section 57, in contrast, contemplates the extraordinary:

If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time.

If after such dissolution the House of Representatives again passes the proposed law, with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may convene a joint sitting of the members of the Senate and of the House of Representatives.

The members present at the joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one House and not agreed to by the other, and any such

amendments which are affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives shall be taken to have been carried, and if the proposed law, with the amendments, if any, so carried is affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives, it shall be taken to have been duly passed by both Houses of the Parliament, and shall be presented to the Governor-General for the Queen's assent.

The first paragraph describes the circumstances in which a deadlock arises. It sets out what have come to be known as the 'triggers'. First, the Senate rejects or fails to pass a bill (a 'proposed law') that has been passed in the House, or the Senate passes a bill with amendments that the House will not accept. Then, after an interval of three months, if the Senate again rejects the same bill or fails to pass it or passes it with unacceptable amendments, the Governor-General may dissolve both houses simultaneously, but not less than six months before a regular House of Representatives election is due.

The second paragraph defines what may follow if the deadlock on the same bill continues after a double dissolution election has taken place: namely, the convening of a joint sitting of both houses of parliament.

The third paragraph describes how the joint sitting will proceed, and how the vote on the deadlocked bill is to be counted—that is, the steps required for the previously deadlocked bill to become law.

We note several salient features. The deadlocked bill must originate in the House of Representatives. Section 57 cannot apply to bills that originate in the Senate. The reference to passing a bill with unacceptable amendments cannot apply to money bills, since, under section 53 of the Constitution, the Senate cannot amend 'proposed laws imposing taxation, or ... appropriating revenue or moneys for the ordinary annual services of the Government'.

The House of Representatives does not have to take any action; it does not have to treat the Senate's rejection of, or failure to pass, a bill as a step towards a double dissolution. The House is not obliged to reintroduce the deadlocked bill after a dissolution, and a subsequent joint sitting is not mandated. The Governor-General's role is central. He or she dissolves both houses and convenes a joint sitting, if this takes place.

The stipulations in the section appear precise, but this precision is deceptive. Notwithstanding the length of the provision—it is one of the wordiest sections of a mostly very economical Constitution—numerous essential matters are missing from its text. Although its framers laboured long and hard on its wording, many questions were left unanswered when the provision reached its final form. These included:

- What constituted a ‘failure to pass’?
- How was the interval of three months to be calculated? From when did it start to run?
- Could the rejection of any proposed law, on any subject matter, qualify as a double dissolution trigger—or did the rejected bill have to be on a matter essential to government, or central to the government’s program?
- Did the provision allow for only one bill to be the subject of a double dissolution, or could multiple bills serve that purpose? Could rejected bills be ‘stockpiled’, stored up by a frustrated government for potential resolution at a joint sitting?
- Could a government deliberately ‘manufacture’ the conditions for a double dissolution, effectively enticing the Senate to twice reject a bill?
- Does the Governor-General have to follow the advice of the prime minister to dissolve both houses?
- Or does the Governor-General have to satisfy him or herself personally that the preconditions of section 57 have been met, or on the general workability of government?
- Whom could the Governor-General consult in determining whether to grant a double dissolution?

Little by little, over the decades, and in the course of Australia’s six double dissolutions¹, answers to these questions became known, although even now, not all are clear. In 1914, notwithstanding how recently the Constitution had been completed, notwithstanding the fact that many who sat in parliament, and fully four of the seven sitting Justices of the High Court, had been delegates at the Federal Conventions of the 1890s, the scope of the provision remained uncertain.

On 2 June 1914, meeting with the Governor-General, Prime Minister Cook explained the legislative history of one particular bill—the Government Preference Prohibition Bill (a bill to prohibit union preference in Commonwealth employment)—which had been rejected twice by the Senate, with an unambiguous three months interval between the two rejections. Cook explained that obstruction in the Senate had made

¹ Including challenges resolved in the High Court: *Cormack v Cope* (1974) 131 CLR 432; *Victoria v Commonwealth* (1975) 134 CLR 81 (‘PMA Case’).

government unworkable. He advised the Governor-General to dissolve both houses, as provided for in section 57.

What, if any, guidance did the Governor-General have on how to proceed? It was well known that there had been constitutional crises in the colonial parliaments, associated with bills deadlocked between the houses. In few of these, however, was the crisis over ordinary legislative bills. Most involved deadlocks over money bills and were therefore potential roadblocks for government. But Cook's Government Preference Prohibition Bill in no way resembled a money bill or threatened the viability of government.

In any case, most colonial precedents involved upper houses that were appointed, not elected. At that time, in South Australia alone both houses were elected. In 1881, a provision had been inserted in the South Australian Constitution specifically to deal with the settlement of deadlocks between its houses; one of the measures it contemplated was a double dissolution. But such had never taken place.² Even had it done, however, the deadlock issue was different; neither the South Australian Legislative Council, nor any of the other colonial upper houses had been designed, as the Senate was, to represent different regional interests or self-governing units.

There were no historical lessons either from other countries. Australia's parliament was unique in having both houses directly elected. Double dissolution procedures could have no application in bicameral systems with only one elected house. There were no indirect analogies to be made, either. The British House of Lords was, of course, unelected, and Britain's then very recent constitutional crisis, 1909–11, had been resolved with an Act limiting the House of Lords' power to obstruct bills from the Commons. But such an Act was simply not constitutionally available to the Australian Parliament. The Canadian Senate was not an elected house either. The United States Senate was unelected until the ratification of the 17th amendment in 1913 which transformed it into a directly elected house, but the first Senate election did not take place until November 1914, and no deadlock issue arose.

The request for a double dissolution

Lack of precedents notwithstanding, Prime Minister Cook had firm views about the application of section 57 to the circumstances facing his government. Cook had not been a delegate at either of the Federal Conventions, but he had worked closely with colonial politicians who were, including in the 1890s in the cabinet of NSW Premier

² Rick Crump, 'Why the conference procedure remains the preferred method for resolving disputes between the two houses of the South Australian Parliament', *Australasian Parliamentary Review*, vol. 22, no. 2, 2007, p. 120.

George Reid (who was to take the lead in the final shaping of section 57). In 1901, in common with Reid (later Australia's fourth prime minister) and many other members of the Federal Conventions, Joseph Cook entered the new Commonwealth Parliament, representing the NSW seat of Parramatta.

In colonial politics and for the first few years in the life of the Commonwealth, federal politics had been organised around two major parties—their names and purpose now lost to popular memory—the Protectionists and the Free Traders. But the Labor Party was already a significant alternative. By 1903, the three parties stood, effectively, shoulder to shoulder. Alfred Deakin famously called them the 'three elevens'. By 1909, it had become clear to the non-Labor side that they had more in common as opponents of Labor than against each other; the Free Traders and the Protectionists amalgamated, or 'fused'. Cook became deputy leader of the new Fusion Party (soon after known as the Federal Liberal Party) led by Alfred Deakin.

In 1913, Deakin stepped down and Cook took his place; the Liberals defeated the Fisher Labor government that same year. It was a fragile victory. The new government's margin in the House of Representatives was the narrowest possible: one seat alone. Cook, now prime minister, tried to entice the outgoing Labor Speaker to stay on, but was unsuccessful. Thereafter, the Liberals had to rely on the casting vote of their own Speaker for the passage of bills. Even more frustrating was the lack of balance in the Senate. The Opposition was firmly in command. Of the 36 Senate places, 29 were Labor; seven alone were Liberal.

From the start, both parties had their eye on the strategic possibilities in this arrangement. The Senate repeatedly obstructed where it could, including refusing to grant pairs. Less than a year after forming government, Cook sought, and was granted, a double dissolution. The parliament was dissolved on 30 July 1914, and the election set for 5 September.

In opening his election campaign, Cook dwelled on his government's frustration at the hands of the Senate, describing the calling of a double dissolution as 'the only honourable course to take':

Our opponents never once, 'played the game'. From the first day we had to meet a hurricane of virulent abuse and bitter recrimination ... [I]n the Senate, the one place of all where one would expect calm and reasonable consideration of the country's affairs, [there has been] insolence and overbearing arrogance ... Altogether, the performances of these gentlemen have made a perfect parallel to one of Gilbert and Sullivan's operas.

Cook assured his audience that:

it was only after exhausting all the possibilities of the situation that we decided to clear the decks, alter the course, and steer the ship of State back to the port of public opinion from which it had set out on its tempestuous voyage a year ago.

‘Any action’, he concluded, ‘which does not finally and firmly uphold the right of the democracy to sovereign power, and compel the Senate ultimately to bow to that power, would be a betrayal of the people’.³

Cook made no attempt to disguise the fact that, almost immediately after the 1913 election, he had devised a plan to activate section 57. Barely months into government, he had two bills drafted that he knew to be contrary to Labor policy, and that he openly and calculatingly planned to offer as double dissolution ‘triggers’: a bill to restore postal voting, and the Government Protection Prohibition Bill. The second, as intended, was a red rag to the Senate. Like clockwork, the bill was passed in the House, rejected in the Senate, passed again in the House three months later, and rejected a second time. The last federal election had been only a year earlier; there was no danger of running into the six months cut-off before a regular election was due ‘by effluxion of time’.

All appeared to be in place, and Cook was, it seems, entirely confident that the Governor-General would act as advised and dissolve both houses. Indeed, Cook was of the view that the Governor-General was *obliged* to act on the advice of the prime minister, that he had no discretion in the matter.

The role of the Governor-General

Between the first Senate rejection and the request for a double dissolution, a new Governor-General had arrived in Australia. Sir Ronald Munro Ferguson was no stranger to politics. He had behind him thirty years’ service as a Liberal member of the House of Commons, including as parliamentary private secretary to the one-time British Prime Minister, Lord Rosebery. He was, in addition, a man whose vigorous, independent temperament had made the British Government more than happy to offer him the role of representative of the Crown in a far-distant dominion. His favourite form of exercise, we are told, was chopping down trees.⁴

³ Joseph Cook, speech delivered at Parramatta, NSW, 14 July 1914, Museum of Australian Democracy, <http://electionspeeches.moadoph.gov.au/speeches/1914-joseph-cook>.

Before his arrival, Munro Ferguson had been following the Australian political scene, receiving information from the outgoing Governor-General, Lord Denman, and consulting with the former prime minister, Sir George Reid, now High Commissioner in London, on how to proceed in the likely event of a request for a double dissolution. It was clear that the technical preconditions surrounding section 57 had been satisfied; the major unanswered question about the section's operation was whether he, as Governor-General, could exercise any discretion in the matter.

Cook's view, expressed in a memo prepared by his Attorney-General, was that the representative of the Crown was obliged to follow ministerial advice. This opinion was fortified by the recent writings of the leading British constitutional authority, Arthur Berriedale Keith.⁵ But, there were alternative perspectives. Keith's views were based on British conventions, and formed in relation to the dissolution of lower houses. The powers of Australia's Governors-General were to be exercised in a different context, and were complicated by the difference between the constitutional status of the Governor-General and the monarch.

Until 1926 at least, when constitutional equality between the Dominions and the United Kingdom was declared, Governors-General were, effectively, dual representatives: both the constitutional representative of the Queen or King, and agent of the British Government. The conventional restraints upon the exercise of discretion by the monarch regarding a prime minister's advice (so vividly illustrated in the British constitutional crisis) did not necessarily apply in Australia. Indeed, in the decade since federation, as Munro Ferguson knew, Governors-General had refused a prime minister's request to dissolve the House of Representatives three times (1904, 1905, 1909), following the government's loss of the confidence of the House.

But Cook's was a request for a double dissolution. The government had not lost the confidence of the House. And there were textual, not merely conventional, guidelines that appeared at least to offer guidance. Section 57 stated that, following certain preconditions, 'the Governor-General may dissolve the Senate and the House of Representative simultaneously'. Just what did that 'may' signify?

Munro Ferguson had determined to satisfy himself personally that the conditions for a double dissolution had been met. In addition, he wanted to be satisfied that government had become unworkable, and that no alternative government could be formed. To satisfy the last, he proposed to consult with the Leader of the Opposition, Andrew Fisher. In London, George Reid had advised him that he could, and Munro

⁴ Christopher Cuneen, *King's Men: Australia's Governors-General from Hopetoun to Isaacs*, Allen & Unwin, Sydney, 1983, p. 109.

⁵ *Responsible Government in the Dominions*, Clarendon Press, Oxford, 1912.

Ferguson raised the idea with the prime minister. Cook was not happy, and the Governor-General gave way.

The proposal to consult with members of the High Court received a warmer response. Sir Samuel Griffith, Chief Justice of Australia (and leading member of the 1891 National Australasian Convention), was more than happy to be consulted. Griffith joined the Governor-General for lunch the day after the meeting with the prime minister and, at the request of the former, prepared a memo setting out his own opinion of the scope of the section 57 power. He later wrote a second version of the memo, anticipating the tabling in parliament of the Governor-General's correspondence on this matter.

The Chief Justice wrote: 'An occasion for the exercise of the power of double dissolution under Section 57 formally exists ... whenever the event specified in the Section has occurred, but it does not follow that the power can be regarded as an ordinary one which may properly be exercised whenever the occasion formally exists': there was, that is, an apparent operational power, but in reality, a discretionary power. The power, the Chief Justice continued, was only to be exercised when the Governor-General was personally satisfied:

after independent consideration of the case, either that the proposed law as to which of the Houses have differed in opinion is one of such public importance that it should be referred to the electors of the Commonwealth for immediate decision by means of a complete renewal of both Houses, or that there exists a state of practical deadlock in legislation as can only be ended in that way.⁶

On these matters, the Governor-General could not act without the advice of his ministers, but he was not bound to follow their advice. He was, Griffith concluded, an 'independent arbiter'.⁷

Cook did not deviate from his view that the opposite was the case. He considered the origins of section 57, and claimed that it was 'not reasonable to suppose that the framers of the Constitution intended to place the responsibility of granting or refusing the double dissolution upon the Governor-General personally—to place him in the invidious position of appearing to take sides with one House or the other, or with one political party or the other'.

⁶ I.C. Harris (ed.), *House of Representatives Practice*, 5th edn, Department of the House of Representatives, Canberra, 2005, p. 457.

When Munro Ferguson granted the dissolution, Cook chose to interpret this as a vindication of his own views. Munro Ferguson, on the other hand, considered his actions to be an exercise of his vice-regal discretion. Andrew Fisher, who held the ‘independent arbiter’ view (the Governor-General should ‘read the Constitution ... and act accordingly’, he said) had chafed at the Governor-General’s back-down on his proposal to consult the Opposition leader. However, although concluding that Munro Ferguson had improperly followed Cook’s advice, he agreed with the decision. Everyone, it seems, thought they had got the result they wanted.

The 1914 election

The outcome was another matter. Cook’s confident strategy for gaining control of the Senate failed abysmally. With a 73.5 per cent voter turnout (in the days of voluntary voting), Labor attracted a 2.42 per cent swing and gained a convincing majority in the House of Representatives, winning 42 of the 75 seats. While Labor lost no seats, the Liberals lost six: five to Labor and one to the sole independent MHR. Not only did Labor retain control of the Senate, it increased its control, winning 31 of the 36 Senate places. Cook, back as Leader of the Opposition, but ever cheerful, would describe the result as a ‘jolly good licking’.⁸

The 1914 election returns strikingly illustrate the shift in Australian party politics that had occurred since federation: out of 75 House of Representatives electorates, only three offered any alternative candidate to either Labor or Liberal. The alternatives were all independents (including, in Victoria’s electorate of Kooyong, where the Commonwealth’s first female candidate, Vida Goldstein, stood as an independent).⁹ It is also striking that, in 13 of the 75 electorates, candidates (seven Labor and six Liberal) were elected unopposed. The two political parties, both relatively new, were now absolutely dominant.

The election had made something else clear: the deadlocked bill was dead in the water. There would be no prospect of its being reintroduced and no need for a joint sitting of the houses to resolve any further deadlock. So, had section 57 served its purpose?

⁷ Don Markwell, ‘Griffith, Barton and the early Governors-General: aspects of Australia’s constitutional development’, *Public Law Review*, vol. 10, no. 4, 1999, pp. 280–94.

⁸ *Sydney Morning Herald*, 3 October 1914, p. 14.

⁹ It was her fourth attempt, and she emerged as the runner-up, second to the victorious Liberal candidate, Sir R.W. Best, who secured 18,545 votes: Goldstein secured 10,264; E.W. Terry (Ind) 2,400.

The framing of section 57

What *was* the purpose of section 57? We can say that it was to provide a means of breaking deadlocks in the passage of legislation, but this describes only the problem that the section was intended to address. The other sense of purpose—what it represented in the minds of the framers—was never entirely settled. For one thing, a higher or ulterior purpose is difficult to put into words with practical application; and secondly, most significantly, the framers held many different objectives and understandings about the section's purpose.

Was the section intended to 'punish' the Senate for repeated obstruction to an elected government (as Joseph Cook appeared to think)? Or was it intended to hold the House of Representatives or the elected government to account, forcing it to test public approval for proposed legislation, specifically legislation that was contrary to the interests of the states? Was it, in short, an affirmation of the ultimate sovereignty of the House of Representatives, or of the federal equality of the states? There was simply no consensus among the Constitution's framers.

The need for such a provision was hinted at in the first Federal Convention, in Sydney in 1891. It arose in debate on the fiscal powers of the respective houses of parliament—an issue that was to be the most contentious and controversial of all. The equal representation of each state in the Senate, regardless of population (as in the United States), had raised some objections among the delegates from the more populous colonies, but it had been conceded relatively early. Indeed, without this concession, there would have been little prospect of accomplishing federation. But, legislative equality between the houses was not so easily conceded.

The Convention finally agreed that the Senate should have co-equal powers regarding all non-fiscal legislation, but would be prohibited from originating or amending money bills. However, it was permitted to recommend amendments, or to fail to pass such bills. (We see these arrangements now in section 53 of the Constitution.)

In 1891, debate on the Senate's power to suggest amendments to money bills prompted Victorian delegate, Sir Henry Wrixon, to raise the prospect of deadlocks between the houses. The Senate, at that time, was conceptualised as an appointed chamber, and the option of a double dissolution was therefore not available, but the recognition of tensions between the different principles embodied in the two houses was growing and already pushing delegates to offer procedural solutions. Wrixon suggested a provision: 'If the house of representatives decline to make [an] ... omission or amendment [as suggested by the Senate], the senate may request a joint meeting of the members of the two houses, which shall thereupon be held, and the

question shall be determined by a majority of the members present at such meeting'.¹⁰ This procedure, he explained, would provide the 'means of securing finality, and ... settling a difference if it arises ... on such a critical measure as an appropriation bill'.¹¹ The proposal was quickly negated. Sir Samuel Griffith (Queensland delegate) objected that Wrixon's scheme would mean that 'The senate need not ask for a joint meeting unless it likes, and it would not ask for it unless it counted heads and saw that it would have a majority; so that by his proposal the senate would be able to coerce the house of representatives'. He objected, he said, to any 'artificial means of settling differences between the two houses'.¹²

Victorian delegate, Nicholas Fitzgerald, also objected to what he called 'mechanical' means, but he conjured up more honourable motives and nobler alternatives:

Can we have the great national life which we all say we shall call into existence by federation without an enhanced sense of national honor? Must not the two go together; and, if we have both, cannot we rely upon the proper spirit and motives which will actuate the members of both houses, and believe that questions of difference will not lead to confusion, and that the members of the federal parliament will not be governed by the consideration of party or personal politics, but by the interests of the country at large?¹³

By the second Federal Convention, however, with the Senate now conceptualised as an elected house, recognition of the need to provide for potential deadlocks had grown. Still, the debate got off to an unpromising start. At the Adelaide session of the Convention, NSW delegate, Bernhard Wise, moved the first new deadlock proposal. It involved consecutive dissolutions; first of the House of Representatives and then, if the Senate again rejected the disputed bill, dissolution of the Senate. This arrangement, Wise said, would preserve the independence of the Senate on matters affecting state interests and at the same time secure dominance of the popular vote on national matters. At this stage, it was clear that the primary concern was the likelihood of deadlocks arising over money bills (as had happened in colonial parliaments). It was a view that persisted for many years in some quarters at least, and lent an interpretation to section 57, as intended specifically for such deadlocks.¹⁴

¹⁰ *Official Report of the National Australasian Convention Debates*, Sydney, 8 April 1891, p. 707.

¹¹ *ibid.*, p. 759.

¹² *ibid.*

¹³ *ibid.*, p. 761.

¹⁴ 'Sympathy' for this view was expressed in J.R. Odgers, *Australian Senate Practice*, 2nd edn, Government Printer, Canberra, 1959; J.E. Richardson, 'Federal deadlocks: origin and operation of section 57', *Tasmanian University Law Review*, vol. 1, no. 5, 1962, p. 712. This was, perhaps, also the public understanding. In 1949, following the Liberal Party's election victory, which left it without control of the Senate, the Melbourne *Argus* reported on speculation that a double

In this vein, responding negatively to Wise's proposal, Edmund Barton pointed out that the mixing of taxation measures with ordinary subjects in legislation was to be prohibited by the Constitution (now in section 55), and that a deadlock provision was therefore unnecessary. But Victorian delegate, William Trenwith (the one labour representative at the Convention), responded that deadlocks might also arise on non-fiscal bills. And this, increasingly, was to be the tone of the Convention.

Indeed, late in the final session of the Convention, in discussion of the appropriate majority for a bill to pass at a joint sitting, Victorian delegate (and future High Court Justice), Henry Higgins, felt the need to remind fellow delegates to '[k]eep an Appropriation Bill in your mind'. This was, he said, 'the most awkward case [of deadlock] which can arise, and it is quite possible that it may arise'.¹⁵ But, although appropriation and taxation bills were mentioned in debate with some frequency, this reminder did not prove influential.

Wise's proposal for a consecutive dissolution was lost. Higgins then proposed a simultaneous dissolution. After this was defeated, Victorian delegate (also a future High Court Justice and first Australian Governor-General), Isaac Isaacs, joined by Victorian Premier, Sir George Turner, moved a new provision: that there should be a popular referendum on a deadlocked bill. If the bill were supported by the electors in a majority of states containing a majority of the population, then—the proposal went—it was to be submitted to the Governor-General for assent. This, too, was defeated.

Nothing on deadlocks was agreed at the Adelaide session of the Convention and the draft Constitution bill that was completed there did not include a deadlock provision. The various defeated resolutions, however, had effectively set out the broad alternatives: dissolution of both houses, either consecutive or simultaneous, following a deadlock, or a referendum on the disputed bill, to be submitted to a 'mass' or 'national' vote, or alternatively to a 'dual' vote, factoring both national and state majorities into the count.

The issue picked up steam in the break between Convention sessions. In the long debate that followed, in the Sydney session, in September 1897, and in the final session, in Melbourne, from January to March 1898, many different iterations appeared, some of which included a combination of several or all alternatives. The break between the Adelaide and Sydney sessions had been designed to allow the

dissolution election might soon follow. The preconditions for a double dissolution election, the paper claimed, began with the Senate's 'failure to pass a monetary bill in a form acceptable to the Government'. *The Argus*, 9 December 1949, p. 2.

¹⁵ *Official Record of the Debates of the Australasian Federal Convention*, Third Session, Melbourne, 10 March 1898, p. 2224.

colonial legislatures to discuss the draft Constitution bill, and to make suggestions for amendment. Among the 300 or so suggestions, a good number of deadlock-breakers featured. The larger colonies tended to support resolving deadlocks by referendum, but the smaller were concerned about the prospect that a referendum would favour the more populous states, and they tended to support consecutive, conditional dissolutions.

At the Sydney session of the Convention, Sir John Forrest, Premier of Western Australia, vividly illustrated the preference for the consecutive dissolution. Everyone knows, he said, that:

no case has arisen in Australia, nor anywhere else, in which the upper house has been the aggressor, forcing upon the lower house some measure of which it disapproved ... If any conflict occurs in the Commonwealth in the future it will be caused by the house of representatives trying to coerce the senate.¹⁶

The house that causes the trouble, he continued, should be the one to go to the country. When ‘people ... have had time to work off their angry passions’ and ‘cool down’, if the government has been returned at an election of the House of Representatives, and the Senate still refused to give way, then it could be sent to the country. Consecutive dissolution, Forrest concluded, would make the House ‘much more careful, [and] much less eager to enter into conflict’ with the Senate.¹⁷

Higgins objected that Forrest’s proposal ‘simply makes the house of representatives a cats paw in order to pull the nuts out of the fire’. He went on to explain his allusion. The proposal, he said, ‘simply allows the members of the senate to see by the voting in the different states which way the feeling ... is going, and they will know exactly then as to whether it is or is not worth while for them to face a dissolution’.¹⁸

Gradually, however, support for the referendum proposal weakened. Consecutive dissolution also gave way, albeit narrowly, to simultaneous dissolution. Support for a joint sitting to follow a dissolution now inched forward. Although Isaacs objected that a joint sitting would effectively create a unicameral parliament as an arbiter of disputes, this reasoning was not followed through, and the size of the majority that would count for the passage of a previously deadlocked bill at a joint sitting became the focus of debate. Finally, the provision was settled; the joint sitting was adopted,

¹⁶ *Official Record of the Debates of the Australasian Federal Convention*, Second Session, Sydney, 17 September 1897, pp. 717–18.

¹⁷ *ibid.*, p. 718.

¹⁸ *ibid.*, p. 725.

and the majority for the passage of bills was set at three-fifths of the members present. The survivor from an exhausting tussle, even this provision did not endure.

The Constitution Bill, as adopted at the conclusion of the Melbourne session of the Convention in March 1898, was sent for the voters' approval in referendums in four colonies that year. In New South Wales the referendum failed. While technically possible for federation to proceed with the agreement of three colonies alone, it was politically inconceivable for the others to go ahead without the 'mother colony'. A special Premiers' conference met in January 1899, and George Reid was now in a position to extract concessions from the other premiers, making the Constitution Bill more attractive to the voters of his colony. The primary concession—what the people of NSW really cared about—was that the Constitution should specify that the federal capital site, when chosen, must be in NSW. But several other provisions in the Constitution had concerned Reid, an advocate of a stronger House of Representatives. One was the three-fifths majority in section 57. Reid now persuaded the others to substitute 'an absolute majority of the members of the Senate and House of Representatives', giving the House the decisive numerical advantage. Section 57 was finally finished. This was the version that went to the people in the new round of colonial referendums, this time successfully, in 1899 and in Western Australia in 1900.

Notwithstanding the multiple conflicting preferences expressed in the deadlocks debate, the Convention delegates had all agreed on one thing. They expected section 57 to be very rarely used. In this, they were proved correct. Although the threat of a double dissolution has been invoked with predictable regularity whenever the houses have clashed, the double dissolution experiment of 1914 would not be repeated for another 37 years. In particular since the introduction of proportional representation for Senate elections and the rise of minor parties, governments have often enough faced a hostile Senate, but only five more double dissolutions have occurred (in 1951, 1974, 1975, 1983, 1987). This total of six represents less than two per cent of Australia's 44 federal elections.

Of the six double dissolutions, half resulted in return of the government; half in defeat. In one case alone (1951) did the returning government gain control of the Senate. If mastering the Senate is the primary motivation for contemplating a double dissolution, history suggests caution.

The year 1914

The 1914 election was scarcely the major event of that year. A much larger, much more dramatic and tragic event was unfolding. The grant of the double dissolution

occurred in peacetime; the election itself occurred one month after the declaration of war. Looking at the newspapers of that year, it is surprising—a little disconcerting even—to see how long it took before the realisation dawned that government would be a different matter for the foreseeable future, and how little the imminence of war featured in the debates surrounding the election.

It did not go unnoticed, however. There were disagreements about preparation for war, reflected in the campaign speeches of the Prime Minister and the Leader of the Opposition concerning funding for Australia's defence. Cook proposed borrowing, to finance the expansion of Australia's defence capacity; Fisher described this approach as 'shameless', as a reflection of the Cook Government's having squandered the surplus built up previously by the Fisher Government. But these issues were swallowed up in lists of many other promises and policy commitments: from the government, expanded immigration, Commonwealth and state cooperation in managing the River Murray, a program to build transcontinental railways and achieve a uniform rail gauge, development of the Northern Territory and Papua, pension reform, construction of lighthouses, anti-trust measures and more (Cook also, interestingly, advocated proportional representation for Senate elections); and from the Opposition: tariff reform, anti-trust measures, the expansion of social welfare to provide for orphans, the establishment of a uniform rail gauge, and a reminder of the Fisher Government's previous achievements, including the establishment of compulsory national military training.

It is unclear how much the declaration of war affected the election outcome. Andrew Fisher famously vowed during the campaign that Australia would 'stand beside our own to help and defend Britain to the last man and the last shilling', but there was no evidence that Joseph Cook thought otherwise. He, too, promised a commitment of all Australia's 'resources ... for the preservation and the security of the Empire'.¹⁹ By the eve of the election, the focus on the war had dramatically increased; war measures, including recruitment for the Australian Imperial Force, had already begun, notwithstanding that the parliament had been dissolved. Recognising that the normal grant of funds for government services would now not suffice, urgent alternatives were canvassed. The Governor-General consulted with members of government and with the Chief Justice. The Chief Justice proposed a mechanism for recalling parliament²⁰ or, alternatively, postponing the election. Cook, clearly untroubled by any intimation that a delay might have offered some advantage, wanted the election to proceed. And so it did.

¹⁹ *Evening News* (Sydney), 1 August 1914, p. 8.

²⁰ Markwell, *op. cit.*

On New Year's Eve 1914, the *Adelaide Advertiser* reflected on 'The Dying Year'. Nineteen fourteen, it observed, had begun well: 'The skies were blue and cloudless, and there were no portents to threaten that the black shadows of war and drought would fall athwart the fortunes of the State'. The coming of war, it said, had evaded even 'prophets with the keenest vision'.²¹ By December, many new war measures were in place: press restrictions, bans on trading with the enemy, special measures governing the sale of wheat and other commodities, and financial measures, including an increase in taxation.

In the reporting of these developments, the fact that an event of such constitutional novelty and drama—the double dissolution—had taken place seemed insignificant.

Conclusion

Addressing the first Federal Convention in 1891, Henry Parkes spoke of the as-yet imagined Senate as an upper house that should 'have within itself the only conservatism possible in a democracy—the conservatism of maturity of judgment, of distinction of service, of length of experience, and weight of character'.²² Almost no one foresaw the rapid rise of party interests in the Senate. One Queensland delegate in 1891, John Macrossan, was the first to predict this development, but his death two weeks into the Convention robbed him of a chance to persuade the others or to enjoy his ultimate vindication. At the second Convention, Alfred Deakin also predicted that the states' house would be quickly transformed into a party house: 'The contest [between the houses], he said, 'will not be, never has been, and cannot be, between states and states ... it is certain that once this constitution is framed, it will be followed by the creation of two great national parties'.²³

The 1914 double dissolution, and the five that have followed, have been governed by party distinctions; the anticipated tug of war between national and state interests that shaped the complex debate at the Federal Conventions over the framing of section 57 did not eventuate. We cannot, however, conclude that the section would have been framed differently, had this reality—which may, of course, alter over time—been realised. Two houses, both directly elected, with almost co-equal powers, but with different electorates and, since 1948, subject to different electoral systems, will always have the potential to differ, and those differences will always have the potential to turn into deadlocks.

²¹ *The Advertiser* (Adelaide), 31 December 1914, p. 10.

²² *Official Report of the National Australasian Convention Debates*, Sydney, 4 March 1891, p. 25.

²³ *Official Record of the Debates of the Australasian Federal Convention*, Second Session, Sydney, 15 September 1897, p. 584.

Over the years, the unanswered questions in section 57 have been answered:²⁴ ‘failure to pass’ may include delaying tactics as well as outright rejections; multiple bills may be stockpiled and together serve as double dissolution ‘triggers’;²⁵ the three months’ interval between the two rejections or failures to pass runs from the date of the Senate’s action; the bill or bills in question do not need to be on a matter of national importance, let alone confined to fiscal matters; the government does not need to have been rendered unworkable by the deadlock; a government can certainly ‘manufacture’ the conditions for a double dissolution. Governors-General have an undefined quantum of discretion over whether to grant a double dissolution (although possibly less than in the past); they may consult whom they like in reaching their decision. But, no Governor-General has ever refused a prime minister’s advice to dissolve both houses.

Given the relative ease with which double dissolutions have been granted and the relatively low threshold for a deadlock to qualify as a section 57 ‘trigger’, and given that it is far from rare for bills to be rejected in the Senate, it is notable that there have been so few double dissolutions. Notable, but not surprising.

If there is one ‘lesson’ from the 1914 election, it is a simple one. A government cannot count on getting what it wants from a double dissolution. Like the delegates at the Federal Conventions of the 1890s who laboured so valiantly over the wording of the section but who failed to achieve consensus over its rationale, the Australian public has never held a common position on its application. They have never risen up either to punish a recalcitrant Senate or to chastise an overbearing House of Representatives. They have never—as far as we can tell—decided how to vote in a double dissolution election by weighing up the virtues of the particular bill or bills that provided the trigger. They began in 1914 as they meant to go on: voting according to their party loyalties, and to their perception of the respective merits of the government and Opposition of the day. Governments can never be confident that the Australian public shares their sense of the importance of particular policy measures, let alone of the frustrations encountered in inter-cameral politics. As Senator John Faulkner has written, ‘[v]oters are not swayed by government complaints about Senate obstruction’.²⁶

Joseph Cook was necessarily a pioneer, and, in the event, a casualty of constitutional novelty. Still, he acted deliberately and had no one else to blame. At a dinner held in

²⁴ See Sir Anthony Mason, ‘The double dissolution cases’ in H.P. Lee and George Winterton (eds), *Australia’s Constitutional Landmarks*, Cambridge University Press, Cambridge, 2003.

²⁵ In 1914, 1951 and 1987, only one bill was listed in the Governor-General’s proclamation of the double dissolution; in 1974, there were six bills; in 1975, 21 bills; in 1983, 13 bills.

²⁶ John Faulkner, ‘A Labor perspective on Senate reform’, in Brian Costar (ed.), *Deadlock or Democracy?: The Future of the Senate*, UNSW Press, Sydney, 2000, p. 44.

his honour a month after the election, he cheerfully quipped that the ‘jolly good licking’ his party had suffered would do them ‘no end of good’. There was ‘one consolation’ in changing sides of the House, he said: ‘we have picked a job we all know about’.²⁷ This is not a thought that other prime ministers might find consoling.



Question — I was wondering if you see any parallels between what happened in 1914 and the double dissolution in 1983. So what we had there was that Malcolm Fraser wanted to recommend a double dissolution. Sir Ninian Stephen as Governor-General wanted fuller and better particulars and that delay then allowed the Labor Party to change leaders from Mr Hayden to Mr Hawke. I was just wondering about that process of seeking the further details. Did Mr Fraser wrongly assume that it would be automatically granted? And do you have any other aspects of 1983 that you could share with us?

Helen Irving — Yes, there are parallels of course. The gamble in both cases failed: the government lost and the prime minister was defeated. There were and have been over the years different views as to whether the Governor-General should satisfy him or herself in particular on the question on workability of government. In 1951, when Prime Minister Menzies advised Governor-General McKell to dissolve the houses, Menzies, who was himself a very experienced former constitutional lawyer, advised that workability of government was not an issue that Governors-General should take into account. It seems that Governor-General McKell who, like all Governors-General, wanted to take time to make up his own mind, probably shared that view.

In 1983, Governor-General Sir Ninian Stephen held the opposite view. He has made it clear that he held the view that a Governor-General should satisfy him or herself not only that the technical preconditions have been satisfied but also that it is a question of unworkability of government. Malcolm Fraser had put the case that a double dissolution was needed in particular in what he saw as a critically difficult economic situation with the potential of unworkability. It is not necessarily clear that Malcolm Fraser held the view or predicted that the Governor-General would simply accede to his request, but certainly the delay, as you pointed out, allowed for the Labor Party to change leaders in a surprise tactic.

In 1914 a war gets declared. It is not quite the same as a change of political leader but was a big surprise in terms of the strategy of the prime ministers. We also note that

²⁷ *Sydney Morning Herald*, 3 October 1914, p. 14.

Malcolm Fraser is the one prime minister to have been brought into government through a double dissolution election and lost government through a double dissolution election. That is surely a first, maybe a one and only!

Question — I was just wondering what you thought of section 57. Do you think it is a good provision? Or do you feel that there are ways we could improve it? And is there any parallel overseas for a model which you think works better?

Helen Irving — That is a very big question. I do not really know enough to answer the second part of your question on whether there are good overseas alternatives. Each legislative system is very much shaped by the particular national context. Look at the House of Lords in 1911. The British constitutional crisis was ended then by the Parliament Act that very much restricted the House of Lords' chance to obstruct bills. Ultimately the House of Lords lost the power to reject money bills altogether, which had been the cause of the crisis. Focusing on the question of money bills would be interesting in terms of evaluating whether there is anything further that could be done with section 57, but being constitutionally realistic, anything that involves a referendum is extremely unlikely to be successful.

There have been, over the years, many proposals—from the constitutional convention of the 1970s, the Constitutional Commission which reported in 1988, proposals from a discussion paper produced for Prime Minister Howard—which involved amending section 57 to make it less likely that the Senate would obstruct the House of Representatives or to provide an alternative procedure such as a joint sitting, which was, as we saw initially proposed back in 1891, to resolve deadlocks. But as I said, the reality is that anything that required a referendum, that required constitutional alteration, would be extremely unlikely to succeed. There have been a couple of referendums which have related to the Senate's relationship to the House of Representatives—not on section 57 itself—but those referendums have also failed.

There are, I am sure, procedures that could be dealt with through standing orders or practices or conventions that might be adopted between the two houses such as conferences of managers and so on which might minimise the likelihood of a disagreement blowing up into a deadlock. That is certainly something that could be contemplated, but as for the Constitution itself, I think we are pretty well stuck on section 57.

Exploring the Role of the Commonwealth Ombudsman in Relation to Parliament*

Colin Neave

First of all, I would like to acknowledge the traditional owners of the land on which we meet and pay my respects to their elders both past and present. I am very happy using the word ‘meet’ actually, because this Ombudsman is not the hectoring, lecturing sort of Ombudsman, I hope. The word ‘lecture’ has that sort of hectoring overtone to it, so what I want to do today is talk to you about our role in the context of the parliament and our role in general.

I have been the Ombudsman for a little over two years now. It seems like, as a lot of you might understand, as you go on in life two years flashes by pretty quickly. And so my reflections on the role are influenced by the fact that I have been here for two years and I have had almost twenty years’ experience with ombudsmanship altogether. But I have also had about 45 years’ work in the private sector, so I am not really from a public sector-type background. Most of my experience has been in the private sector. And I was just thinking today, as I was coming along, that the very first job that I ever had started 56 years ago virtually today when I was working in the Myer underwear department after having completed my intermediate year at school. I don’t remember ever getting the intermediate certificate, by the way, I am not sure whether they handed them out in 1958 or whenever that was. Anyway, that is by the by.

What I want to do today is to talk broadly about my perceptions of the role of the Ombudsman under various headings: I want to talk about leadership, I want to refer to some history issues, I want to talk about what I regard as good ombudsmanship, I want to talk about the policy contribution that an Ombudsman can make, and I want to talk a bit about the future of the role of Ombudsman.

There are some people, both in government and the community, who think that all the Ombudsman does is to handle complaints, that we investigate complaints that people can’t resolve in their dealings with the Commonwealth or ACT government agencies. That is a very narrow view these days, and it falls dramatically short. In fact, it is a very old-fashioned notion. In reality, we are leaders in building better public administration. We have got a critical place between government and the public, and

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we are a safety net for members of the community. Ombudsman schemes are an integral part of a framework that provides access to justice, to consumers as well, and we contribute significantly to the standards of public administration. We promote good governance, accountability and transparency, through oversight of government administration and service delivery.

Ombudsmen contribute to improving accountability and good governance in three main ways. Firstly, we do resolve individual disputes. We investigate complaints, we safeguard citizens from government actions which could adversely affect them, and we give citizens a voice to complain where they would otherwise fear to do so. Ombudsmen are often the only avenue readily available to individual citizens seeking recourse on matters of maladministration or official misconduct that affect everyday lives. Because ombudsmen services are free, they are practically valuable to the most vulnerable.

We investigate systemic problems. I had a conversation with a very senior public servant very recently who didn't realise that we do that. And we do that on our own initiative, from time to time. On other occasions we might have one complaint made to us which we can see might well apply to many other thousands of people. So we look at how we can fix problems through an Ombudsman investigation, not only in relation to the complaint that has been made to us, but also to help others who might have been adversely affected by, for example, maladministration.

We contribute to improving public sector performance, and that works in two ways: directly, where the information from complaints about areas of poor service delivery is fed back to agencies; and indirectly, where the potential oversight of each decision by the Ombudsman is an incentive to public servants to improve the quality of their actions and decisions. In our case, we can add a fourth element. That is, we monitor law enforcement agencies for their compliance with the relevant legislation. It is a topic on which I will elaborate later.

An Ombudsman can get good insight into how a policy or the delivery of that policy can go off track or where there is a mismatch between what the government offers and what the public expects or demands. It is recognised that mechanisms are needed to ensure administrative processes are sound. No agency, of course, sets out to perform badly, but mistakes are inevitable in any industry or field of endeavour, and the public sector is certainly not immune from that.

Now I want to deal with some historical matters. The idea that people have a right to complain about government without hindrance or reprisal, and to have their complaint resolved on its merits, is firmly established. Most agencies are willing to engage with,

resolve and seek to learn from complaints. It is best summed up by saying—and this is really a quote from Colin Neave—‘agencies deal with complaints while ombudsmen deal with disputes’. Agencies should rightfully be the first to receive and deal with complaints. If the citizen is not satisfied, they can come to us. For this reason, we are very interested in agencies’ complaint-handling systems. The better they work, the fewer disputes that come through to ombudsmen.

The role of Ombudsman initially came across as being very combative—that is why I referred to the ‘lecturing and hectoring’ point I made at the outset. However, Ombudsman offices have developed into being powerfully influential and able to work in collaboration with agencies and departments under their jurisdiction with the objective of continually improving the quality of public administration. The Commonwealth Ombudsman commenced operations in 1977. At that time, dealing with the Commonwealth Ombudsman was a new experience for Commonwealth public servants. Some of you may have been in the public sector at that time. Indeed, what the Ombudsman did initially, may well have come as a shock to what was then called a permanent head of a government department and leaders of agencies. Those permanent heads no doubt saw themselves as running the country. The effect of the Ombudsman’s scrutiny of administrative acts of their departments may well have been interpreted by them as reducing their power.

The first Commonwealth Ombudsman, Professor Jack Richardson, was not backward in coming forward in his approach to the role. He engaged in a lot of publicity for the existence of the office of the Ombudsman back in 1977, suggesting that citizens disturbed about administrative acts performed for them should come direct to him in order to obtain appropriate redress. That publicity included paying for an advertisement for his office on milk cartons in the ACT, and one can imagine a permanent head of a government department confronting a smiling picture of Jack on a milk carton with an advertisement and contact details for his office as that permanent head poured milk on his breakfast cereal. And ‘his’ is correct in those days—there were no women heads of department.

In short, there was quite a deal of conflict between the first Ombudsman and senior members of the bureaucracy in Canberra initially. Around the time of the establishment of the Commonwealth Ombudsman, other state ombudsmen were being set up. Some were established before the Commonwealth Ombudsman. In 1989, the first industry ombudsman was announced by the banking industry. This was followed shortly thereafter by organisations handling complaints about telecommunications, general insurance, investment products, energy and water. There are lots of ombudsmen these days. Those industry ombudsmen were established essentially to redress what was seen to be a power imbalance between individual consumers and

industry, when many organisations were being privatised like Telecom as part of asset sale initiatives or by various state governments or as a result of freeing up markets. The government-owned telecommunications company was sold, and the market for financial services was deregulated from around 1987. So the industry ombudsmen, along with government ombudsmen, as they have developed, have been seen as a very important access to justice mechanism given that their services are free to consumers and generally small businesses. They also have extensive public awareness programs in place, which has had the effect of making the Ombudsman name readily recognised in the Australian community. In fact, over seventy per cent of the Australian community now have an appreciation of what an Ombudsman does.

Moving to the present, the 2014 Federal Budget and the report by the Commission of Audit highlighted the changing environment for public sector agencies in general. For us, this has included a change in some functions in the future, a requirement to manage, of course, with fewer resources and a growing role for what has come to be known as an integrity agency. None of these factors have affected our core purpose which is to influence agencies to treat people fairly through our investigation of their administration. In pursuing this purpose the office seeks outcomes that deliver fairer treatment of people, accessible, effective and targeted complaint-handling services, agency compliance with legislation in the use of intrusive and coercive powers and the effective and efficient conduct of our own business. The ombudsman of all organisations needs to be a shining example to the rest of the public sector in relation to management and the way in which we conduct our business, and so we pursue these outcomes through four pillars of assurance, integrity, influence and continuous improvement. Essentially we aim to provide assurance that agencies act with integrity and treat people fairly. We work with agencies to influence them to improve public administration and assure the Australian community and the government that those agencies treat people fairly by monitoring their complaint handling. Access to justice is assured through those accessible, effective and targeted complaint-handling services.

Like every other agency, our role will continue to evolve. As governments' activities and citizens' expectations of government change, so must ombudsmen. We should no longer see change as unusual; it is with us in the public and the private sectors and now always will be. As announced in the 2014 Federal Budget, the Private Health Insurance Ombudsman function is expected to come to our office from 1 July 2015 and we are having discussions with that agency at the moment about the best way to transition that role to us. It is also expected that the handling of freedom of information complaints will come to us from 1 January 2015. In addition, developments on Norfolk Island and the ACT have resulted in some function changes.

Norfolk Island has enacted its own Ombudsman Act which includes provisions that establish the position of a Complaints Officer and the requirement for the Commonwealth Ombudsman to inspect and report on the Complaints Officer's records at least annually. Under an arrangement between the ACT Government and the Australian Government, the Commonwealth Ombudsman is also the ACT Ombudsman, which is a role I enjoy because some of the work that we do at the Commonwealth level is remote from the community, whereas the role as ACT Ombudsman is very close to the community, dealing with the sort of issues with which communities are directly involved. Problems about parking and problems about tenancies for public tenants, all those sorts of issues come to the ACT Ombudsman and it really is good for our office because it brings us back to earth in a sense.

The ACT Ombudsman's office was established in 1989 as part of the framework for ACT self-government. On 1 July this year, the *Officers of the Assembly Legislation Amendment Act 2013* came into effect. That changed the status of the ACT Ombudsman, the ACT Auditor-General and members of the ACT Electoral Commission so that we became very clearly officers of the Legislative Assembly. There is much to commend this initiative because then there is no doubt about the role that the Ombudsman in the ACT jurisdiction has, to make reports direct to parliament. That is available to us in our legislation at the Commonwealth level but it is certainly there with great clarity in relation to the ACT Assembly, which as I say, is a very welcome development.

We are assuming a greater role as an 'integrity agency', overseeing and investigating the activities of Australian and ACT public sector agencies. This year we were instructed with new functions, such as our role in the Public Interest Disclosure (PID) scheme because of our independence, impartiality and investigative skill. These attributes developed through traditional complaint-handling roles, mean that we can play a bigger role in improving and maintaining the standard of public administration in Australia. The PID scheme is central to our growing integrity role. It seeks to improve accountability and integrity in the Commonwealth public sector by supporting agencies to address suspected wrongdoing. The scheme became effective on 15 January 2014. It conferred a number of roles and powers on the Commonwealth Ombudsman to ensure the scheme provides robust protections to public officials who report wrongdoing in the public sector while protecting national intelligence and security. Our role includes assisting both agencies and disclosers, to interpret, understand and comply with the legislation. The oversight of agency decisions and annual reporting to the parliament also provides transparency and accountability.

As I said before, our complaint-management function is enshrined in the Ombudsman Act. The parliament has passed other legislation which gives us additional roles where

clear, impartial, external oversight is required and that is what we call our monitoring role. One of these functions, and one which is most closely aligned to our core complaint-management business, is our review of the Australian Federal Police's administration of part five of the Australian Federal Police Act. Part five of the Act has regard to the AFP professional standards and provides the framework for its complaint-management system. The introduction of that part of the Act resulted from a review of the AFP's disciplinary processes with a view to moving towards a more administrative approach to professional standards.

We now focus on how the AFP deals with complaints, not just the subject matter of the complaint. The AFP Act requires my office to inspect records of AFP complaint investigations and to review the comprehensiveness and adequacy of the AFP's administration of part 5 of the Act. We are then required to report to parliament on our findings. In conducting these reviews we don't reinvestigate the AFP's investigations into complaints, rather we assess its complaint records against specified criteria, which are in turn based on what is in the AFP Act, the AFP Commissioner's Orders and his guidelines and best practice in complaint management. By focusing our reviews on the administration and processes of the AFP's complaint-management system, we can incorporate factors for assessment that the complainant may not be aware of, such as conflicts of interest.

People who lodge complaints with the AFP, or AFP officers who may be the subject of a complaint, should expect that the complaint will be managed in an objective and professional manner. Therefore, during our inspections we have regard to matters such as the consideration given by investigators to possible or actual conflicts of interest, how conflicts of interests were managed and whether the investigators contacted relevant witnesses. I am giving you this as an example of the sort of monitoring role which we perform because we do consider the entire complaint-management process from start to finish, including the reasonableness of the findings from the investigation, to identify where the AFP complaint-management process may not have been complied with. We can then raise these issues with the AFP which can then take appropriate action. Our oversight of the AFP's complaint management system is all-encompassing and we also investigate complaints, of course, about the AFP that are made to our office direct.

As well, where we identify AFP conduct or practice which is not the subject of a complaint, we may choose to commence our own investigation, and we have developed a very productive working relationship with the AFP. Another example of where the parliament may prescribe a monitoring role for our office includes when legislation is passed that empowers agencies to conduct covert or surveillance activities. Again, as the public would not, or at least should not, be aware of those

covert, secret activities, they are unable to make a complaint about an agency's actions—we can't get a complaint about something the public does not know about—therefore the legislation will often include an independent oversight mechanism to increase accountability and transparency of agencies' use of those powers.

Currently my office performs this independent oversight in relation to powers such as intercepting telecommunications, preserving and accessing stored communications, using surveillance devices, undertaking covert and undercover operations and exercising coercive examination powers. In performing some of these functions, my staff inspect the records of Commonwealth and also state and territory agencies, and I have myself been on a visit to work with my staff just to see what is done, which I found very illuminating indeed. After inspecting each agency's records, we then report to ministers in the parliament on agency compliance with the relevant legislation.

The Ombudsman is also required to appear before parliamentary joint committees to brief parliamentarians on some of our monitoring activities and answer questions about how we conduct our inspections. We welcome this scrutiny on behalf of the parliament to ensure that our office conducts this work to the highest possible standard. We have an established set of methodologies for each of these oversight roles which are applied consistently across all agencies. These methodologies are aligned to best practice in auditing standards, focus on areas of high risk and are based on the principles of transparency, accountability and procedural fairness. Our methodologies are also based on legislative requirements and best practice. We also give, as required by legislation, notice to each agency of our intention to inspect their records and provide them with a broad outline of our inspection or review criteria. This focuses agencies on what we will be assessing and keeps surprises to a minimum.

To ensure procedural fairness we provide a draft report on our findings to the agency before it is finalised and we report to the relevant minister. So there is a constant involvement with ministers and also with the parliament to ensure that the community can be reassured about the use of some of these covert and surveillance powers. Occasionally we may also report to the parliament if we identify an issue that falls outside that which is required of us, but which we consider to be an important issue of safety in the community or interest.

For example, the ACT Ombudsman is required to monitor ACT Policing's compliance with chapter four of the Crimes (Child Sex Offenders) Act which establishes the ACT Child Sex Offenders Register and relevant access restrictions. In 2010, as a result of performing this monitoring role, it became apparent to our office

that the Act could be improved to help reduce the likelihood of child sex offenders reoffending and could be strengthened to help ACT Policing monitor offenders. We wrote to the ACT Attorney-General, who responded and in due course amended the legislation in 2012. Most recently we have used our monitoring experiences to inform our submissions to and our appearances before parliamentary inquiries into proposed reforms to the Telecommunications (Interception and Access) Act and the Crimes Act.

During the course of performing these oversight functions we interact with parliamentary process at most stages, including the drafting and passage of legislation, through to the monitoring and reporting of how the legislation is applied. Robust oversight also allows my office to provide assurance to the parliament that agencies are engaging in sound administrative practices and to identify and report on issues that may impact on the community, and of which the community would not otherwise be aware.

I now want to talk about what I call good ombudsmanship. ‘Ombudsmanship’ is a long word and I have made it up for the purposes of today, but it is pretty illustrative.

Ombudsmen—out of necessity, to maintain both actual independence and perceived independence—work, to a very real extent, in isolation. You have got to be, as an ombudsman, a person who is very comfortable occupying the middle ground because obviously you can’t be an advocate for a department or an agency, and also you can’t be an advocate for a citizen or community member. You have to be there as a person seeing fair play and forming views based on fairness and other considerations. We can also work, as ombudsmen, against entrenched and powerful interests. Most ombudsmen have experienced resistance to the oversight of government. While we need to, and do, maintain good working relationships with agencies, we also need to maintain our distance. It is what I call ‘collaboration without capture’: working with agencies, but not being unduly influenced by them. For that reason it is important that ombudsmen institutions support each other.

I am the regional president of the Australasia and Pacific Ombudsman Region of the International Ombudsman Institute and I am also a board member of that Institute and also the Chair of the Pacific Ombudsman Alliance, which deals with ombudsmen in the Pacific region. I was formally the Chair and one of the co-founders of the INFO Network, which was the organisation of financial ombudsmen throughout the world. The International Ombudsman Institute (IOI) is a global organisation that promotes cooperation between 150 ombudsman institutions all around the world. I recently had the great pleasure of going to its board meeting in Vienna. The IOI encourages the exchange of information at regional and international levels, but the main goal of the

Institute is to facilitate communication between all members in order to be a forum within which ombudsmen can frankly discuss issues which confront them. Our involvement in the Institute gives us a platform for voicing regional issues and ideas to the international ombudsmen community and to influence the discussion about the place of ombudsmen within the integrity landscape now, and into the future, and to learn about developments overseas.

Some of the matters which have come up internationally include a move to have a complaints agency with jurisdiction over a single department. In my view, this is a very unwise development, given the possibility of complaint-handler capture or an unworkable relationship if things do not go well between the complaint handler and the single agency about which it handles complaints. That relationship problem can, in my opinion, develop for the following reasons: coupled with proposals for single agency complaint handling, comes suggestions that the complaint handler should have on its staff, specialists in the business of the agency about which it gets complaints, so that the complaint handler has a deep technical knowledge of the business of the agency about which complaints are received. This can lead to the complaint handler second guessing the agency's decisions, which should not be its role. The Ombudsman's role is based on examining administrative processes and service delivery. It is for other agencies to handle appeals from decisions.

An ombudsman needs to develop a collaborative approach, as I said earlier. If there is a second guessing of decisions based on technical or legal differences, the potential for breakdown in a relationship is heightened and in the end a poorer service for the community because, as the complaint handler or ombudsman has no determinative powers, it can't force an agency to do anything. Only influential powers and the power to influence will be lessened, if there is a deep-seated difference regime between the complaint handler and the agency. There is a chance, in the same circumstances, of complaint handler capture, so that the complaint handler does not act independently where a complaint handler deals with complaints about a single agency. Where there is a one agency, one complaint handler regime in place, the temptation is to have staff secondments and a whole lot of things, which can lead to the complaint-handling organisation becoming cosy with the organisation subject to its jurisdiction. So that is one of the issues, just giving you an example, of the sort of issues that could come up in the international community and from which we can learn here in Australia.

Closer to home, the Pacific Ombudsman Alliance (POA) is a service delivery and mutual support organisation for ombudsmen and allied institutions of countries that are members of the Pacific Islands Forum. Our office receives funding from the Department of Foreign Affairs and Trade to provide secretariat services and funds

activities which are selected and evaluated by the Pacific Ombudsman Alliance Board, which I chair and which has members on it, for example, including the Ombudsman from Papua New Guinea, the Ombudsman from Vanuatu and the Ombudsman from the Marshall Islands.

So what is the point of a regional network? Members of POA share a number of critical development challenges stemming from their geographic location, small populations and markets that limit economies of scale. As well they work in an inherently contested environment, often vulnerable to the political whims of the government of the day, and where from time to time there are significant allegations of corruption. That is the sort of thing that is regularly confronted by the Ombudsman in Papua New Guinea and from time to time the Ombudsman in the Solomon Islands. The POA provides a regional support mechanism that facilitates dialogue and cooperation between ombudsmen and allied institutions on issues relating to accountability, transparency and integrity. The members of the Pacific Ombudsman Alliance share many challenges and use the alliance to exchange ideas and experiences and target assistance to its members to build institutional capacity. The Pacific Ombudsman Alliance also provides a visible international support structure that can assist ombudsmen in strengthening their domestic positions.

My office supports it because we are a well-established office with access to expertise and resources in ombudsman theory and practice and we have an established relationship with the Pacific Ombudsman Alliance and with its members collectively and individually. As well the Commonwealth Ombudsman has an established relationship with parliamentary and industry ombudsman officers across the world through the International Ombudsman Institute and other organisations. At the moment we manage four aid-funded international programs for the Pacific Ombudsman Alliance. We work in Indonesia and Papua New Guinea and the Solomon Islands and we can offer coordinated support by counterpart countries across programs. I should say that we learn, in a way, just as much from what is going on in some of those areas, as we might give to those people that we work with, because we always keep an open mind about whether or not we can learn, as well as invest in, providing information ourselves. In short, our international connections allow us to tap into overseas experiences and provide leadership to other offices which need our help.

I just want to spend now a moment on policy contribution. Given the theme of this talk rather than lecture, I would like to mention the role of an ombudsman in relation to policy development. The first Commonwealth Ombudsman, my friend Professor Jack Richardson, who unfortunately has now passed away, said almost 30 years ago, ‘occasionally, it is still said that ombudsmen do not and should not, delve into matters

of policy. I believe that to be a misconception of the Ombudsman's function.' Some controversy is unavoidable by an ombudsman, as Bob Ellicott who, as Attorney-General, had appointed Professor Richardson as Ombudsman, commented also in 1985. Professor Richardson had served that position with great distinction, though not always without controversy. But then, he was not intended to be non-controversial. I am not here today to argue for, or defend, the notion that I as Commonwealth Ombudsman should be able to critique government policy. What we do is make appropriate submissions when requested to parliamentary inquiries where legislation is being examined, and that has been our policy for many years and that will continue into the future. The overall aim of my presentation today was to outline how my office works within the scope of the parliamentary process. To me that is part of the parliamentary process and reinforces the valuable contribution that we make to improving public administration.

So where do I see the future of ombudsmen? I recently read a publication produced by the Catalan Ombudsman in Spain, to which contributions were made by a professor and lecturer in constitutional law at the University of Barcelona. The publication *International Framework of the Ombudsman Institution*, describes a growing interest among international organisations including the Council of Europe and the United Nations in the implementation and strengthening of the Ombudsman Institution as an institutional mechanism to guarantee human rights. In this publication the strong connection is made between maladministration, the hiding or non-disclosure of that maladministration and the development of corrupt practices, flowing initially from that maladministration and its non-disclosures. So the focus of our office on maladministration is really about reducing the possibility of corruption because hidden maladministration, in the view of many commentators, can then lead to corrupt practices developing. So it follows that the Institute of Ombudsmen is therefore important, not only to protect human rights but more broadly. That publication also refers to the ombudsman being appropriately and doctrinally referred to, and I think this is a lovely phrase myself, as 'a magistrate of persuasion'¹. Only Europeans, I think, could put together something like that.

In other words, the impact of the Ombudsmen Institution's final decisions is not derived from binding, coercive, or determinative powers, but from the rigour, objectivity and independence with which ombudsmen conduct their activities. In other words, from their implied authority and one could say, their 'gravitas'. Indeed, international studies and the International Ombudsman Institute have stressed the relevance of the ombudsman as a mechanism essential and necessary for the strengthening of democracy and the guarantee of rights, especially in times of

¹ *International Framework of the Ombudsman Institute*, Sindie de Grenges de Catalunya, May 2014, p. 10.

economic crisis. In Australia, too, this is relevant not only in relation to government ombudsmen but to those industry ombudsmen that I talked about before. Internationally the ombudsman role has continued to develop and be recognised as an important part of a democratic state.

So what I have been saying today is this: the ombudsman is not just a complaint handler, we have got a very strong commitment to exposing systemic issues. We have a very strong monitoring role which has developed over the last almost 40 years. We have very strong mutually beneficial international connections and overall, our approach in order to get a better result for the community, is to collaborate with departments and agencies, but not be captured.



Question — Ombudsman, from your experience how many of the problems you get stem from the culture within the agency that is complained about?

Colin Neave — I think it is very possible to trace the attitude to complaints in any organisation to its leader. I suppose it is probably safer for me to talk about my experiences as Financial Services Ombudsman, which I was for 15 or 16 years, when there were, for example, changes made at ANZ Bank in the leadership there. When John McFarlane took over—he was a guitar-strumming Chief Executive—the whole flavour of responses from ANZ Bank changed quite dramatically. I am a great believer that in any organisation, whatever it might be, the general attitude to the way in which that organisation operates and its culture is driven very strongly by whoever is heading up that organisation and the way in which it operates is driven very much from the top.

Question — This question is probably a little naïve, but invariably you are shining a light on how a government department and a government operates. How does that work in relation to funding? You have said you have to do more with less. In a way you do make some enemies by uncovering maladministration. Do you have operational independence from a funding perspective?

Colin Neave — We have been subjected to the same cuts that all public service agencies have been subjected to this year and there is no evidence, as far as I am concerned, that we are in any way being punished. We have found all our dealings entirely appropriate with both the leaders of government departments and the politicians that we have had contact with and we cannot say that that is the way in

which budget decisions are made at all. In fact I think that we are in difficult times at the moment and all of us need to shoulder the burden, as I have said before. I think that the Ombudsman's office needs to be an example to other agencies and departments and doing what we can to manage effectively and efficiently within our budget envelope—to use the public service type term—is the way we have to operate.

Question — Is there a dedicated budget you get each year? Or is it subject to appropriations every year?

Colin Neave — It is certainly subject to appropriations every year, yes.

Rosemary Laing — I have a question about your relationship with parliament. Where I sit I see a lot of reports from your office being tabled such as reports on your monitoring of law enforcement agency controlled operations during the year or migration issues coming to the parliament. If there was an ideal world, how would you see your relationship with the parliament being enhanced? Do you think there is room for a particular committee to have a role in assessing and monitoring your reports and reporting back to the houses on those, just as the Public Accounts Committee, for example, examines reports of the Auditor-General and reports back to the houses.

Colin Neave — I think there is quite a lot to commend such a proposal because—just using the ACT as an example—we do report to the Public Accounts Committee of the ACT Legislative Assembly and that works very well. This has only happened since the 1st of July so I think I have been along to the Assembly three times now to talk to the Public Accounts Committee and I found that a very good way to operate. I think there is much to commend that approach, yes.

Question — I would like to ask for your comments about these new ASIO laws. Just how much power now does the Australian Security and Intelligence Organisation have? I know that Julian Burnside has told me to my face that they are worthy of Nazi Germany.

Colin Neave — We do not have any jurisdiction in relation to ASIO and I am not familiar with the detail of those laws so I am really not in a position to make a useful comment.

Comment — But you are aware of them?

Colin Neave — Yes, I am certainly aware of the laws but it is not something that comes across our area of responsibility or indeed expertise and in those circumstances anything that I said would not be a useful contribution, I don't think.

Rosemary Laing — But it is an interesting question isn't it because there are different oversight mechanisms for different areas of Commonwealth operations. With intelligence agencies, there is the Inspector-General of Intelligence and Security and a specific parliamentary joint committee on intelligence and security. The Inspector-General has a complaint capacity I believe.

Colin Neave — Yes, that is right, the Inspector-General is part of that integrity framework which I referred to before and that is where those sorts of issues need to be dealt with.

Question — The success of the Ombudsman depends to some extent on the culture within the bureaucracy and the culture within government. I think it is well known that the first Ombudsman had direct access to the prime minister. In more recent times that has been more difficult. There have been times when government and the bureaucracy have cooperated extensively with the Ombudsman; there have been other times when there has been very strong resistance including, for example, bitter fights about jurisdiction and so on. Could you comment on the culture of cooperation or non-cooperation to your office today?

Colin Neave — Well since my time as Ombudsman I have been very pleased with the level of cooperation. We have completed reports on some very controversial areas such as suicide and self-harm in detention centres. We discussed the content of that report with the Immigration department as it was then called and we were in fact very pleased at the level of cooperation that we received. We are continuing to monitor the compliance with the content of that report but overall I have been very pleased. I cannot say that I have been pleasantly surprised because I am not; I would expect cooperation. But it has gone well.

Question — I am curious of your response to WikiLeaks and the other leaks of information collected by the government. Was that a fair release of information? We have to protect certain information which is not suitable for public disclosure, but as an individual it seemed to me that sometimes the information released is something that should be given to us to give us government transparency. I would be very much interested in your comments.

Colin Neave — Well, once again I have not studied the full detail of what was disclosed as part of WikiLeaks. My own view is very supportive of transparency in

government. I think that there are good reasons for governments being very open and everyone hears politicians all the time saying that there is very strong support for transparency but I am really not in a position to make a judgement about the particular WikiLeaks occurrences. Rather, what I would say is that we generally support—in fact all Ombudsmen generally support—the provision of information to the community where that does not involve breaches of information privacy and a whole lot of other issues which might be relevant. A general commitment for transparency in government is part of any Ombudsman’s approach.

Global Development: The Long-term Context of Australian Development *

Ross Garnaut

I am going to say a few things about the current state of the Australian economy and the international dimensions of that and then I am going to share with you some work in progress and things I am thinking through on big longer term developments in the global economy that will feed back strongly into Australian opportunities and challenges.

For the moment, these are hard days for the majority of Australians who mainly depend on work for their livelihood.

Wednesday's national accounts tell us what analysis told us to expect: real income of Australians has fallen for two quarters in succession. Our population growth makes that a large fall in average income. Regrettably, there is much more of that to come.

Your real income may have increased if you have many more assets and income from them than the Australian average. But for most Australians, employment and wages mainly determine the standard of living. Many others in small business have fared about as well as wage earners. The ratio of employment to population has sagged continuously since the China resources boom went into retreat in the third quarter of 2011. Real wages have fallen over the past year.

It is worse if you are young. Youth unemployment has grown much more rapidly relative to total unemployment than in earlier downturns.

Dog days indeed.

The good news is that the exchange rate is again heading down and wages are not rising to compensate for the associated rise in domestic prices. After the mismanagement of the China resources boom from 2003, the average Australian standard of living has to fall if we are to restore full employment and share equitably the pain of the dog days.

The fall in Australian living standards was rendered inevitable by how we managed the salad days—inevitable, but let no one kid themselves that it is easy for the people

* This is an edited transcript of a lecture presented in the Senate Occasional Lecture Series at Parliament House, Canberra, on 5 December 2014.

most affected by it. A wise government led by a wise society would be thinking of how it could cushion the blow to ordinary Australians by ensuring that discretion favours equity whenever there is a choice between policies with different distributional consequences.

We have had a big productivity growth problem since the early years of the century. Don't kid yourself by looking at labour productivity changes that are boosted by the huge investment levels of the resources boom. Capital has a cost. What matters most for sustainable increases in living standards is total factor productivity, and the latest numbers give us no reason for joy.

It is not an easy matter to define the policies that can contribute to re-establishing substantial growth in total factor productivity. It is harder still to build support for productivity-raising reform and to make it work in practice. I talked about candidates for reform in last year's book, *Dog Days: Australia after the Boom*. There are no quick fixes. Policies to lift total factor productivity have to be thought through carefully and implemented steadily over many years.

We have a long-term budget problem—a big one. We should be making sure that we are not doing anything to make it worse, that we are aware of how much ground we have to cover and planning and gradually putting in place the policies that will cover that ground.

But the priority for the immediate future is to restore enough growth in economic activity to stop the deterioration in employment relative to population and to start the repair. Apart from its importance to the living standards of ordinary Australians, this will do more than anything else to improve budget outcomes in the next couple of years. It will also help to re-establish a political basis for productivity-raising reform.

The centrepiece of a program to restore sustainable growth in employment is a big real exchange rate depreciation—a big fall in the nominal rate, without the price effects of depreciation being passed through into wages. Avoiding wage increases in these circumstances is important enough to make the Senate discussion of Defence Force pay and conditions a factor in the battle for restoration of full employment. Jacqui Lambie has full employment in her hands.

More than half a century ago, my athletics coach at Perth Modern School, Jerry Hare, used to teach me that time wasted over each hurdle was time wasted in the race. We have wasted a couple of years above the exchange rate hurdle. We now have to get the front foot on the ground quickly so we can start running towards the next hurdle. It is nearly two years since I first put a number on the amount of real depreciation that was

necessary for us to return to sustainable growth in employment. I said 20 to 40 per cent from the US\$1.05 at the time. Twenty per cent would be 84 cents. We reached that number just minutes after the ABS released the national accounts on Wednesday and returned there yesterday. That is good news.

The middle of my range was 73.5 cents, and the most that might be required was 63 cents. That is the fall in our dollar. Excellent modelling by Janine Dixon and her colleagues in the Centre of Policy Studies at Victoria University for the Melbourne Economic Forum in July suggests that the middle of the dog days range is the real depreciation that we will need to restore full employment sustainably. With the depreciation of other resource currencies, the yen and the won against the dollar; the time wasted above the hurdle; and the limited response so far of investment in the trade-exposed industries, the middle of the range now may not turn out to be low enough.

Let us not waste any more time floating over the exchange rate hurdle. Let us decide to deal with any concerns about a housing bubble in the right way, with housing measures—first of all the removal of the irresponsibly low risk weightings for housing lending in assessment of the banks' capital adequacy. That will free the Reserve Bank to set official cash rates according to the needs of the economy as a whole rather than the risks of housing. That means moving cash rates down towards the lower levels currently in developed economies in the northern hemisphere. That is what will bring the exchange rate down.

Let me say one more thing about my old sports master Mr Hare, lest the modesty of my own achievements on the track encourage doubts about his authority. Jerry Hare had also been the coach of Chilla Porter, whose legendary struggle with American world record holder Charles Dumas in the high jump at the Melbourne Olympics kept us glued to our radios late into the Perth afternoon, as the evening shadows dimmed to night at the MCG before the lights. Most of you here are about my age, so you will remember how the previous Olympic record was equalled or broken 10 times before Dumas climbed half an inch higher to victory. Chilla's son, Christian, is a member of this parliament and can share more of the story with you.

So, when you hear Mr Hare telling you not to waste time over the hurdles, you had better take note of his advice.

I thought I would get the dog days out of the way at the beginning so that I could spend most of the lecture on longer term global development issues, with some reference to how these affect Australia. The rest of the lecture will focus especially on one big question of global development and its effects on Australia: how global

savings have been tending to exceed global investment in the twenty-first century, how this has led to unprecedentedly low real interest rates for long-term debt, and how new approaches in the developed countries to public investment at home and abroad are necessary to secure full employment in the developed countries. Judicious developed country investment in income-earning infrastructure in the developing countries can accelerate growth in the latter at a crucial time.

I find it useful to think of the world economy as having three parts. Obviously every country and every part of every country is unique, but we have to think in broader categories if we are to speak of the world as a whole. So, I find it useful to think about developed countries, developing countries and underdeveloped countries. The developed countries are those like us, which enjoy the high living standards that come from full absorption of the benefits and effects of modern economic growth. Ordinary people in all of the developed countries have standards of living—of consumption, of material comfort, of health and longevity—in many ways beyond those of elites of any earlier generation of humanity. For all of our problems, being in the developed countries of 2014 is a good place to be.

And then there are the developing countries, which are most of the world's people, which have put their foot on the escalator of modern economic development and are moving towards the income levels and material standards of living of the developed countries but at varying rates. Most that get on that escalator on average keep moving, but at different paces and with bumps in the road, with quite a lot of thought being given to what will determine whether they eventually get there. And then there are the underdeveloped countries, which have not succeeded in putting their foot on that escalator.

The developing countries are experiencing growth in living standards at varying rates, but usually at considerable rates and on average much faster than the rate of increase in living standards in the developed countries.

In the underdeveloped countries, on average, there is no growth in living standards at all. Here we are talking of around a billion of the seven billion members of humanity. I found very useful and interesting Paul Collier's book *The Bottom Billion*, talking about the phenomenon of the underdeveloped countries. Most of those are in Africa; some are in our immediate region—I will come back to that.

I see the only stable end point of global development as being the whole of humanity joining in the high standards of living that people in the developed countries currently enjoy. Obviously, there have to be major modifications of that or the pressures on resources would destabilise everything, not least through anthropogenic climate

change. But all the technical means are available to reconcile one day all of humanity having the standards of living that we enjoy without destabilising the fundamentally important dimensions of the natural environment.

It will be a standard of living with different components. Obviously, there will be much less consumption of fossil fuels—at least without major measures being taken to abate their environmental consequences. There will be different patterns of consumption. But everything we know about development and the way that humans can gain satisfaction from modern invention tells us that what I call the maturation of economic development is possible. Not only is it possible; it is the only stable end point of modern economic development.

For the developed countries, while our material standard of living is high compared with earlier generations of our species, we nevertheless are facing challenges of a kind that most people in developed countries have not faced for a very long time. We have seen in virtually all the developed countries, stagnation in living standards since the Great Crash of 2008. And yet everywhere there is still an expectation of each generation living better than generations before—an expectation created in earlier eras of economic development. So the stagnation in living standards is the source of some disappointment and tension.

In all the developed countries, there has been a marked slowdown to very low levels in productivity growth since 2000. In the most advanced countries, productivity growth since 2000 is proceeding less rapidly than at any time at the frontiers in the leading countries since the early days of modern economic development from a millennium ago. This has been the subject of some discussion in the economic literature.

A famous paper by Robert J. Gordon published by the National Bureau of Economic Research in the United States has put forward the data and some hypotheses that in his view suggested we may not see again the rises in productivity and therefore of living standards that we had seen in earlier periods of modern economic development.¹

It is worse than that for ordinary people in many developed countries, and in the United States, living standards of people at the median, in the middle of the distribution, are actually lower now than they were three decades ago. It is not quite so stark in Japan and Europe but it is heading in that direction.

¹ Robert J. Gordon, 'Is US economic growth over? Faltering innovation confronts the six headwinds', National Bureau of Economic Research working paper no. 18315, August 2012.

In Australia and in other English-speaking countries plus Spain, the consequences of low productivity growth were masked for a while by an extraordinary housing and consumption boom from the turn of the century to the Great Crash of 2008 that was unsustainable. It was funded by our banks borrowing abroad in wholesale markets. It had to come to an end. Well, it came to an end in cataclysm in other developed countries. It didn't end in catastrophe in Australia. The better end here was partly a result of quick-footed policy, but that policy was only viable because of our special fortune in being beneficiaries of an extraordinary China resources boom—the strongest period of growth over a long period in any country ever, in a country that happened to be the world's most populous country and the most energy and metals intensive growth that any country has ever had. That all generated growth in demand for those commodities which Australia was especially well placed to supply.

So that postponed the effects of declining productivity on the Australian community until all those changes in China changed again. One can date the second change from the September quarter of 2011. The change was not so much a reduction in the Chinese rate of growth. There has been a reduction of a couple of per cent in the average rate of growth in China since then, but much more importantly there was a change in the nature of Chinese growth. From 2000 to 2011, Chinese growth was more investment intensive, more energy and metals intensive than growth anywhere has ever been. This was part of a brilliantly successful growth strategy that turned China into a great economic power and raised average living standards of most of its people by large amounts. But this pattern of growth had adverse consequences, to which there were political reactions and which led to a reshaping of priorities.

One consequence was the old pattern of growth was associated with rapidly widening inequality in the distribution of income. The Chinese Government, by 2011, had decided that that needed to be corrected. The old pattern of growth had to be modified. And the old pattern of growth was very damaging to environmental amenity and stability, both within China and in the world as a whole. And so, local and global environmental amenity became an important objective of Chinese policy. The Chinese economy is a big ship. It takes a long time to turn around. You see discussion of new policies going back as early as 2006.

The new approach was embodied in the 12th five-year plan from 2011 to 2015, and during that period we have seen more and more policies put in place to reflect the new priorities in China. With each passing year, these new policies have stronger effects, and these effects have been apparent in the statistics on Chinese development since about 2012. Broadly, the changes that the Chinese Government wants in the pattern of growth are being implemented successfully. It is very hard; there is resistance politically from parts of the Chinese polity. Some things can and will go wrong,

because you can't make change on that scale without taking risks with economic stability. But so far you would have to say the changes are in the direction the government is seeking.

One consequence is that what had been extraordinarily rapid growth in Chinese demand for metals and energy turned into more moderate growth in demand from 2011, especially from 2012. In fact, for the two central commodities in our resources boom—coal and iron ore—there is now very little growth at all, and looking into the future there may be relatively little growth. So in the first decade of the century Australia had a big cushion against some of the challenges that were facing other developed countries, but that cushion has been pulled away in the last few years. It is still being pulled away—and we are going to take a while in getting used to the consequences and managing the consequences of all of that.

I see a marked slowing of productivity growth as an underlying problem of the developed countries—which means we can't rely on average incomes rising in the future as they have for many generations. But there are other changes going on that are also putting stress on the developed countries. For productivity, there are things that we do not understand about where it is likely to go next. There is even a question of whether we properly can measure productivity, because in some areas of our life we have had new commodities and new services that greatly improve the quality of life, but those qualitative factors are not properly represented in the statistics. But nevertheless, measured well or not, the reality of low and—in the case of Australia since 2005—negative total factor productivity growth of the traditional kind means that there is much less incentive for investment, business investment, in activities of the traditional kind, giving employment of the traditional kind. Levels of business investment have been low this century, and especially since the Great Crash of 2008, in all of the developed countries.

Amongst the other challenges, a common theme across all the developed countries is the consequence of ageing. People are living longer and having less children and, as a result, average age of population is growing very rapidly. In the early years—and this looks like it is going to be a long period in most countries—that leads to increases in savings rates, as people prepare for longer retirements.

So we have lower incentives for business to invest, lower investment, at the same time as we have higher savings. And since the Great Crash of 2008 we have seen both household and government tendencies to save more, and in the case of governments there has been a fairly general wish to consolidate budgets, to reduce deficits, in response to the increased indebtedness that was incurred during the financial crisis.

And, in the case of private households and businesses, there has been a tendency to want to reduce debt, for precautionary reasons, after the disruption of 2008.

A combination of all of these things is leading to substantially higher levels of savings and substantially lower levels of business investment, and that means a tendency towards reduced demand in all of our economies, higher unemployment and lower economic growth. So that is a common story across the developed countries. The consequences of ageing are not as severe in those countries which have high levels of immigration, and Australia is one of those. In fact, Australia is in the front of the developed countries for that, but the factors behind the tendency for savings to run ahead of investment are important even in those countries.

One consequence of higher savings and lower investment in the developed countries as a whole is tendencies to lower interest rates. There is a bit of a tendency, after the global financial crisis, to see a period of very low interest rates as simply being part of the process of recovery from the financial crisis, to see the central bank interventions keeping cash rates low, short-term interest rates low. In the case of, at various times, Britain, Europe, Japan and the United States, a new phenomenon called quantitative easing has been introduced, where central banks are exchanging assets that can be turned into cash as they buy back government bonds from the private sector. Quantitative easing has been putting more money into the community with a view to reducing interest rates and encouraging business activity.

There has been a tendency to see lower interest rates over the last half-dozen years as being significantly a result of the crisis and to the policy response to the crisis. But I think there is a fair bit of evidence that more than that is happening—that we are entering a world in which long-term interest rates are much lower on an ongoing basis than they used to be. The most common long-term government security in most countries is a 10-year bond, and the interest rates on the 10-year bond are lower in real terms than they have ever been in almost all of the developed countries: last night, at 2.23 per cent in the US; 1.99 per cent in the UK; 0.77 per cent in Germany; 0.44 per cent in Japan; and, this morning in Melbourne, 3.01 per cent in Australia. That is the rate at which the private sector is prepared to lend to government on a 10-year basis, and in some of these cases these are negative rates in real terms. We have not been in this territory before. But we were actually getting into it before the financial crisis.

Amongst the evidence for that, you might remember the celebrated, now discredited, Chairman of the Federal Reserve, Alan Greenspan, talking, about a decade ago, about the conundrum that the Reserve was trying to raise interest rates by raising the cash rate and finding that long-term interest rates did not move at all or actually fell. I think we can now interpret that as an early sign of this new world in which the weight of

savings in excess of investment was depressing long-term interest rates. And, recently, we have had the United States Federal Reserve withdrawing quantitative easing, withdrawing the unusual monetary policies of buying up government bonds. But long-term interest rates have actually fallen since they stopped quantitative easing. So we are in a new world of, I think, for a long time, if not permanently, much lower long-term interest rates.

Now, being in this world has a lot of consequences. One is a very fundamental consequence for the distribution of income within societies. Some of you may have read the celebrated recent book by the French economist Thomas Piketty, *Capital in the Twenty-First Century*. It has been the best-selling economics book of our time. If you take the first couple of years after publication, it is, I think, the best-selling economics book ever. Not many people bought and read *The Wealth of Nations* in the first few years! Piketty argues that we are in for a world, in future, of widening and widening inequality and income distribution because we are going to have a rate of interest above the rate of growth—that those who already have capital will be accumulating it at that high rate. He notes a lot of historical data that shows that there has been a tendency for rates of return on low-risk investment, like government bonds or land, to be around four to five per cent in real terms, after inflation, right back to the eighteenth century; and he quotes extracts from Balzac and Jane Austen to show their principal characters talking about the wealth that the man you marry will have to have if you are going to live in the style a gentlewoman wants to live in—and that is all premised on long bond rates or yields on land assets of around four or five per cent in real terms. Piketty says that will stay there like that forever, and therefore we are entering a period—and he talks about structural reasons why this will be the case—where inequality will grow wider and wider and we will be back to the inequality of the Belle Époque in Europe.

That is a very different perspective from that of a number of other economists. The greatest public intellectual of the twentieth century, John Maynard Keynes, wrote a couple of important things in the 1930s that talked about this issue: what will happen to the rate of return on investment into the long-term future? He came to this theme in two places—an essay in his lovely collection of essays, *Essays in Persuasion*, and then in the last chapter, chapter 24, of his main book *The General Theory*. He talks about modern economic development being so productive that there will be productivity growth for a long time. He sees quite a lot of income being saved, especially by current owners of capital. So he says that, so long as we do not make a mess of it with war—well, there was a big war just a decade after he wrote it (or unnecessary depressions) and he wrote a book about how we could stop having them—then the long-term future for the global economy is one in which capital is abundant. The rate of return will fall to very low levels. There will be no special

advantages in income for those who have a lot of capital. For those who are interested in the important things of life—and he would have had in mind the London opera and French champagne—there will be an abundance, so that questions of inequality will not matter very much. He talked about the ‘euthanasia of the rentier’—the person who earns income simply from ownership of capital—with the rentier ending up not having a substantial income. The world he points to is almost the opposite of the world that Piketty anticipates in his book.

If you look at the data in the last decade, it looks a little bit as if Keynes was right. Well, that is only a bit of the story. Keynes had some weaknesses in his view of the world, but the big one was that his world was the world of, if not England, the developed countries—for some purposes the Empire, but not much the colonies of the Empire. Even his interest in Continental Europe was constrained. Friedrich Hayek once criticised him for not being interested in anything that was not published in England. But certainly Keynes did not see a world in which China and Indonesia and India would be enjoying the living standards of the developed countries. If he had, then he would have had to have wondered about whether this huge abundance of capital would come for the world as a whole so early. That was a gap in his thinking. Those are the economic challenges of the developed world.

I will say a little about the developing countries. I have talked a lot about China already. For the purposes we are talking about, we should think of China as a developed country. I think it will be in the range of incomes of developed countries within a decade. It has the tendency towards savings over investment like the developed countries. In all of the developed countries—and I am including China in that category—to maintain full employment and economic growth in the period ahead, you are going to need a lot more investment promoted by the public sector. In some countries, there will be opportunities for that to be in infrastructure, but in many countries we will have to see large-scale investment in income-earning assets in the developing countries if we are going to see significant yields on investment. And that will be helpful to maintaining employment and economic growth in the developed countries.

If this starts to happen, we will see a tendency towards net exports exceeding imports in the developed countries, capital outflow into income-earning development activities in developing countries and greater activity for employment in the export industries in the developed countries.

I think that is the way the developed world will need to shift for its own development reasons and it will be highly advantageous for the developing countries. And there will be opportunities in the developing countries because those developing countries

that have put their foot on the escalator of modern economic growth—the big ones being India and Indonesia, but lots of others—have the capacity to absorb a lot of that sort of capital.

It is a bigger challenge in the underdeveloped countries, roughly corresponding to Colliers' *Bottom Billion*. Today, the bottom billion include all of Australia's island neighbours in an arc of instability, intensifying poverty, high fertility and population growth, at least through Papua New Guinea to Fiji. Collier did not include Papua New Guinea in his bottom billion in 2007 and the persistence then of the struggle for good governance within the leadership justified his hesitation at that time. Regrettably, there is a Gresham's law of corruption in a country with weak institutions. When the currency has been debased, bad money drives out good. The good is forced out of circulation until there has been transformational institutional change.

Debasement occurred in Papua New Guinea this year with the serial dismissal of the anticorruption commissioner and a Law Minister who defended him, of a Public Prosecutor who took his recommendations seriously, and the replacement of an independent with a compliant Police Commissioner—all around the question of whether the system of justice should take action when the anti-corruption commissioner draws attention to prime ministerial breaches of the law. When the head of government is above the law, there is no rule of law. The struggle is now over for the time being in Papua New Guinea and the country's categorisation as part of the bottom billion is unambiguous.

My observations from experience of development in the island countries of the south-west Pacific correspond to those of Collier in Africa and support his main conclusions. Underdevelopment has its origins in problems of governance, which are far-reaching and intractable. Making headway on the problems of governance sets a path to development, but it is hard to get started.

Democracy is often an illusion until institutional weaknesses have been removed by education and drawing on external institutions. The exploitation of valuable natural resources can temporarily create the statistical illusion of development but is usually associated with kleptocratic corrosion of established institutional strengths.

The magnitude of the challenge does not mean that progress is impossible—just difficult, requiring institutional stability, wisely directed institution-building over long periods and often intrusive external support. A number of bottom billion African countries are making headway in the twenty-first century so far, led by Ethiopia with large Chinese support for infrastructure and agricultural and industrial development.

The bottom billion are more important than their current numbers suggest because much higher fertility makes them a rapidly increasing proportion of humanity. We could be confident that the global population will be on a downward path within a few decades despite increasing longevity with all of its benefits if and only if a large proportion of the bottom billion were headed towards entry into the ranks of the developing countries.

International support for development in the bottom billion must take the form of transfers rather than income-earning investments and be justified on development and security grounds. It can contribute to lower real exchange rates and net exports, and therefore on employment in the developed countries, but not to future income for an older population in the developed countries.

Whether we are successful in the maturation of global economic development with all the benefits that come from that really depends not only on the continued success of the developing countries but on getting onto the economic development escalator the people of the underdeveloped countries.

That is a hard task and, failing that, we cannot even be certain that the proportion of people on earth enjoying high living standards will increase over time, even if countries like China and Indonesia and India are growing very strongly. There is a danger that a failure of development in the bottom billion will catch humanity in a Malthusian bog.



Rosemary Laing — Thank you very much, Professor Garnaut. No wonder they call it the dismal science!

Ross Garnaut — Our profession was given that name by the historian Thomas Carlyle because the classical economists were deadset against slavery. They thought it was a terrible institution that defied all of the premises upon which they did their work. Carlyle was a defender of established institutions, of which slavery was venerable and had widespread support. Economists were ‘dismal’ because they said that that venerable institution had to go.

Rosemary Laing — I stand chastened! It is a very depressing picture you paint of the developing world on our doorstep. And from a parliamentary point of view I know that a great deal of work is being done by this parliament and Australasian

parliaments generally in capacity-building in our south-west Pacific neighbours to try to help create the institutions that will strengthen governance and accountability in those societies. I know this is a very broad question, but a successful economy does not have to have its base in democratic institutions, does it? Would you care to comment on that thesis?

Ross Garnaut — That is true; it does not. And of course China is the exemplar of that point. We do not know if we can have a successful developed country without democracy. We will learn that over the next decade or so in China. The Chinese leadership, under the General Secretary of the Communist Party, Xi Jinping, is setting out to improve the Communist Party, to constrain corruption, which is seen by the Communist Party leadership as undermining support and legitimacy, making it more efficient and effective. And I think the model that he has in mind is a model of the platonic guardian. Now, Karl Popper in his great book *The Open Society and Its Enemies* identified Plato as the source of enmity to the open society. He contrasted the platonic view of the world with the democratic open society, where you had government by an elite—and Plato, with his aristocratic background, an aristocratic elite—that had the interests of the community at large and governed benevolently in the interests of the community at large.

Well, I think Xi Jinping was seeking to build a Communist Party around that ideal of autocratic government. We do not know if that will be successful. If it is successful, it will be a very big challenge to democracies which are going through problems of political culture.

In China and in Australia we both face problems of maintaining integrity in government, maintaining public purpose in policy-making, against the pressures of private interests as private interests become less constrained in the pressure that they apply to public policy-making. You see in our current Senate manifestations of those pressures of a kind that we would have thought that we would never see. In recent times, we have seen an influence of vested interests in the policy-making process that certainly is larger, less constrained, more effective, at least than in the late periods of the twentieth century, where public policy and the public interest seemed to be more firmly established.

If Xi Jinping succeeds and our own political systems continue to be more deeply corrupted over time, it won't be felt as an existential challenge to our own form of government in our own society—there will be deep commitment to our democratic institutions in our society. But in other societies that are still making up their minds about political systems, then a successful China will not look so bad against corrupt democracies.

I think we can do much better than we have in recent times. I think it is the responsibility of all of us to make sure we do much better than that. I do not think that Xi Jinping's challenge is an easier one. He may very well fail. We just do not know if you can have an autocratic, developed, market economy that he is seeking to build. That is very important.

I think that when you speak about the pessimism you are thinking about the small countries of the south-west Pacific. I cannot see any system of government that is more certain to work in the interests of broadly based development than a democratic one, in the south-west Pacific. One can dream of a Leninist state emerging and sponsoring effective development like in Ethiopia. One can dream of an efficient—a more or less efficient—military government along the lines of the Suharto regime, in the period leading up to Indonesian democracy, but I think these are foolish dreams in the south-west Pacific. I think that for all of their weaknesses the challenge is to make current institutions work. But let us recognise that current institutions are not working, that there are profound problems, that we Australians have stood by and watched with little demur the disintegration of the rule of law in Papua New Guinea this year. So I think that is a problem for all of us.

Question — You referred in your speech to the housing bubble. In terms of this problem, do you perceive it to be something that regulators should be interested in because it detracts from productive investment or because a correction will create volatility, and whether you think we have got to the point where it is a lean or clean decision and, lastly, whether you think the macro-prudential regulation we have seen in New Zealand is suitable for Australia.

Ross Garnaut — My view of the housing problem is a very simple one: the economy as a whole needs lower interest rates, which will bring about a lower exchange rate. Some people say, and some readings of what the Reserve Bank has said, suggest that they think that the constraint on lowering interest rates is that we have got a bubble in the housing market. I am not so sure, but I sure don't want worries about a bubble in the housing market to stop us from lowering interest rates when the rest of the economy needs it. So, if there is a housing problem, deal with it in the right way, with a housing solution—and a form of macroprudential management of the housing sector is the right way of dealing with it.

My first priority would be normalisation of the extraordinary arrangements we have for risk weighting, for capital adequacy purposes, of bank lending for housing, where banks really have a considerable discretion in how they weight the risk of lending to housing, which means that you have much more highly leveraged lending for housing than for other activities. Banks make a lot more money as a return on investment of

lending to housing than to anything else for this reason, and so you get an artificial focus of lending in that sector.

So I am all in favour of cleaning up that weakness in our regulatory system, which will free the Reserve Bank to reduce interest rates and to thereby bring down the exchange rate so we can get over that hurdle, start employment growing again, and then we can turn our minds to the harder and longer term issues of productivity and the budget.

Question — Staying on housing: the Chinese problem about the vacancy rates in building and housing—what is going to happen there?

Ross Garnaut — I do not know much more than the analysts who follow those specific issues and write about them have been saying. I myself do not see a likelihood of a major disruption of growth in China. The most important thing, from Australia's point of view, that is happening in China is the structural change, which is intended and which is working as intended, which is reducing growth in demand for iron ore, for coal, for some of our other energy and metals products. I think that that will be more. That planned structural change is of more fundamental importance for Australia than the problem of the housing market.

China is now to a very large extent a market economy, and market economies spring surprises; and it would be surprising if some of the surprises to Chinese development are not large, now that it is a market economy. So this might be the first of the big ones, but my basic judgement is that it is not a fundamental threat to ongoing growth in the way the Chinese leadership wants it to unfold.

Question — Just very quickly, following up from the G20 and particularly the finance ministers' G20—I am not sure if they are F20 or what—something called bail-in provisions. There seems to be some very low level chat going around and very bad press on the extension of something called bail-in provisions, globally. Could you comment on that and is it something we ought to worry about?

Ross Garnaut — Well, I like bail-in provisions. Bail-in provisions are a way of ensuring that if banks run themselves imprudently and get themselves into deep trouble and we have to bail them out—as we will because it will damage the rest of the economy if we don't—that their shareholders pay a fair bit of it, rather than the rest of us. And, naturally, existing proprietors of banks do not like the idea of them being the big losers if they have to be bailed out with government guarantees or government provision of capital.

I think it is important to set out the rules for a bail-in, well in advance of a crisis so the managers of banks and their shareholders know the consequences of running too close to the wind. If we had that we would see less running close to the wind; it would be less likely that a future prime minister will be called upon to do what Kevin Rudd was required to do one October afternoon in Canberra in 2008, and extend a blanket guarantee to all of the wholesale debt of all of our banks, and put on the balance sheet of the Commonwealth of Australia, \$178 billion of contingent liabilities. We do not want that to happen again. It is less likely if we have careful plans, set out in advance, of the conditions under which the Australian Government will bail out the banks.

Question — Ross, I would like to draw you out a little bit more on the medium to longer term trajectory of growth in the Chinese economy, because it is obviously so important, as you said, to the global economic outlook, but particularly to the economic environment in which Australian policy will have to be made over the coming five, 10, 15 years or so. The expectation that I heard in your presentation was for China transiting, effectively, to high income levels in the next decade or a bit more. But you raised some questions in response to a question about the governance system that will make that effective.

China has a lot of problems, including the problem of growing old before it has become rich. We have seen that advanced economies have not been too successful in reforming the social and economic institutions to manage that problem. So I would like to hear a little bit more about how you think China is going to effect that transition into higher income levels over the next decade or so, and manage the sorts of problems implied in that aphorism. Maybe—because that is too easy a question!—you can tell me a little bit about what you think about where India is going too.

Ross Garnaut — India first, or I will forget if I give a long answer about China. I think that modern economic growth, internationally oriented, is now pretty well established in India. They have got the problems of a democratic polity—good problems to have, but they are real, large. They have got problems of money and politics like we do and like the Indonesians do. That makes it difficult, sometimes, to introduce first best policies in the public interest. One consequence of having those policies now is that there is not so much uncertainty about political transition as there is in China.

But I think we are likely to see a continuation of reasonably strong growth in India. The short-term challenges are very large. Some of the external payments and public debt issues are quite large. I think India could be helped a lot by large-scale investment in infrastructure from the developed countries and China. So I think the Indian prime minister is wise to be as positive as he is about China's proposed Asian

Infrastructure Investment Bank. I think that that type of thing—that type of institution, that type of lending—can make a very big difference to India. India needs a lot of international capital. It does not need a lot of short-term, volatile capital; it needs long-term investment in things like infrastructure. So that would reduce the risks.

The cooperation between China and India on this question improves the chances that India will come smoothly through the challenges ahead. It is hard for India to grow as fast as China for a lot of reasons. It is a very different society. You do not have the capacity for central control. You might never have had it. The Qing emperor had a different kind of control to the Mughal emperor. And tendencies in the Chinese society lend themselves more easily to very high rates of savings, which were the motor of that extraordinary period of growth in the first 11 years of this century. But, nevertheless, there is a basis there for reasonably strong growth.

On the China questions, when you give a brief discussion of China's long-term prospects, then it comes out glibly, and I do not want to be glib about the challenges that China faces. But my feeling is that all of the purely economic problems are manageable and are more or less in hand. On the problem of ageing, China has been making a big effort in recent years to put in place a broadly based social security program, including large transfers to low-income people in rural areas. There is a very large problem of differential access to basic services in different parts of the country—a very strong urban bias. The current policies are putting quite a lot of effort into correcting that, which is quite important for the issues that you are raising. If those changes work, those reforms, you will have some easing of the labour constraints with people from rural areas able to work for longer in urban areas.

I would see the biggest challenges to China's transition to being a developed country being the challenges of managing the political pressures that will be associated with continued rising incomes, internationalisation of information. And I think we are in unknown territory. I do not know how manageable those challenges are going to be.

I would like to begin by telling you a true story. One validated by the principal actor in it, the former prime minister, Gough Whitlam. He was in London and was invited during a visit to the United Kingdom to give a speech to the good and the great from the city of London in the Mansion House. On this particular occasion the host for the event was the then Lord Mayor of London. Whitlam was thinking what he was going to say by way of a few informal remarks before launching into what was going to be a fairly dry speech about economic policy, but was wondering what possible connection he could make with his host because whereas Whitlam saw himself as a radical reforming Labor prime minister, the then Lord Mayor of London was an arch conservative. So he was reading down a briefing sheet provided by a protocol officer and he noticed just one thing which stood out in the career of the Lord Mayor. And that was that he was a distinguished oarsman. He had rowed for his school, he had rowed for his university and he had gone on to row for Great Britain.

Whitlam stood up—and you can imagine the scene: long tables, beautifully pressed and starched linen, gold and silver, people in livery, black tie and all the rest—and Whitlam says, ‘Your Worship, my Lords, Ladies and Gentleman, I came here this evening thinking that His Worship and I have absolutely nothing in common, but now I find that we are united by one thing, because as you know, he is a distinguished oarsman and I am a politician and the thing that unites us is that we both look one way and go the other’. I had dinner with him once and I asked him if this was true and he assured me it was and took great pride in his witticism.

This notion of looking one way and then going the other obviously has its humorous edge but that edge has progressively been blunted when you look around our society and begin to see what flows from that general phenomenon where individuals and institutions look one way and go the other, say one thing and do something else. You can see it in a whole host of institutions that seem to have had a decline in trust, whether it is corporations (particularly those in the financial sector), churches, religious organisations of one kind or another and, of course, public institutions like parliaments, political parties and politicians. So much so now that you are beginning to see deep and public questioning about these institutions and the individuals who allegedly serve them. Questioning about politics and whether it is still in any sense a

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noble pursuit, about parliament and associated institutions and even about the value of democracy itself.

There have been a range of commentators and some of them are just seeking to achieve a certain degree of notoriety by their comments. Recently on 3AW the broadcaster Tom Elliott actually suggested that it was really time for a 'benign dictatorship' to make tough but necessary decisions. He went on to say that the problem was that we as voters have developed short attention spans and high expectations, that there is something wrong with us, that there is a fault in the body politic and this is a kind of solution. As we will see a little bit later, Elliott is not a lone voice in questioning the place of democracy and whether it is well enough equipped to deal with the challenges we face.

Slightly more thoughtful and nuanced analysis has come from the great journalist and historian of Australian politics, Paul Kelly, who has recently been asking similarly profound questions about whether or not the structure of politics and the way in which it is practised today is capable of addressing the challenges we face. His conclusion, a rather pessimistic one, is that there is something fundamentally broken that needs to be repaired and that this is a fractious polity that has fed in all sorts of ways into the practice of politics in this country which ill serves the national interest.

I don't think that in this there is any particular villain. I know that we like to find the person in the black hat, the single individual that can be blamed for all of this. Maybe some people become the apotheosis of a particular trend, but we need to think much more broadly. This is not about any political party or any political individual, it is rather about a larger set of questions that we need to address. One of the things I think we need to recognise is that we can set this question about the state of our democracy at the moment in a much longer narrative, which is to do with the way in which we tend to forget things, at least to forget their central purpose. One of the ideas I would like to put before you for consideration is that we are somewhere near the end of what might be called a long age of forgetting. A long period in which institutions that were established with great moments of insight which in a sense gave them their foundation, have been allowed to grow to develop all sorts of magnificent elements in their exterior and yet meanwhile the foundations, those insights that gave rise to them, have been forgotten.

Think about an institution like the market. At its most basic form, two people meet at a ford in a river, one is hungry, one is cold, one has wool, one has wheat and they exchange. Or think about certain institutions around the notion of justice, the idea that it just can't be right that because somebody is merely stronger than you they have the right to take from you the property that you otherwise have by right of your own hard

work. These deep insights create the foundations for which institutions are built and yet when you surround them with doctrine and dogma and sometimes magnificent buildings of this kind, what lies at their heart is forgotten. Therefore when you see this long age of forgetting unfolding itself, what comes with this forgetting is an enhanced capacity to betray the very things that these institutions were designed to achieve or the interests that they were designed to serve. We see this in society from time to time with unfortunate frequency these days, where great institutions betray the very ideals for which they were established and are immediately perceived with justification by the wider public as being engaged in hypocritical conduct. When you experience hypocrisy, when you experience people who routinely look one way, go another, say one thing or do something else, the product of that hypocrisy is cynicism which acts as a kind of acid that eats away at the bonds of association within a community or weakens an institution. That is what I think we need to think about in terms of what is happening to our democracy today. One of the antidotes to this particular problem is to go back and to ask yourself, what are the fundamental purposes, what are the fundamental things we need to understand in relation to the institutions we care about and seek to see flourish.

What I would like to do now is to do some thinking afresh in terms of what democracy is actually about and why if you understand what democracy is it will help to explain why the public, and those who are involved in political life, have reason to have concern. Understanding what it is begins to give a sense of why there is such an edge to the public debate about where we are today.

Some people think you can define democracy by a set of particular institutional arrangements. This great place, with the Senate and the House of Representatives at parliament, for many people would seem to be an archetype of what you would expect to find within any functioning democracy, surrounded by things like free and fair elections and all of the panoply of what we would expect because of our experience of representative democracy in this country. So when we look abroad at other systems, if they have something like our institutional arrangements, we might conclude they too are democratic. If they have something different from us then we might question the kind of legitimacy of the democratic claim when it is made. But that is not how one should understand democracy. Different political systems are not in fact defined by the particular institutional arrangements that they make, but rather by a deeper philosophical distinction that occurs.

When I was working on democracy back at Magdalene College in Cambridge University, I argued that the best way to distinguish between political systems is by where the ultimate source of authority happens to lie. In a theocracy the ultimate source of authority is god. In an aristocracy traditionally it was in the virtuous, in a

plutocracy the ultimate source of authority is with the wealthy, in a kleptocracy with those who can steal the most and so on. What we come to understand is that the thing that distinguishes a democracy from other kinds of 'ocracies' is that the ultimate source of authority lies in the persons of the governed. Or sometimes that is shortened to say the ultimate source of authority is in the people. When you understand that this is what democracy is then all sorts of things need to be thought through as a result of that.

The first of those things to understand is that there are certain limitations that apply in any kind of government or system that seeks to claim the legitimacy of being democratic. People look to democracy and they often claim it is the most legitimate form of government. To the extent that anybody wants to make that claim they need to know that when they do so it has to be bound by some constraints upon what they can and cannot do. For example, in a democracy where the source of authority is ultimately located in the persons of the governed, then the notion of them giving consent to be governed is absolutely essential. I just noticed in the display around the Magna Carta at the moment is a little excerpt from the proclamation from Edward I in 1295, when he said, calling the parliament together, 'that which touches all should be approved by all'. So this idea of consent runs very deep through this notion.

Of course in order to be able to give free, prior and informed consent, which we will come to in a moment, it is necessary that you be unconstrained in the way in which you actually come to give this. No one should be able to use any form of compulsion to shape the initial conditions from which you choose to give consent or not. So one of the problematic questions that you have when governments seek to use compulsion not to regulate your conduct, but how you might think, how you might form a view about what constitutes a good life, for example, is that this falls outside what should be licit within a democracy.

One of the problems I was looking at when I was doing my original research was whether or not it was consistent with democracy to introduce something like a compulsory national curriculum, in which a government would be able to determine what is the basic knowledge, what are the basic dispositions that all citizens should have and compel you to come and see the world in this way to some degree. I argued that it was illicit and self-defeating for a democracy to seek to impose such a thing because what they would start to do is not merely reflect the view of the good life but use compulsion to promote a view of the good life. You cannot actually restrict access to the enabling goods that a citizen would need to draw upon in order to be a participant within the democratic polity.

I was in New Zealand talking to a senior official from their cabinet office and they had enacted laws which were effectively requiring doctors, for the sake of their patients, to engage in acts of conscientious objection. I will not go into the details of what they were doing, which was strictly prohibited, but it was the kind of thing that you ought to do for your patients if you were genuinely committed to their wellbeing as doctors typically are. This cabinet official, when challenged about this, said, 'oh well, actually there is no problem with this; we can do whatever we like because we have a democratic mandate. We were actually elected by the people'. Well this is nonsense. There are boundaries set by our Constitution that limit what you can do despite what you think might be your democratic mandate.

But at an even more fundamental level, there are boundaries as to what you could legitimately do, as a democracy. For example, you could not seek to have a percentage of your population in a perpetual state of ignorance, denied the opportunity of the basic good of education which would enable them to make informed decisions. You could not legitimately deny a section of your population access to reasonable health care, so that they are not well enough in order to be able to make meaningful choices in their lives. There are certain enabling goods which in a democracy ought to be available to you as a citizen so that you can discharge your responsibility or exercise your right to be this ultimate source of authority. This is one of the reasons when you look at the condition of Indigenous people, most recently disclosed in the latest report on progress, it is such a troubling thing. Apart from any concern you might have just at a human level, or with a regard for historical justice, this is just a million miles away from what you would expect from a democratic society and fortunately no one that I know of in this parliament says this is a good thing. They are just as troubled as I am by the gaps still yet to be closed.

You need to have a regard in a democracy to the fundamental equality of citizens, that everyone as a citizen ought to be regarded as equal, irrespective of where they live, irrespective of their age, their colour, their gender, and all the other things that might be used to distinguish between people. They don't matter when it comes to the basic notion of being enrolled as a citizen. Because it is all based on this notion about the capacity to give consent, there are some people who may be judged to be too young to make free, prior and informed consent, which is why we have a qualification around the voting age and the movement into the full status of citizenship. But assuming you have that capacity to make such choices, then you are equal.

Now, of course, we have pockets of the population who are invisible or are only partially seen by the political apparatus. At the moment, party politics in Australia is focused on politicians having only a partial gaze when it comes to looking at the Australian public. So you are probably seen with much greater clarity and concern if

you live in a marginal electorate than if you happen to live in an electorate where nothing much seems to swing on the nature of the vote. There will be certain pockets of the population who are judged to have greater influence, either because of their wealth, or their capacity to mobilise resources more generally. They may be seen with a greater degree of clarity amongst the political class than those who don't have that capacity to advance their political interests. I am not talking about government per se, but the machinery of politics, the action of it, says you necessarily notice some people more than others because that is part of the great contest to secure power. That in itself is deeply problematic for democracy.

The other great thing is that if it is the case that the ultimate source of authority lies in the persons of the governed and if that authority is expressed from time to time by the active expression of consent, then the quality of the consent becomes a critical question. The gold standard is free, prior and informed consent. It is this notion of informed consent which has been such a subject of criticism in recent elections and in the general discussion about democracy. It cannot be an informed consent if it is ever based on a lie, a conscious or a moderate falsehood. The only way that you can exercise informed consent in a democracy is if those who are seeking to exercise public power through the result of an election are giving a truthful account of what it is that they propose to do. That they do so without guile, without dissembling, without the kind of qualification that has since been seen in notions such as core promises and non-core promises and all the things which offend a public which knows that they are being gamed by those rhetorical devices. At the moment, as we have seen, politics has got to a point where that truth has become so central, that those contending for power will actually make a virtue of their commitment to keeping promises and not making surprises and things of that kind. When coming to power they then suffer a much greater consequence when they are perceived to have looked one way, gone another, said one thing, and done something else.

I don't think that the people who do this are consciously engaging in hypocrisy any more than I think that bishops in churches who dealt with people subjected to child abuse woke up in the morning and said, 'look today what I would like to do before lunch is engage in a massive amount of hypocrisy in the way we are going to respond because when I go to bed tonight I would like to have a tide of cynicism surrounding this whole issue'. That is not what happens. Hypocrisy of this order is often not so much the product of a deliberate decision but instead it is a product of a kind of unthinking custom and practice which has become the norm. In fact if you go into almost any situation where something pretty unpleasant has happened, and you ask people what they were doing at the time, they will first of all look back and say, 'yes, gosh, I don't know how I happened to do this. This is terrible. I can see the effects of

this'. But equally when you say, 'well what were you doing?', they will say, 'well everybody was doing it; that is just the way things were done around here'.

So we have the politicians with their partial gaze, with their temptation to claim that they have a mandate even though what they do might be at odds with democracy itself, and who will make a promise which they are happy to break or to redefine in some way and to pretend that it didn't happen. I am not suggesting that this is a deliberate thing. I think they too stand in thrall of a kind of unthinking custom and practice where if you talk to them about it they will say, 'well that's just the way politics is; the community understands this, they know when we say it, we don't really mean it'. We are all complicit as an electorate and as a political class in this basic failure within democracy. And those who believe that are wrong, because this is having a very profound effect on trust in not just politics, not just political parties, but in our political institutions.

Trust is a very interesting phenomenon; it actually pops up in the economics literature in quite an interesting way that helps give some sense of what we are wrestling with here. Although we focus a lot on trust, there is a larger question that we need to address, which is far more profound and that is to do with legitimacy. But let us just stick with the trust question at the moment. In this I would like to just pay acknowledgement to Giacomo Bianchino who helped me with some of the research around the statistics here. In economics one of the propositions is that high trust equals low cost and we all can imagine a simple example of this. If any one of us in this room now was to reach an agreement about doing something and we could do so on the basis that we can trust each other to follow through, it might just be as much or nothing more than the symbolic shaking of hands to say 'yes, I have agreed to do this' and you would expect that to follow on. That doesn't cost a lot to do, a handshake and an agreement that will be honoured. On the other hand, if there has been a history of mistrust, in which the agreements have been broken, what people typically do is they begin to increase the costs they are willing to bear in order to bring about the delivery of the promise or the agreement. They might think that there needs to be an extensive contract, an enforcement mechanism and a whole panoply of different devices, the expense of which has to be borne by the system as a whole to do this. High trust systems operate with very little cost. Low trust systems become very expensive to operate because we make allowance for the possibility that the commitments will not be honoured.

Well some of that is happening at the moment. There are very expensive mechanisms that are being put in place to try and deal with the breach-of-trust problem. In the state where I live, New South Wales, there is the Independent Commission Against Corruption, there is now a parliamentary ethics commission, or some equivalent term,

and there are various checks and balances that are put in place. As recent events have shown involving the Labor and the Liberal parties in New South Wales, it is expenditure which is warranted because the evidence seems to suggest that the basis for trust has been eroded and the goodwill of the people has been betrayed. This is not just having effect in terms of the kind of costs, the hard costs that have to be borne, but also there is a cost that goes in terms of the robust character of our democratic polity.

The Lowy Institute poll from 2014 showed that around about 24 per cent of people think that autocracy might be a reasonable solution to dealing with the complex problems that our society faces. Remember the journalist or the broadcaster from 3AW? Time for a benign dictatorship to make tough but necessary decisions? Twenty-four per cent of people think that. More troubling, is that only 42 per cent of 18 to 29 year olds who were surveyed in the Lowy Institute poll actually have a strong commitment to democracy. A majority do not. That is telling us something. I am not saying we should panic, it is not the end of the world, but that is a serious issue to contend with if only 42 per cent, a minority of people, have this very strong commitment. Now why do they lack commitment? Forty-five per cent of the respondents thought of the lack of distinction between the two principal political parties and their policies was one reason, and I will come to that in a moment as to what is happening inside politics, and particularly parties. Forty-two per cent claim that democracy was only serving the interests of a few, rather than the many, the fundamental proposition of democracy being betrayed by the way it was actually being practised. Other systems were believed to have a better chance of dealing with complexity while about 63 per cent of people just took democracy for granted. When you look at the poll yourself, either way this decline in trust in the institution of democracy and the system itself is not just something which has happened overnight, this level of engagement has been progressively declining and it should be a cause for concern.

One of the reasons this has been happening is that our system of public institutions is being infected by the demands and ambitions of private associations. What are those private associations? They are political parties. Let us not forget, political parties are entirely private associations that conduct their affairs in order to contest for public power. One of the very sad things I have seen in New South Wales is the activities of those private associations in which individuals, either for their own benefit or for the benefit of their party, have engaged in conduct of a kind which is calling into question our public institutions, the standing of our parliament, our democracy, and other associated institutions. That is a fundamental issue that we need to contend with. What do we do about the fact that private associations can have such a baleful effect upon our public institutions?

Parliaments do not belong to political parties and they do not belong to individual politicians; they belong to us, the citizens. They are ours for our benefit and to the extent that they are degraded by these private associations, the public good, the public weal is being eroded. Yet political parties clearly can play a useful role as they have within parliamentary systems for many centuries. Not necessarily with the same tight restrictions which are imposed here in Australia. If you look at the way Australian political parties operate in the parliament, they have a degree of discipline which is unknown in the rest of the parliamentary world. There is a far greater history of freedom and fluidity within political parties than you would see here with the operation of the whips. It does vary from party to party here but the general tendency is far more strict than is found to be useful in other places.

The other thing that has happened, is that politics has started to be more about the machine: how you run the machinery of politics, the machinery of gaining power rather than, as clearly as it used to be, having both a shared understanding of the purpose for which power is being sought or what restraint ought to be applied in terms of how it is gathered. In our work at the St James Ethics Centre quite a bit of effort goes into working with the Australian Defence Force, particularly in the area of pre-deployment for soldiers, sailors and airman who are going to be put into places like Afghanistan, Iraq and other places where they will encounter the conditions of asymmetric warfare. One of the key elements that inform what we do is a very interesting statement from the Canadian philosopher, Michael Ignatieff, that the difference between a warrior and a barbarian is ethical restraint. I am not sure what the equivalent of warrior and barbarian is in the world of politics but the notion of ethical restraint becomes essential to how you go about the pursuit and exercise of power if you are not going to destroy the democratic institutions. If all you are thinking about is how most effectively to run the machine of politics without the kind of ideological grounding that makes it matter, then you get yourself into difficulties.

In the practice of politics we have lost some of the deeper human dimensions that used to unite people in earlier decades—certainly in the time that I have been alive. Recently Tom Uren died. He was a left-wing character but he had been on the Thai–Burma railway with Sir John Carrick of the Liberal Party, and like others of his generation had been through some truly awful experiences in war, including the tragic circumstances in which those people found themselves in places like Hellfire Pass. There was something that united their practice of politics which was deeper than just the contest that went for one party against another. It was impossible for these people not to know something of the deeply human experience that made democracy matter and that made the contest of ideas vital. It doesn't mean that they weren't combative, that they weren't committed to their causes but there was a deeper human level that informed them because of their shared experience. In fact I had the privilege of

walking through Hellfire Pass about a year ago and as you listen to the audio that accompanies you, it is a really incredible experience to go there, to see this land terraformed by those prisoners of war and other people from the region who had been enslaved to do this. You hear both voices on that tape, you hear Uren and Carrick, and you think that was something about politics that it had a meaning and depth greater than just the contest, just the machine.

So what we find then is that you put these things together: a decline in trust brought about by the looseness with which the basic promise of democracy that you will be able to exercise informed consent is betrayed, machine politics, private associations contending for power in ways that destroy trust in not just those parties but public institutions, a lack of something deeper and more meaningful that informs those who come into the parliament and the shared experiences that can act as a kind of ballast—that ethical restraint I talked about. And you have an observable and somewhat precipitous decline in trust. But that is not what really matters. There is something far more significant that we stand on the precipice of. As I use words like precipice and precipitous decline, let me again say that I am talking here as an optimist, rather than a pessimist, as it might seem. I think there are ways back from this.

I was standing in the shower one day listening to the radio broadcast describing unfolding events in the deserts of Libya, where Muammar Gaddafi was hiding, and the last moments of his life were fast approaching, and I wondered what was it that Gaddafi lacked that put him hiding somewhere in the desert. Here was a man who had his armed forces, he had vast reserves of wealth, stockpiles of arms, mercenaries on hand for the buying and yet it was him who was hiding, not somebody else. What did he lack? And the thought that occurred to me was that the one thing that he lacked was legitimacy. And the thought that became clear to me as I started to play around with this idea, which I put to you, is that although one can suffer and survive a lack of trust—because we will compensate in the way I described in economic terms by increasing the mechanisms by which we get by, even though we don't trust each other—what you cannot survive is a loss of legitimacy. Because the moment legitimacy is lost no one will deal with you irrespective of the cost. The loss of the very reason for your continuing to exist and to act means that you can no longer continue. You must vacate the field or you will be removed.

I think that at the moment there is a challenge in terms of the legitimacy of our democratic institutions including these private associations, the political parties, and the role of the political class itself. It is not something which can be sheeted home to any particular individual, certainly not at this particular time. There has been over a very long time a slowly rising tide of concern within the electorate. I mentioned the core promise/non-core promise and other things going back to the Labor and Liberal

parties. Wherever you look you can find those who, a thimble at a time if you like, have been pouring some of the sludge into this tide that has been rising. The really bad luck for Tony Abbott—and it is partly bad luck and partly something of his own making—is to be there at the point when the tide was so high, and when he came in and made such a virtue of how he was going to keep his promises and how he was going to reverse the ethical slide which he depicted as having occurred under the Labor Party before, and it had. It is his bad fortune that people grasped on to that little straw that was floating on the tide just before he tipped in the next thimble. He now inherits the consequence of that; he is almost the personal embodiment of that rising tide and what happens when it goes too far. Speculation about his personal fate, in terms of the prime ministership is beyond me; that is a matter for the Liberal Party to decide for itself.

When people look at results in elections like Victoria and Queensland and say ‘oh well, it’s a volatile electorate’, or ‘they don’t really understand us’, or ‘if only we had better communicated’, I think they are grossly underestimating the seriousness of the legitimacy of the political process to the political parties with their business-as-usual machine politics and the fact that the community itself, we citizens, are disengaging and looking other places for our own ways to deal with this. And we are simply not going to put up with it. Either it is going to be fixed or it is going to be broken and I am hoping it is going to be fixed.

Part of this problem of legitimacy is to do with the way in which political ideas are being expressed. You will have noticed it really doesn’t matter what policy issue is being discussed in Australia today, ultimately it is only considered to be a good argument if it can be turned into some kind of expression of economic utility. Even as recently as two or three weeks ago, charities that had been established to try and work to end the scourge of child abuse felt it necessary to go to KPMG, or one of the other economic consulting firms, in order to have a document prepared to show that child abuse costs too much. Now you have to ask yourself what kind of society is it that doesn’t think that it is enough to say that child abuse is just terrible, that it is wrong, and that it ought to be halted on its own terms. Why is it necessary to take that next step to say ‘and also, it costs too much’? Well it is a kind of society that has probably lost confidence in the language of ethics, thinks there is too much contestability about it, and believes the myth that somehow or other economics will provide an entirely disinterested and neutral basis for making decisions.

This way in which so often the ethical dimension in politics is only given a passing nod, but really what you need to know is that we have done the economic calculation, rankles within the community. It means that there is nothing more than simple economic utility that is seen to define the policy-making process. I do think that

within Australia, despite our treatment of Indigenous people, despite the way that boat people are treated from time to time, despite all of that, there is an abiding sense in Australia that there needs to be fairness and an equitable society, that there is an ethical component to what we do. In each of those cases, whether it is to do with budgets, the treatment of boat people is not a plain black and white question. There are ethical arguments to be made on both sides that ought to be respected and engaged with. People of goodwill on both sides will have different principles which they bring to bear but too often we don't have that discussion, it is ultimately reduced to just saying, it is a matter of simple economic utility. I am not saying that we shouldn't think about economics. Of course we should. But if it is the knock-down argument for every policy case it has an effect upon our view about the legitimacy of our system.

So where does legitimacy actually come from? Well partly it comes from the willingness to take the consequences when you have to make very difficult public decisions. There is a wonderful literature which every politician, certainly every member of the executive should read, around an area in political philosophy called 'the problem of dirty hands'. The problem of dirty hands is to do with what happens when you may be called on to violate your own conscience for the sake of some public good. And one of the most powerful and perhaps provocative essays in this literature is by Michael Walzer who in an essay entitled 'The Problem of Dirty Hands' says what we expect from a person who defines their whole life by their commitment of human rights but who then becomes an Attorney-General at a time when terrorists plant bombs in primary schools. The bombs are ticking away and the authorities catch one person from this particular cell of terrorists. They come to the Attorney-General and say: 'Attorney-General, we believe that if we could torture this person, we might save some of the children in order to preserve their lives but you must sign the paper'. Walzer's provocative argument is firstly that the Attorney-General should, for our own sakes, be a person who is so committed to human rights that if ever he was to sign that paper, he would be destroyed by this. He would never look at himself in the mirror ever again with any comfort, he would not sleep well at night; he would be destroyed. But, he says, such is his commitment to public service that he should sign the paper and thirdly, he says, he should insist on being punished for doing so.

Now the exercise of government, I am sure, frequently involves circumstances where people are brought into positions where they have to do things which they would not themselves choose to do. And it may even include from time to time breaking promises which they find themselves unable to keep. The difference at the moment in terms of the legitimacy of our democracy is that this seems to occur without the third step that Walzer argues—without a recognition that this is a serious moral problem in a democracy—that it should be done but I must be punished for doing so. So that it

doesn't become the norm. And this, people would rightly say, is an impossible standard. How can I stand here and expect people who are citizens volunteering to serve in politics to do this? I acknowledge it is a terrible cost. Such is also the case with ministerial responsibility where people will remember Winston Churchill's statement when Singapore fell. He said 'I did not know, I was not told, I should have asked'. In Australia you only hear 'I did not know, I was not told'.

These are burdens where you are going to be held to these impossible standards but we ask people to volunteer for the defence force and go and put their lives on the line with no certainty that they will escape being wounded or killed when they serve. I don't think we should trouble ourselves too much if people want to volunteer in politics for a lesser hazard where they may be held to these impossible standards. But it is a standard we must insist on because our Constitution requires that ministers be responsible and our democracy requires that if you have to break your word, and thereby undo the fundamental grounds for consent, then you must insist that you pay the price for doing so.

Now repairing this at the moment requires a few things. The problem of what constitutes legitimacy is very difficult. Some of it comes from tradition, some of it comes from the integrity of what you do, and I am thinking of tradition with the Magna Carta sitting up there and its 800th anniversary this year and what that tells us about the foundations of our system. Some of it comes from competence and one of the really interesting things in the debate about trust in Australia is how the notion of trust is being redefined in the political arena. It happened some years ago under an earlier government, where they said you can trust us to fix the tax system or trust us to do something. The rearticulation of trust, not about integrity, in terms of 'we will be what we say we do', but that 'we are competent', is a very interesting feature to see in our democracy. And of course, ultimately the legitimacy of democracy comes from consent and the quality of the consent.

Let me finish with a couple of things to do with possible areas of repair. Firstly I think there is a need to have another discussion about the role of the Australian Public Service in this country. I described to you how the political gaze is necessarily partial in these times. Unfortunately that partial gaze is progressively being introduced into the Australian Public Service, which must not have that partial gaze. The one bit of government which must see every single citizen, irrespective of where they live, what electorate they are in, whatever their condition, must be the Australian Public Service. We need to go back to Hawke and that other Keating, Mike Keating, who sought to realign the public service so that it served the interests of the government of the day, and have a really solid think about what arrangements we should be making for the Australian Public Service.

But the other thing I am going to finish off with is an idea that what we should do is look beyond the politics of political parties, look beyond particular institutions and instead try to develop a common ethical foundation for the way in which politics is practised in this country. It should be freely chosen, it should be a voluntary commitment but there should be something which no matter what political party you stand for, no matter what your ideology, no matter whether you are interested in machines or otherwise, you should promise to the Australian people as the ethical foundation for your pursuit of politics. I wrote this some years ago and it is called, for want of a better title, 'the politicians' pledge'. What I hope to do is encourage every candidate in the forthcoming NSW election and then subsequently in federal elections to commit to something like this:

The politicians' pledge

As originally conceived, the practice of politics is intended to be a noble calling, the area in which a citizen might contribute to the establishment and maintenance of a good society. Yet, without voluntary, ethical restraint, the pursuit and exercise of power risks becoming personal, brutal and self-serving; coarsening the polity, bringing public institutions into disrepute and damaging the common weal.

So, consistent with the highest ideals of our profession, I promise that:

In the pursuit of power, I will:

- Act in good conscience;
- Enable informed decision-making by my fellow citizens;
- Respect the intrinsic dignity of all;
- Refrain from exploiting my rivals' private failings for political gain; and
- Act so as to merit the trust and respect of the community.

In the exercise of power, I will:

- Respect the trust placed in me by the people through the ballot box;
- Abide by the letter and spirit of the Constitution and uphold the rule of law;
- Advance the public interest before any personal, sectarian or partisan interest;
- Hold myself accountable for conduct for which I am responsible; and
- Exercise the privilege and discharge the duties of public office with dignity, care and honour.



Rosemary Laing — Let me throw my titles in for the political equivalent of barbarian versus warrior: politician versus parliamentarian.

Simon Longstaff — The difference between a politician and a parliamentarian is ethical restraint.

Rosemary Laing — Ethical restraint, commitment to the ideals of the institution, to the Constitution and to service to the community.

Question — I think that young people have a really good sense of ethics and ethical foundations but I am concerned as you are that they are completely disconnected from the political system. I wondered if you had any thoughts on how young people and their good sense of ethics can be reconnected back to the political system so that we can bring about this common ethical foundation that you have been talking about.

Simon Longstaff — Thank you for that. I agree very strongly with the first point you make, that younger people are brim-full with idealism, but often what they are lacking is hope, that it actually is possible to make a difference. And so the level of engagement that flows is they tend to work on things that they can control themselves in their own friendship group, smaller community things, or sometimes in an online way, where there is a dissipated influence. I see this as partly a product of the baby boomers too often telling younger people to be realistic. I hate being realistic. I am a pragmatic idealist: the triumph of optimism over experience! But I think you can be pragmatic and you can be idealistic. So part of what we need to do is to convince people that the better world we might hope to make as citizens doesn't always require grand gestures. More often than not, it is falling just slightly the right side of each question, and slowly the accumulation of those smaller decisions begins to effect change.

But to engage in politics is going to require a new model of citizen engagement and it is starting to happen. I was invited to north-eastern Victoria late last year. I went to Swan Hill and Yackandandah and over two days about 300 people ranging from about 12 years of age through to 80 came off their farms and out of their shops, to talk about their democracy. I believe that there is a capacity to provide a different scale of engagement which young people are just as likely to plug into because it provides a chance to do something which doesn't have to be huge but is big enough to make a difference. There were people there for example from the northern rivers of NSW who had invited me up, and Tony Windsor was the other person who was there to talk

about democracy. Now I suspect that there may be small-scale community engagement which is going to be attractive and then for people to become involved in practical ways which they can afford with the time and resources they have.

Question — As a long-term resident of the ACT I have constantly felt under-represented. When I arrived in the ACT we had one federal member, Jim Fraser. If we are talking about a democracy how can we better change our model to remove some of the skews that are in our electorates in the way they are set up and the almost fundamental intent by certain political parties to continue to maintain the lack of representation in our federal parliament of a fairly vibrant well-resourced well-educated society like we have in Canberra?

Simon Longstaff — There is obviously a technical aspect to how you do that which I don't know the answer to, but the thing I take from your question is this very interesting idea that somehow the electorate always gets it wrong when it puts into the Senate a mixture of people. You see discussion now about how the big political parties, Liberal and Labor, could arrange the electoral system so as to have fewer minor parties elected to parliament. There is absolutely nothing wrong with our system as it is. The system allows us, if we wanted, to elect all of one party and none of another. It is to do with the attempt by those who control it, to tinker with it, to bring about the result that they would like to have, rather than one that will authentically represent the views of the public, as if the public is constantly getting it wrong. And I think if you keep doing that, it is going to be another issue that begins to call into question the legitimacy of the system. I think the consequence of not fixing the problem which you put your finger on is potentially that it delegitimises that; it looks like it has been set up for everybody. And that is one of the things we would have to look at. But you can only answer that question, if you go back to the one I tried to pose, to understand the proper purpose of the institutions and particularly what democracy actually is. I wish I had a technical answer but I don't.

Question — Could you comment on caps on financial contributions in the context of your ethical analysis?

Simon Longstaff — I am an advocate of the public funding of elections. I would have a different model than the one that exists at the moment, in which there is a public pool, administered by someone like the Australian Electoral Commission, to which any citizen may make a donation and with a capped amount which can then be specified for the use of a particular party of their choice. I am not going to answer your question properly now as it is a very complicated and lengthy answer I would have to give to you but I am happy to share some information later if that would be helpful. I think that too often I see people argue in favour of wanting to support

democracy, when what they want to do is support a partial interest and I think there are better ways to put that in place. So I am sorry that is an inadequate answer but what you ask is a very complex question.

Question — You had a lot of criticism for the major parties and I think it was quite justified. I was wondering what you thought about the minor parties and what they have done in recent times. If you look at the Democrats, they said they would ‘keep the bastards honest’, but often they would not allow the party that won at an election to enact their policies and kept them dishonest. You have got the Greens at the moment refusing to support indexation of petrol but that has been their policy for ever and a day so that is when the electorate gets very volatile and frustrated when even the minor parties are acting in a hypocritical fashion.

Simon Longstaff — I tried not to speak just about the major parties or any individual so it is my fault for not being clearer. The comments I was making applied to the political class and all parties. I think every one of them has played some role tipping a thimble at a time into the situation in which we find ourselves. It is to do partly with the game of politics. Sometimes it is based on a principled position; other times it is just political calculation. I think that all parties play the game as if it is all understood within the limited rules that take place here in the Senate and House of Representatives. It isn't. It bleeds out into the community at large. I believe there is a different kind of politics that can emerge which would be far better at serving the national interest and which would bail out some of this sludge but it is going to be very difficult. But it is only going to happen if politicians in every single party believe that they have a public duty to our democracy and the quality of our polity that comes before the duty to their party. All of them have got to say, we see what is happening here now; we have got to protect our democracy and that has a prior claim upon us.

Politicians at War: The Experiences of Australian Parliamentarians in the First World War*

Aaron Pegram

Sometime around noon on 25 April 1915, a 35-year-old sergeant of the Australian 1st Battalion lay mortally wounded in thick scrub above the beach that would later be known as Anzac Cove. Having come ashore with the second wave attack earlier that morning, men of the 1st Battalion were rushed inland to a position on Pine Ridge to help reinforce the tenuous foothold troops of the 3rd Brigade were holding in the face of growing Turkish resistance. Stretcher-bearers came to carry the wounded man back down the gully, but he refused. ‘There’s plenty worse than me out there’, he said, in what was the last time he was seen alive.¹

Sergeant Edward (Ted) Larkin was among 8,100 Australian and New Zealand troops killed and wounded at Anzac within the first week of fighting.² His body was recovered during the informal truce with Turkish troops in the following weeks, but the whereabouts of his final burial place remains unknown. As such, he is commemorated on the Lone Pine Memorial, alongside 4,934 Australian and New Zealander soldiers killed on Gallipoli who have no known grave. As a soldier, Larkin appears no different from the 330,000 men who served in the Australian Imperial Force during the First World War, but as a civilian, he was among a number of state and federal politicians who saw active service with the AIF during the First World War.

According to figures compiled by the Commonwealth Parliamentary Library, 119 Australian MPs saw active service in the First World War: 72 were members of the House of Representatives, 44 were senators and three served in both chambers. Among them were nine federal MPs who fought while in office, and an estimated twenty state MPs who saw active service abroad during their time in office.³ Not only

* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra, on 15 April 2015.

¹ H.W. Cavell, *Imperishable Anzacs: A Story of Australia’s Famous First Brigade*, William Brooks, Sydney, 1916, p. 78.

² C.E.W. Bean, *The Story of Anzac: From the Outbreak of War to the End of the First Phase of the Gallipoli Campaign, May 4, 1915*, vol. 1, Official History of Australia in the War of 1914–1918, 11th edn, Angus & Robertson, Sydney, 1941, p. xxiii.

³ Nathan Church, Hannah Gobbett, Martin Lumb and Rob Lundie, *Commonwealth Members of Parliament Who Have Served in War: Colonial Wars and the First World War*, Research Paper, 19 September 2014, Parliamentary Library, Canberra, 2014, p. 7. Estimates of MLAs who served in the First World War are based on rolls of honour compiled by the NSW, Victorian and Western Australian Legislative Assemblies.

were these men who debated, decided and legislated for the young Australian nation, but they, like many Australians, were personally affected by the war and nation's involvement in it. As the Labor member for Willoughby in New South Wales as well as the NRL's first full-time secretary, Ted Larkin was among the 10,000 men who enlisted at Victoria Barracks in Sydney within a fortnight of Britain's declaration of war against Germany in August 1914.⁴ To a crowd outside the recruiting depot, Larkin announced this was 'a critical time for our Empire, and I deem it the duty of those holding public positions to point the way'.⁵

The First World War casts an exceptionally long shadow over Australian history. From a wartime population of 4.5 million people, the cost of participating in the conflict was exceptionally high. Within four short years, the AIF sustained over 215,000 casualties, of which 60,000 died on active service, while countless others, and their families, lived with the war's psychological consequences for decades afterwards. Virtually every household and community in Australia was affected by the fighting and debates over the issue of conscription divided Australia along social, sectarian and political lines. The war also had a deep and lasting impact on Australia's political community—not just in the form of the political issues that affected the nation during the war, but on a more private level, impacting on serving politicians in both state and federal politics whose sense of loyalty, duty and patriotism to the broader British Empire led them to become active participants in the fighting.

The First World War is often seen today as a costly and futile slaughter of no real gain or outcome, but in 1914, Australians like Ted Larkin were deeply and personally committed to Australia's military commitment to the conflict. This was mainly due to the fact that Australia was a dominion of the British Empire and shared exceptionally close ties with Britain when war began. The six self-governing British colonies had federated just thirteen years before the outbreak of war, 20 per cent of the population residing in Australia had been born in Britain and, on the international level, Britain still managed Australia's diplomatic relations with the rest of the world. These strong ties to the 'mother country' meant there were few dissenting voices in Australia in August 1914 when German troops invaded neutral Belgium, putting an invasion force within 100 kilometres of the English Channel ports, and Britain declared war.

Australia was automatically at war along with the rest of the dominions when Britain declared war on Germany. This may seem absurd to modern Australians, but the government at the time was willing to accept Britain's decision without question, believing that defending the rights of small countries like Belgium and containing

⁴ Joan Beaumont, *Broken Nation: Australians in the Great War*, Allen & Unwin, Crows Nest, NSW, 2014, p. 21.

⁵ 'MLA for the front', *Mudgee Guardian and North-Western Representative*, 20 August 1914, p. 18.

German expansionism in Europe were core interests for Australia. News that Britain was at war with Germany came in the midst of a federal election campaign where it received unanimous support from both sides of politics. One of the earliest overtures took place at Horsham in Victoria, weeks before war was declared, when the incumbent prime minister, Joseph Cook, announced that if war broke out in Europe all of Australia's resources would be committed for the preservation of the British Empire. His opponent, the leader of the Australian Labor Party, Andrew Fisher, echoed the sentiment at Colac where he famously declared Australia would stand beside 'our own to help and defend [Britain] to our last man and last shilling'.⁶

Recruiting began for the Australian Imperial Force on 11 August in order to fulfil the government's pledge to send Britain a military force of 20,000 troops in the form of an infantry division and a light horse brigade; but by the end of the year, more than 50,000 men were ready for active service abroad. Outside Victoria Barracks, Ted Larkin urged all in public office to lead by example and volunteer for overseas service, but the reality was that very few members in state and federal parliament at the time would have met the strict eligibility requirements. At the start of the war, the



The AIF recruiting office at Melbourne Town Hall, where the federal member for Bendigo, Alfred Hampson, attempted to enlist in 1916, but was turned away owing to his age. Following his defeat at the 1917 federal election, Hampson left politics, lied about his age and successfully enlisted in the AIF. AWM J00320

⁶ Beaumont, *op. cit.*, pp. 16–17.

AIF required applicants to be between the ages of 18 and 35, a height of 5 foot 6 inches and a chest measurement of 34 inches; since the average age of federal MPs at the time was 43, most were either too old or unfit to serve. Recruiting standards were lowered after Gallipoli as mounting casualties and falling enlistment numbers resulted in a greater need to fill reinforcement quotas, so it was not until later on in the war that most MPs could follow Ted Larkin's example.

In January 1916, at the age of fifty-one, the federal member for Bendigo, Alfred Hampson, fronted the recruiting depot at Melbourne's Town Hall where he passed the medical test but was turned away because of his age.⁷ Undeterred, Hampson tried a second time after losing his seat to Billy Hughes in the 1917 federal election. After leaving parliament and lying about his age, Hampson was eventually accepted into the AIF and served on the Western Front in the final months of the war with the 2nd Light Railway Operating Company.⁸

Some MPs had political and religious reasons that prevented them from serving in the AIF, and certainly some felt a moral obligation to their constituencies to remain in Australia. During the 1914 federal election, the senior member of the federal Labor Opposition, Billy Hughes, suggested suspending the election during the international crisis in support of a government of national unity. Hughes' proposal meant elected members would return unopposed, but the idea was considered unworkable and was quickly forgotten.⁹ Federal MPs who felt duty-bound to enlist took a leave of absence and generally came from parties that occupied safe seats, while those in marginal seats were more inclined to enlist after the 1917 federal election.

William Fleming, the federal member for Robertson (NSW), enlisted as a private in 1916 following news that his old Labor opponent, William Johnson, had been killed at Pozières. Fleming was still in camp when his conservative seat was contested by Labor candidate Eva Seery—one of the first women endorsed by a major party to contest the Australian Parliament—who questioned the duration of his training and accused him of 'playing at soldiering' to secure votes.¹⁰ An ardent patriot who opposed conscription, Fleming's personal decision to enlist helped Hughes and his Nationalist colleagues brand themselves as the 'Win-the-War' party, conveying the message that they alone could lead Australia to victory for the imperial cause. Fleming successfully retained his seat and sailed for England five months later as a

⁷ 'Mr Hampson enlists', *The Bendigonian*, 27 January 1916, p. 9.

⁸ War Service Record, NAA, B2455, Hampson, A.J.

⁹ Beaumont, op. cit., p. 17.

¹⁰ 'Mrs Seery at Gosford', *The Gosford Times and Wyong District Advocate*, 3 May 1917, p. 8.

driver with the Australian Army Service Corps. Promoted to sergeant, he was gassed at Péronne in France in September 1918 and returned to Australia after the armistice.¹¹

Some politicians simply could not face the shame of not going to the war. One was James O’Loughlin, the only sitting senator to serve overseas, who enlisted in 1915 and declared to the Defence Minister, George Peace, that ‘If you cannot put me in the firing line, put me as near to it as you can’.¹² Another was Granville Ryrie, a distinguished Boer War veteran and Nationalist member for North Sydney, who wrote to his wife on 4 August 1914: ‘I couldn’t look men in the face again, especially some of my political opponents whom I have accused of disloyalty, if I didn’t offer to go. I simply cannot hold back’.¹³ A major in the part-time militia, and commander of the 3rd Light Horse Regiment, Ryrie typified a number of militia officers who held political positions in the years after Federation. With substantial command and leadership experience backed by years of overseas service, men like Ryrie were fundamental in raising, training and commanding the newly formed AIF before it sailed for the Great War. Promoted to brigadier general, Ryrie was given command of the 2nd Light Horse Brigade which defended the Suez Canal in Egypt against Ottoman incursions, then fought dismounted on Gallipoli, where his men held the southernmost defences at Anzac. Wounded twice on Gallipoli, Ryrie later led his men across the Sinai desert and took part in the long advance across Palestine and into Jordan. He was awarded the Order of the Nile, mentioned in despatches five times, and commanded the Anzac Mounted Division before returning home to his electorate in 1919.¹⁴

Ryrie had a long and distinguished military career that would have helped further his political aspirations in the years after the war, but there was at least one New South



Henry Woollcott, ‘Major General Sir Granville Ryrie’, oil on canvas on cardboard, 53.5 x 42.8 cm, 1919, AWM ART03583.

¹¹ Stuart Piggin, ‘Fleming, William Montgomerie (1874–1961)’, *Australian Dictionary of Biography*, online edition, <http://adb.anu.edu.au/biography/fleming-william-montgomerie-6190/text10639>.

¹² Graeme Powell, ‘O’Loughlin, James Vincent (1852–1925)’, *The Biographical Dictionary of the Australian Senate*, online edition, <http://biography.senate.gov.au/>.

¹³ Ryrie cited in Church, Gobbett, Lumb and Lundie, op. cit., p. 8. For another example, see ‘Major Baird, welcome home by state parliamentarians’, *Bendigo Advertiser*, 6 April 1917, p. 7.

¹⁴ Peter Travers, ‘O’Loughlin, James Vincent (1852–1925)’, *Australian Dictionary of Biography*, online edition, <http://adb.anu.edu.au/biography/oloughlin-james-vincent-7905>.

Wales politician who had risen through the ranks of the pre-war militia, and whose skills and command and leadership experience extended much further than his time in politics. The Liberal member for Armidale, George Braund, commanded the 13th Infantry Regiment on the eve of the First World War and, on the formation of the AIF in August 1914, was appointed commander of the 2nd Battalion. Braund led his men ashore on Gallipoli on 25 April, and for two days held an isolated position atop of Walker's Ridge in the face of growing Turkish resistance. Early on the morning of 4 May, Braund set off to brigade headquarters via a short cut through the scrub. Slightly deaf, he failed to hear a challenge from an Australian sentry who mistook him for a Turk and killed him.¹⁵



Three members of the NSW Parliament in Egypt, several weeks before the Gallipoli landings on 25 April 1915. From left, Sergeant Edward Larkin, 1st Battalion (killed 25 April), Lieutenant Colonel George Braund, 2nd Battalion (killed 4 May) and Lieutenant Colonel John Nash, 2nd Australian General Hospital. AWM H19448.

Larkin, Fleming, O'Loughlin and Rylie all equated war service with an unwavering loyalty to the British Empire, but in South Australia, Australia's entry into the war affected the careers of a number of political figures in very different ways. Germans were the largest non-British group of Europeans in Australia at the time, and reflecting the large population of German migrants that settled in South Australia in the nineteenth century, there were at least seven South Australian MPs of identifiably

¹⁵ Darryl McIntyre, 'Braund, George Frederick (1866–1915)', *Australian Dictionary of Biography*, online edition, <http://adb.anu.edu.au/biography/braund-george-frederick-5340/text9027>.

German descent in parliament when Britain and the dominions went to war with their homeland.

All seven members (five Liberal and two Labor) came under intense public scrutiny at a time when Germans and all things German were openly subjected to hostility. As rumours of atrocity stories from the fighting in northern France and Belgium filtered home, locals directed their anger at some of the state's most respected German citizens. Among them was the Attorney-General and Industry Minister, Hermann Homburg, whose offices in Adelaide were raided by soldiers armed with rifles and fixed bayonets after war was declared. Homburg resigned in January 1915 to avoid embarrassing the government in the forthcoming election, writing of a campaign 'of lies and calumnies against me ... because I am not of British lineage'.¹⁶ The German MPs were considered something of an electoral handicap when the state government lost the election, and mistrust intensified the following year when it was clear that voters in German districts had contributed to South Australia's rejection of conscription at the 1916 referendum. The war gravely affected the political careers of those German MPs holding office in South Australia, with just one of the seven remaining in parliament by November 1918.¹⁷

After Gallipoli, the AIF returned to Egypt where it effectively doubled in size in preparation for the fighting on the Western Front. As soon as the AIF arrived in France in mid-1916, the main challenge facing Australians was matching casualties with a steady stream of willing volunteers. Eight months of fighting on Gallipoli had cost the AIF 26,000 casualties, the same number lost in eight weeks in France in costly actions at Fromelles, Pozières and Mouquet Farm.

In Australia, state-based recruiting committees increased their efforts in urging young men to enlist in the AIF, and certainly local members used public meetings and gatherings to urge the men of their electorate to volunteer. Some led by example, such as Ambrose Carmichael, the Labor member for Leichhardt and Minister of Public Instruction in the New South Wales Parliament, who signed on as soon as the extended age requirement permitted him to do so. In November 1915, Carmichael announced he would personally 'raise a thousand rifle reserve recruits' from the rifle clubs of New South Wales.¹⁸ Enlisting as a private at the age of 44, Carmichael and his willing volunteers entered Broadmeadow Camp in Newcastle where they formed

¹⁶ Ian Harmstorf, 'Homburg, Hermann Robert (1874–1964)', *Australian Dictionary of Biography*, online edition, <http://adb.anu.edu.au/biography/homburg-hermann-robert-7069>.

¹⁷ Jenny Tilby Stock, 'South Australia's German MPs in World War I: the limits of tolerance', p. 7, <http://www.sahistorians.org.au/175/documents/south-australias-german-mps-in-world-war-i-the-lim.shtml>.

¹⁸ Bede Nairn, 'Carmichael, Ambrose Campbell (1866–1953)', *Australian Dictionary of Biography*, online edition, <http://adb.anu.edu.au/biography/carmichael-ambrose-campbell-5506/text9369>.

the basis of the newly raised 36th Battalion—a unit that colloquially became known as ‘Carmichael’s Thousand’.



Unknown artist, ‘Join ‘Car’s’ Thousand’, chromolithograph on paper, 73.4 x 47.6 cm, c.1918, AWM ARTV00817.

and for ‘setting a splendid example of courage and determination’, Ambrose Carmichael was awarded the Military Cross.¹⁹

Carmichael missed the fighting at Messines, but he was promoted to captain and rejoined his unit in Belgium in time to participate in the Third Battle of Ypres. He was wounded a second time a Broodseinde on 4 October, receiving gunshot wounds to his arms and legs which necessitated his evacuation to England and repatriation to Australia in January 1918. Carmichael was a strong advocate of conscription, but his return to Australia in the wake of the defeat of the second conscription referendum led him to appeal for another ‘great sustained recruiting campaign’²⁰ as voluntary

¹⁹ War Service Record, NAA, B2455, Carmichael A.C.

²⁰ Nairn, *op. cit.*

enlistments for the AIF plummeted to an all-time low. He was not expelled from the Labor party after the split over conscription, but he gradually drifted from the party as he invested all his energy in stimulating voluntary recruiting. In February 1918, Carmichael became the chairman of the New South Wales Recruiting Committee, raising yet another ‘Carmichael’s Thousand’ and returning to France with a reinforcement group for the 33rd Battalion in September 1918. He arrived just several weeks before the armistice was signed, and did not see any further fighting.

Carmichael returned to Australia and state politics where he was revered as something of ‘an over-age and mercurial war hero’²¹, but his energy and personal sense of conviction in believing in the cause for which he himself had fought was shared by at least one other state politician who had enlisted in the latter stages of the war.²² Bartholomew Stubbs, the Labor member for Subiaco in the Western Australian Legislative Assembly, enlisted as soon as the eligibility requirements permitted, signing on in Perth at the age of 43 in January 1916. As a member of the Western Australian recruiting committee, Stubbs had publicly voiced his beliefs about the justice in the Allied cause and had spoken at a number of recruiting platforms in the Subiaco area, but believed that leading by example was the best course of action. To reporters of *The Daily News*, Stubbs urged ‘middle-aged men without children or other ties, or whose children have grown up, [to] volunteer before the young married men’.²³

After a period of training at Blackboy Hill, east of Perth, and the Royal Military Academy, Duntroon, Stubbs was commissioned as a second lieutenant and embarked for the Western Front with a reinforcement group for the 51st Battalion. In Flanders in early August, he sent a cablegram confirming he would run again as the Labor candidate in the upcoming Western Australian state election, and on 12 September retained the Subiaco seat unopposed. Two weeks later, Stubbs was shot in the chest and killed during the AIF’s highly successful attack at Polygon Wood near the Belgian town of Ypres. According to an account written eighteen years after the war, the loss of such a popular commander resulted in soldiers of his platoon seeking battlefield justice on a group of surrendering German soldiers whose pleas for mercy were swiftly ignored.²⁴ Stubbs was given a hasty battlefield burial by his men, but the location of his temporary grave marker was lost in subsequent fighting. Stubbs therefore has no known grave, and is today commemorated on the Menin Gate Memorial in Ypres amid the names 6,100 Australians who remain missing from the fighting in Belgium.

²¹ *ibid.*

²² *ibid.*

²³ ‘Another Laborite’, *The Daily News*, 31 January 1916, p. 6.

²⁴ ‘The 51st “Over There”’, *Western Mail*, 20 August 1936, p. 9.



Polygon Wood battlefield in the days after the Australian attack on 26 September 1917. Bartholomew Stubbs was killed leading his platoon during the battle, but his body was never recovered. AWM E00987.

Commenting on the makeup of Australian politics in the decades after the war, Chris Coulthard-Clark writes that the First World War was something of a catalyst for a military influx into state and federal politics.²⁵ The divisive issues such as conscription, inflation, wage freezing and export embargoes had the effect of hardening political views in Australian society, and caused a number of returned servicemen to enter politics before the Armistice. Throughout the 1920s, men who had risen through the ranks of the AIF, occupied command positions or were highly decorated during the war were naturally drawn to a career in politics. Victoria Cross recipients Lieutenant Arthur Blackburn and Private William Currey both entered state politics on their return to Australia, as did General Sir William Glasgow, Major Generals Sir Neville-Howse and Sir John Gellibrand, Brigadier General Harold 'Pompey' Elliott and Colonel Edmund Drake-Brockman.

Some rose to prominence after their war service. Wilfrid Kent Hughes, cabinet secretary and government whip in the Victorian Legislative Assembly in the late 1920s, served with the 3rd Light Horse Brigade on Gallipoli where he was wounded at the charge at the Nek in August 1915. Serving again during the Second World War, he was captured by the Japanese at Singapore in February 1942, and spent three years

²⁵ Chris Coulthard-Clark, *Soldiers in Politics: The Impact of the Military on Australian Life and Political Institutions*, Allen & Unwin, St Leonards, NSW, 1996, p. 122.

imprisoned at Changi, Formosa and Manchuria. Returning to politics, he served as the Member for Chisholm (Vic.) in the House of Representatives from 1949 to 1970. Thomas White, the Minister for Trade and Customs in the first Lyons Ministry, had been a pilot in the Australian Flying Corps. Brought down over Mesopotamia in 1915, White spent three years a prisoner of the Turks, and was the only Australian to escape Ottoman captivity. Another was Jim Fairbairn, the Minister for Air and Minister for Civil Aviation in the first and second Menzies ministries, who had served as a pilot in the Royal Flying Corps in the Great War. Fairbairn was brought down near Cambrai, France, in February 1917 when his aircraft was set upon by a *Jasta* of German scouts. With his arm and aircraft shredded by machine-gun fire, and his face badly burned, Fairbairn crash-landed on the other side of No Man's Land and spent the following twelve months in a German prison camp.

At least one-third of senators and members in federal politics in the late 1940s were First World War veterans, but it is important to recognise that the conflict also shaped the lives of some of Australia's first female politicians. Although Australian women had the right to vote and be nominated for federal election in 1903, it was not until after the First World War that the first female members of parliament were elected. A strong advocate of the suffrage movement and women's rights and welfare, Edith Cowan was the first woman elected to an Australian parliament after her victory in the Western Australian election in 1921. During the war years, Cowan worked for a number of patriotic and humanitarian aid organisations, which included the Australian Red Cross Society, for which she helped with fundraising and starting up the Welcome Home for returned soldiers. For this, Cowan was awarded an OBE after the war, but during it, she was an ardent pro-conscription campaigner and an active member of the Perth Recruiting Committee. Red Cross work played a crucial role in involving women in the war effort and in public life, but the war also had a profound impact on women like Ivy Weber, the first woman elected at a general election in Victoria, whose war years were spent maintaining family and home. Long before she entered politics in the 1930s, Weber received the devastating news that her husband, Lieutenant Thomas Mitchell of the 59th Battalion, had been killed in action at Bapaume.

Just like any other community in Australia at the time, the First World War had a significant impact on the personal and private lives of a number of state and federal politicians whose sense of loyalty, duty and patriotism led them to become active participants in it. Some led by example, not wanting to hide behind the excuse of public position to shirk their duty and do what many political figures were expecting of other men, while others, with extensive experience in raising, training and commanding soldiers, helped raise a voluntary army that served with distinction on Gallipoli, in Sinai–Palestine and the Western Front.

Perhaps one of the reasons why their story remains little known is the fact that no one memorial recognises the service and sacrifice made by both state and federal MPs during the First World War. The three serving MPs who died in the First World War are commemorated on the bronze cloisters of the Roll of Honour at the Australian War Memorial, alongside 102,000 Australian men and women who died on active service since before the Boer War. But they appear without distinction, rank or profession pointing to the very unique community to which they belonged. One of the few sites of commemoration is a small tablet to Ted Larkin and George Braund in the New South Wales Legislative Assembly chamber, which was unveiled in November 1915 and is still there today. The inscription thereon reminds us that the First World War had a significant impact on the lives of all Australians, which included those in public office: ‘In time of Peace they readily asserted the rights of citizenship. In time of War they fiercely protected them’.



Question — My grandfather is Senator O’Loughlin from South Australia who you referred to earlier. You somehow inferred that he was shamed into enlisting. Maybe I inferred that wrongly but it sounded like that. You didn’t mention that he was 62 at the time which makes it a bit difficult for him to be embarrassed about not going. He did prevail on the Minister of Defence to allow him to go and he was eventually put in command of a troopship, appointed a lieutenant colonel and did two trips to Egypt at the age of 62 while a serving senator.

Aaron Pegram — That inference that he was somehow shamed is not correct. I think his remarks to the Defence Minister really point to the fact that he, among many politicians, felt enlisting was his patriotic duty. I believe that he also had a very distinguished career in the militia beforehand, which may have shaped his view that if he could be of service he certainly wanted to go, irrespective of his age.

Question — I am assuming that the members of parliament concerned kept their positions in parliament while serving and that they would have received leave of absence. What arrangements were typically made for dealing with constituent affairs and for campaigning in elections?

Aaron Pegram — This is an issue that I really couldn’t get my head around. The men who enlisted in the AIF appear to be from very safe seats that were not going to be contested. I haven’t found any examples of it in the Australian experience, but

certainly in New Zealand there were two members of parliament from opposite sides of the house that agreed to pair during the war so as to not affect the voting numbers.

But in terms of dealing with local affairs I really get the sense that it was done from afar and these men did take a leave of absence. I get the sense that men who go off to the war occupy safe seats, that they are in a safe position because their constituency is backing them 100 per cent and no one is going to contest their seat; it is almost seen as being disloyal or unpatriotic. In terms of how they manage their constituencies, I will have to get back to you on that one.

Question — I was wondering if you have detected any kind of pattern from the people who enlisted who were serving as MPs as to whether or not they were predominantly pro-conscription or predominantly anti-conscription and whether or not that tells you something about the political climate at the time?

Aaron Pegram — The interesting thing about the two conscription referenda is that they polarise Australia. There is no argument about whether or not Australia should be involved in the war, it is about whether men should be going under their own volition. There isn't a pattern. I get the sense that even though there are pro- and anti-conscriptionists, the men who feel patriotic and compelled to enlist still do so for one reason or the other. So there isn't a pattern I can detect and that is probably because there is a very small percentage of men who enlist while serving members. But certainly it is an interesting question that we can ponder on.

Question — You indicated at the start of your address that the age limit for enlistment was 35. There were a significant number of MPs who eventually fought. Did they enlist after that age limit was relaxed, or did some of them tell a few lies?

Aaron Pegram — Some evidently did tell a few lies. If we take the example of William Johnson, the former Labor MP who was killed at Pozières, I think he was in his mid-50s. He would have enlisted in 1914, so I think there were a few porkies being told there. There is also the increasing age limit as the war progresses. Certainly the men who enlisted in 1914 were among the fittest and strongest in the AIF during the war. That all changes once we go the Western Front where we have this struggle to try and maintain reinforcement quotas so the age limit does bump up. That enables a number of MPs to enlist. There is a sense that, certainly at the federal level, the outcome of the 1917 federal election ultimately decides for some people whether they should enlist or not. There is the case of Alfred Hampson who was defeated by Billy Hughes. Even though he has tried before, the election of 1917 is certainly something that is a great impetus. So that is another thing, as long as the war continues the age limit gets bumped up and more men are being drawn in.

There is also the issue of the militia men who were serving in politics at the time. These men are Boer War veterans who have commanded regiments. Irrespective of their age, they are capable officers, which at the time the Australian Imperial Force simply doesn't have. This is an all-volunteer army that has been formed for the exclusive purpose of serving overseas in the Great War and it needs commanders. Granville Ryrie I think was in his 50s on the eve of the First World War so there are a number of factors that are at play there. Certainly Ted Larkin was amongst the very few that would have fit the age requirements in 1914.

Commonwealth Executive Power and Accountability Following *Williams (No. 2)*

Glenn Ryall

I Introduction

The importance of the High Court's decision in the first School Chaplains case¹ to our understanding of Commonwealth executive power, parliamentary accountability and federalism has been demonstrated in previous editions of *Papers on Parliament*.² This paper further considers these issues by examining the significant implications of the second School Chaplains case.³

In *Williams (No. 1)* the High Court, relying to a large extent on principles underlying parliamentary accountability and federalism, held that the Commonwealth executive did not have the power to enter into a funding agreement with a private company that provided chaplaincy services in a Queensland government school. The Court thereby effectively invalidated the National School Chaplaincy Program (NSCP) and cast doubt over the constitutional validity of a significant proportion of Commonwealth expenditure.⁴

Following *Williams (No. 1)* it appears that the Commonwealth will only have authority to expend public money that has been legally appropriated when the expenditure is:

1. authorised by the Constitution;
2. made in the execution or maintenance of a statute or expressly authorised by a statute;
3. supported by a common law prerogative power;
4. made in the ordinary administration of the functions of government; or
5. (possibly) supported by the nationhood power.

¹ *Williams v Commonwealth* (2012) 248 CLR 156 ('*Williams (No. 1)*').

² See Cheryl Saunders, 'The scope of executive power', *Papers on Parliament*, no. 59, April 2013, pp. 15–34 and Glenn Ryall, '*Williams v Commonwealth*—a turning point for parliamentary accountability and federalism in Australia?', *Papers on Parliament*, no. 60, March 2014, pp. 131–48.

³ *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416 ('*Williams (No. 2)*').

⁴ Ryall, *op. cit.*, p. 131.

Any expenditure of validly appropriated public money that does not fall into any of these categories is invalid.⁵ Thus, in most cases the Commonwealth requires some form of legislative authority in order to expend public money.

While these general principles can be discerned from the case, *Williams (No. 1)* is also ‘fundamental in nature, and like all such cases that involve major changes and development in our understanding of the Constitution, it will take many decades of future cases for it to be refined into a comprehensible and logical set of principles and rules’.⁶ On 19 June 2014, the High Court handed down its decision in *Williams (No. 2)*—the first of the potential line of cases to provide this greater clarity.⁷

As the Commonwealth Attorney-General has stated, the decision in *Williams (No. 2)* was quite limited;⁸ however, the decision is important to the extent that it:

- (again) invalidated the NSCP and all payments made under it;
- detailed the High Court’s apparent frustration at the Commonwealth’s continuing refusal to accept limitations on its executive power;
- resulted in all payments made under the chaplaincy program becoming debts owing to the Commonwealth which the Commonwealth subsequently decided to waive; and
- did not consider broader questions in relation to the validity of the legislative response to *Williams (No. 1)* (with the result that there remains uncertainty surrounding the constitutionality of many Commonwealth spending schemes).

This remaining constitutional uncertainty means that ‘governments should be cautious about their spending and do their best to ensure that government programs involving payments or grants to third parties are adequately supported’.⁹ In this context, it is also important to emphasise the benefits of establishing spending schemes in primary legislation.

⁵ Anne Twomey, ‘Post-*Williams* expenditure—when can the Commonwealth and states spend public money without parliamentary authorisation?’, *University of Queensland Law Journal*, vol. 33, no. 1, 2014, pp. 9–10.

⁶ *ibid.*, p. 9.

⁷ More recently, arguments based upon the *Williams* principles have also been advanced in a challenge to the offshore detention regime which is currently before the High Court. See Transcript of Proceedings, *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2015] HCATrans 160 (24 June 2015).

⁸ Senate debates, 19 June 2014, p. 3412 (George Brandis), 23 June 2014, p. 3555 (George Brandis).

⁹ Twomey, *op. cit.*, p. 27.

II Chaplaincy program invalidated (again)

A The legislative response to Williams (No. 1)

The immediate legislative response to *Williams (No. 1)* was the *Financial Framework Legislation Amendment Act (No. 3) 2012* (Cth) (the FFLA Act). The FFLA Act itself purports to retrospectively provide legislative support for over 400 non-statutory funding schemes whose validity was thrown into doubt following *Williams (No. 1)*. Furthermore, future additions to the list of spending schemes can be made by the executive by the making of a disallowable instrument (the power to do so was provided for in new section 32B of the *Financial Management and Accountability Act 1997* (Cth) (the FMA Act)).¹⁰ The list of items purporting to authorise executive spending schemes are contained in Schedules 1AA and 1AB of what is now known as the Financial Framework (Supplementary Powers) Regulations 1997 (Cth) (the FF(SP) Regulations).

The FFLA Act has been subject to significant criticism,¹¹ including concerns expressed by the former Chief Justice of New South Wales, James Spigelman. Specifically, the former Chief Justice noted that ‘the Commonwealth proceeded to virtually replicate its view of the Executive power in the form of a statute’ and expressed concern that this may amount to a breach of the rule of law. At a general level, Spigelman expressed concerns about the Commonwealth ignoring the limitations on its executive power in the Constitution—particularly after *Pape*.¹² This issue is discussed in further detail below.

B The challenge to the legislative response

In *Williams (No. 2)*, Mr Ron Williams (the parent of children who attended a Queensland government school in which services were provided under the NSCP) challenged the legislative response to *Williams (No. 1)*. Specifically, Mr Williams challenged the purported authorisation of funding of the chaplaincy program in the FFLA Act on the basis that:

- (a) there was no Commonwealth head of legislative power to support the authorisation of expenditure on the chaplaincy program (the narrow submission); and

¹⁰ Ryall, *op. cit.*, p. 143. This provision is now section 32B of the *Financial Framework (Supplementary Powers) Act 1997* (Cth) (the FF(SP) Act).

¹¹ *ibid.*, pp. 143–7.

¹² *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1; James Spigelman, ‘Constitutional recognition of local government’, Speech delivered at the Local Government Association of Queensland 116th Annual Conference, Brisbane, 24 October 2012, pp. 12–13.

(b) section 32B impermissibly delegated to the executive authorisation of expenditure because the relevant programs were all identified by regulations which could be made and amended by the executive (the broad submission).¹³

The High Court rejected arguments that the chaplaincy program was supported by a Commonwealth head of legislative power and therefore upheld the plaintiff's narrow submission—that is, it found there was no head of legislative power to support the expenditure of funds on the chaplaincy program. The Court, however, left undecided the question of whether section 32B was invalid because of an impermissible delegation of the power to authorise expenditure to the executive. It was not necessary for the Court to decide this point because even if section 32B were valid it still did not support the chaplaincy program. As Anne Twomey notes, for present purposes, the Court 'read down s 32B as not applying to support expenditure on those programs that do not fall within a Commonwealth head of power'.¹⁴ The Court thus clearly affirmed the requirement for a constitutional head of power to support spending programs.

C No head of legislative power

As noted above, ultimately, the central question in *Williams (No. 2)* was whether the chaplaincy program was supported by a Commonwealth head of legislative power. Both the Commonwealth and Scripture Union Queensland (SUQ) argued that section 32B and the item in the regulations specifically providing authority for the chaplaincy program were supported by:

- the 'benefits to students' limb of section 51(xxiiiA) of the Constitution; and/or
- the express incidental power (section 51(xxxix)) taken together with sections 61 or 81 of the Constitution.

SUQ also argued that the item was supported by the corporations power (section 51(xx)).¹⁵

1 Benefits to students power

Section 51(xxiiiA) of the Constitution provides the Commonwealth Parliament with the power to make laws with respect to:

¹³ Anne Twomey, 'Déjà Vu—the Commonwealth's response to the Williams Case', *Constitutional Critique* (Constitutional Reform Unit, Sydney Law School), 3 July 2014, http://blogs.usyd.edu.au/cru/2014/07/deja_vu_the_commonwealths_resp_1.html.

¹⁴ *ibid.*

¹⁵ Australian Government Solicitor, 'Further challenge to the Commonwealth's power to contract and spend money on school chaplains', *Litigations Notes*, no. 24, 6 November 2014, p. 3.

the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances [emphasis added].

The Court held that the word 'benefits' in section 51(xxiiiA) 'is used more precisely than as a general reference to (any and every kind of) advantage or good'.¹⁶ Therefore, for something to come within the meaning of 'benefits to students' the relief should amount to 'material aid provided against the human wants which the student has by reason of being a student'.¹⁷ While the chaplaincy program had 'desirable ends' ('strengthening values, providing pastoral care and enhancing engagement with the broader community'), the Court held that 'seeking to achieve them in the course of the school day does not give the payments which are made the quality of being benefits to students'.¹⁸ The provision of chaplaincy services at a school therefore cannot be characterised as falling within the meaning of 'benefits to students' in section 51(xxiiiA).

2 *Express incidental power*

Section 51(xxxix) of the Constitution provides the Commonwealth Parliament with the power to make laws with respect to:

matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

The Commonwealth argued that the authorisation scheme established in the FFLA Act was incidental to section 61 of the Constitution (relating to executive power).¹⁹ The Court also rejected this argument on the basis that:

... to hold that s 32B of the FMA Act is a law with respect to a matter incidental to the execution of the executive power of the Commonwealth (to spend and contract) presupposes what both *Pape* and *Williams (No 1)* deny: that the executive power of the Commonwealth extends to any and

¹⁶ *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416, 458 [43].

¹⁷ *ibid.*, 460 [46].

¹⁸ *ibid.*, 460 [47].

¹⁹ Australian Government Solicitor, *op. cit.*, p. 4.

every form of expenditure of public moneys and the making of any agreement providing for the expenditure of those moneys.²⁰

The swift rejection of this argument appears to indicate the High Court's frustration at the Commonwealth's continuing refusal to accept limitations on its executive power. This is discussed in further detail below.

3 Corporations power

Section 51(xx) of the Constitution provides the Commonwealth Parliament with the power to make laws with respect to:

foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.

SUQ argued that section 32B, in combination with the relevant item in the regulations that purported to provide legislative authorisation for the chaplaincy program, was supported by section 51(xx).²¹ The Court noted that SUQ's argument in this respect 'may be dealt with shortly'.²² The Court held that a law which gives the Commonwealth the authority to make an agreement or payment of the kind in question is not a law with respect to trading or financial corporations because:

The law makes no provision regulating or permitting any act by or on behalf of any corporation. The corporation's capacity to make the agreement and receive and apply the payments is not provided by the impugned provisions. Unlike the law considered in *New South Wales v The Commonwealth (Work Choices Case)*²³, the law is not one authorising or regulating the activities, functions, relationships or business of constitutional corporations generally or any particular constitutional corporation; it is not one regulating the conduct of those through whom a constitutional corporation acts or those whose conduct is capable of affecting its activities, functions, relationships or business.²⁴

As Simon Evans notes, this makes it clear that the 'Commonwealth can no longer assume that contract is available as a regulatory tool whenever the entity it seeks to

²⁰ *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416, 470 [87].

²¹ Australian Government Solicitor, *op. cit.*, p. 4.

²² *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416, 460 [49].

²³ (2006) 229 CLR 1.

²⁴ *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416, 461 [50].

regulate is a constitutional corporation’ and therefore the Commonwealth will need to reconsider how it implements its policy objectives in this regard.²⁵

III The Commonwealth’s continuing refusal to accept limitations on its executive power

While the decision in *Williams (No. 2)* was quite limited, in addition to making it clear that neither the benefits to students power, the express incidental power nor the corporations power could support the expenditure of funds on the chaplaincy program, the decision also demonstrated the High Court’s apparent frustration at the Commonwealth’s continuing refusal to accept limitations on its executive power. In this regard the Court rejected an assumption underlying the Commonwealth’s argument that the executive power of the Commonwealth Government can be equated with the executive power in Britain.

The Commonwealth’s disregard for the limitations on its executive power appears to have continued with the Commonwealth purporting to rely on the executive nationhood power (coupled with the express incidental power in section 51(xxxix)) to provide legislative authority for spending schemes relating to matters such as mathematics and computing curriculum resources. Of course, as will be demonstrated below, this is particularly problematic given that this argument (in relation to the NSCP) was expressly rejected in *Williams (No. 1)*.

A The High Court’s apparent frustration with the Commonwealth

The Court characterised the Commonwealth’s arguments in relation to ‘the ambit of the Executive’s power to spend’ as being advanced ‘under the cloak of an application to reopen the decision in *Williams (No 1)*’:

The Commonwealth parties put four main reasons for what they described as “a compelling case” to reopen the decision in *Williams (No 1)*.

First, they submitted that “the principle identified in [*Williams (No 1)*] was not carefully worked out in a significant succession of cases” and “constituted a radical departure from what had previously been assumed by all parties to be the orthodox legal position”. Second, they submitted that the course taken in the hearing in *Williams (No 1)* resulted in the Court not receiving “sufficient argument ... on what became the ultimate issue” ... Third, they submitted that “the reasons of the four Justices constituting the majority in [*Williams (No 1)*] do not contain a single answer” to when

²⁵ Simon Evans, ‘Williams v Commonwealth (No 2): the National School Chaplaincy Program struck

and why Commonwealth spending requires authorising legislation ... And fourth, they submitted that the decision in *Williams (No 1)* “led to considerable inconvenience with no significant corresponding benefits”.²⁶

In refusing the Commonwealth’s application to reopen *Williams (No. 1)*, the Court noted that the decision in *Williams (No. 1)* depended upon premises already established in *Pape*.²⁷ In relation to the Commonwealth’s submission that the decision in *Williams (No. 1)* ‘led to considerable inconvenience with no significant corresponding benefits’ the Court noted that:

What was meant in this context by the references to “inconvenience” and “corresponding benefits” would require a deal of elaboration in order to reveal how they bear upon the resolution of an important question of constitutional law. Examination of the proposition reveals no greater content than that the Commonwealth parties wish that the decision in *Williams [No 1]* had been different and seek a further opportunity to persuade the Court to their view.²⁸

The Court went on to note that the Commonwealth’s submission in relation to the scope of the executive’s power to spend and contract ‘was, in substance, no more than a repetition of ... the “broad basis” submissions which the Commonwealth parties advanced in *Williams [No 1]* and which six Justices rejected’.²⁹ The submissions were, in effect, simply ‘another way of putting the Commonwealth’s oft-repeated³⁰ submission that the Executive has unlimited power to spend appropriated moneys for the purposes identified by the appropriation’.³¹

Overall, the Court noted that the Commonwealth’s arguments in *Williams (No. 2)* about its own executive power ‘have been advanced ... more than once in litigation in this Court’ and that they ‘have not hitherto been accepted by the Court’.³² The Court pointedly concluded that ‘[t]heir repetition does not demonstrate their validity’.³³ This

down again’, *Public Law Review*, vol. 25, 2014, p. 171.

²⁶ *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416, 463 [57]–[59].

²⁷ *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1; *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416, 463 [60].

²⁸ *ibid.*, 464–465 [65].

²⁹ *ibid.*, 465 [69].

³⁰ See, for example, *Victoria v Commonwealth* (1975) 134 CLR 338, 342–343; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 10; *Williams v Commonwealth* (2012) 248 CLR 156, 167. See also *Attorney-General (Vic) v Commonwealth* (1945) 71 CLR 237, 242–243; *Brown v West* (1990) 169 CLR 195, 197; *Combet v Commonwealth* (2005) 224 CLR 494, 510–512.

³¹ *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416, 466 [71].

³² *ibid.*, 450 [13].

³³ *ibid.*

characterisation of the Commonwealth's arguments appears to demonstrate a level of frustration within the Court at the Commonwealth's continuing refusal to accept the constitutional limitations on its executive power.

B Executive power of the Commonwealth cannot be equated with the executive power in Britain

Following *Williams (No. 1)* it was suggested that the decision 'substantially alters our understanding of the Commonwealth Executive, and significantly removes it from our British origins and, on one view, from the intentions and expectations of the framers'.³⁴ It has previously been noted that, while the Constitution drew on 'British origins', the framers explicitly and deliberately departed from the British model in many respects. The limitations on the Commonwealth executive outlined in *Williams (No. 1)* therefore 'simply underscore Australia's unique constitutional arrangements—arrangements which should not automatically be equated with British traditions'.³⁵

In *Williams (No. 2)* the High Court outlined the relevance of Australia's unique constitutional arrangements to the scope of the executive power in Australia. In this regard the Court pointed to 'more fundamental defects [than those outlined above] in the argument of the Commonwealth parties about the breadth of the Executive's power to spend and contract'.³⁶ In particular, the Court noted that underlying the Commonwealth's argument was the premise 'that the executive power of the Commonwealth should be assumed to be no less than the executive power of the British Executive'.³⁷ The Court stated that this 'premise is false'³⁸ and observed that the Commonwealth had not demonstrated:

why the executive power of the new federal entity created by the Constitution should be assumed to have the same ambit, or be exercised in the same way and same circumstances, as the power exercised by the Executive of a unitary state having no written constitution ...³⁹

The Court acknowledged that '[t]he history of British constitutional practice is important to a proper understanding of the executive power of the Commonwealth', and particularly to understanding 'why ss 53–56 of the Constitution make the provisions they do about the powers of the Houses of the Parliament in respect of

³⁴ Gabrielle Appleby and Stephen McDonald, 'Looking at the executive power through the High Court's new spectacles', *Sydney Law Review*, vol. 35, no. 2, 2013, p. 272.

³⁵ Ryall, op. cit., pp. 137–9.

³⁶ *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416, 467 [75].

³⁷ *ibid.*, 468 [78].

³⁸ *ibid.*

³⁹ *ibid.*, 468 [79].

legislation, appropriation bills, tax bills and recommendation of money votes'.⁴⁰ Of course, it should be noted that while these provisions are informed by British constitutional practice, they also depart significantly from British traditions by ensuring that the Senate has nearly the same legislative powers as the House of Representatives, including the power to reject all bills, even 'money bills'.⁴¹

The Court further noted that British constitutional history also 'illuminates ss 81–83 and their provisions about the Consolidated Revenue Fund, expenditure charged on the Consolidated Revenue Fund and appropriation'.⁴² However, the Court emphasised that this history:

says nothing at all about any of the other provisions of Ch IV of the Constitution, such as ss 84 and 85 (about transfer of officers and property), ss 86–91 (about customs, excise and bounties), s 92 (about trade, commerce and intercourse among the States), or ss 93–96 (about payments to States).⁴³

The Court concluded that 'questions about the ambit of the Executive's power to spend must be decided in light of *all* of the relevant provisions of the Constitution, not just those which derive from British constitutional practice'.⁴⁴ Therefore, the assumption underpinning the Commonwealth's argument (that the Commonwealth has an executive power to spend and contract which is the same as the power of the British executive) was 'not right and should be rejected' because it 'denies the "basal consideration"⁴⁵ that the Constitution effects a distribution of powers and functions between the Commonwealth and the States'.⁴⁶

⁴⁰ *ibid.*, 468 [80].

⁴¹ Ryall, *op. cit.*, pp. 137–9. This is a significant departure from British constitutional practice. At the time the Constitution was drafted the powers of the two houses in the United Kingdom in relation to financial legislation were governed by a resolution of 3 July 1678. This resolution declared that all financial grants were the 'sole gift' of the House of Commons, and that the Commons had the sole right to determine all financial legislation. Therefore, at the time that the Constitution was drafted, the House of Lords was, at a fundamental level, already a 'powerless second chamber', particularly in relation to financial matters. See Harry Evans, 'The Australian Constitution and the 1911 myth', *Papers on Parliament*, no. 52, December 2009, p. 88.

⁴² *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416, 468 [80].

⁴³ *ibid.*

⁴⁴ *ibid.* For a recent discussion of the influence of the Constitution of the United States of America on the development of the Australian Constitution, see Kathleen Morris and James Allsop, 'The United States and the Australian Constitution: influence of US constitutional model on development and interpretation of the Australian Constitution', *Australian Law Journal*, vol. 89, 2015, pp. 309–30.

⁴⁵ *Attorney-General (Vic) v Commonwealth* (1945) 71 CLR 237, 271–272 (Dixon J).

⁴⁶ *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416, 469 [82]–[83].

C Potential unconstitutionality of new programs added to the FF(SP) Regulations

A cursory examination of recent regulations purporting to provide legislative authority for spending schemes reveals items which may not be supported by a Commonwealth head of legislative power.⁴⁷ For example, the Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 3) Regulation 2015, in part, purports to provide legislative authority for several initiatives including ‘Mathematics by Inquiry’ and ‘Coding across the Curriculum’. Without reflecting on the policy merits of these initiatives, there is a real question about whether they fall within the legislative competence of the Commonwealth and, consequently, as to whether they are constitutionally valid.

The objective of the ‘Mathematics by Inquiry’ program (to which the Commonwealth Government has committed \$7.4 million)⁴⁸ is:

To create and improve mathematics curriculum resources for primary and secondary school students:

- (a) to meet Australia’s international obligations under the Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights; and
- (b) as activities that are peculiarly adapted to the government of a nation and cannot otherwise be carried on for the benefit of the nation.⁴⁹

The objective of the ‘Coding across the Curriculum’ program (to which the Commonwealth Government has committed \$3.5 million)⁵⁰ is:

To encourage the introduction of computer coding and programming across different year levels in Australian schools:

- (a) to meet Australia’s international obligations under the Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights; and
- (b) as an activity that is peculiarly adapted to the government of a nation and cannot otherwise be carried on for the benefit of the nation.⁵¹

⁴⁷ The Senate Regulations and Ordinances Committee has undertaken significant work to ensure that explanatory statements for regulations that add new items into the FF(SP) Regulations explicitly state, for each new item, the constitutional head of power that purportedly supports each new spending program.

⁴⁸ Explanatory Statement, Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 3) Regulation 2015 (Cth), p. 3.

⁴⁹ Financial Framework (Supplementary Powers) Regulations 1997 (Cth) sch 1AB pt 4 item 75.

⁵⁰ Explanatory Statement, Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 3) Regulation 2015 (Cth), p. 4.

⁵¹ Financial Framework (Supplementary Powers) Regulations 1997 (Cth) sch 1AB pt 4 item 76.

The explanatory statement accompanying the regulation confirms that the objective of both items:

references the following powers of the Constitution:

- the external affairs power (section 51(xxix))
- Commonwealth executive power and the express incidental power (sections 61 and 51(xxxix)).⁵²

However, the explanatory statement asserts that this ‘is not a comprehensive statement of relevant constitutional considerations’.⁵³ While it is not immediately clear what other constitutional considerations would be relevant, it seems that the Commonwealth is seeking to rely on the external affairs power and the executive nationhood power (coupled with the express incidental power) as relevant heads of legislative power to authorise the making of these provisions (and therefore the spending of public money under them). However, as discussed below, it is unlikely that the provisions in question would be supported by these heads of power.

1 External affairs power

In relation to the external affairs power, it appears that the Commonwealth is attempting to rely on Australia’s international obligations under the *Convention on the Rights of the Child* and the *International Covenant on Economic, Social and Cultural Rights*. While it is beyond the scope of this paper to consider the terms of these treaties in detail, it is clear that for a legislative provision to be supported by the external affairs power in section 51(xxix) the relevant treaty ‘must embody precise obligations rather than mere vague aspirations, and the legislation must be “appropriate and adapted” to the implementation of those obligations’.⁵⁴ In other words, if a treaty obligation merely amounts to ‘a broad objective with little precise content’, and thus permits ‘widely divergent policies by parties’, the Commonwealth will not be able to rely on that provision to support legislation.⁵⁵ This position was outlined by the High Court in *Victoria v Commonwealth*:

When a treaty is relied on under s 51(xxix) to support a law, it is not sufficient that the law prescribes one of a variety of means that might be

⁵² Explanatory Statement, Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 3) Regulation 2015 (Cth), pp. 3–4.

⁵³ *ibid.*

⁵⁴ George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory: Commentary and Materials*, 6th edn, Federation Press, Annandale, NSW, 2014, p. 923.

⁵⁵ Leslie Zines, *The High Court and the Constitution*, 5th edn, Federation Press, Annandale, NSW, 2008, p. 397.

thought appropriate and adapted to the achievement of an ideal. The law must prescribe a regime that the treaty has itself defined with sufficient specificity to direct the general course to be taken by the signatory states.⁵⁶

Therefore, it seems that it could not be cogently argued that the broadly expressed terms of the *Convention on the Rights of the Child* and the *International Covenant on Economic, Social and Cultural Rights* could support specific Commonwealth legislative provisions in relation to improving mathematics curriculum resources for primary and secondary school students,⁵⁷ or encouraging the introduction of computer coding and programming across different year levels in schools.⁵⁸

2 *Executive nationhood power and the express incidental power*

The Commonwealth's purported reliance on the executive nationhood power (coupled with the express incidental power in section 51(xxxix)) is even more problematic given that this argument was rejected in *Williams (No. 1)* in relation to the NSCP. The nationhood power provides 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 on for the benefit of the nation'.⁵⁹ As Twomey notes, 'the combination of the executive nationhood power with s 51(xxxix) of the Constitution potentially provided a legislative head of power to support the chaplaincy program'.⁶⁰ This was not accepted by the Court in *Williams (No. 1)*—all justices (other than Heydon J who held that the nationhood power was irrelevant to the case)⁶¹ held that the chaplaincy program did not fall within the nationhood power.⁶² Kiefel J, for example, stated that:

It may be accepted that the executive power extends to ... matters which are peculiarly adapted to the government of a nation. [This power does not] support the Funding Agreement and the payment of monies under it ... [as] there is nothing about the provision of school chaplaincy services which is peculiarly appropriate to a national government. They are the province of the States, in their provision of support for school services, as evidenced in this case by the policy directives and funding undertaken by

⁵⁶ (1996) 187 CLR 416, 486.

⁵⁷ Financial Framework (Supplementary Powers) Regulations 1997 (Cth) sch 1AB pt 4 item 75.

⁵⁸ Financial Framework (Supplementary Powers) Regulations 1997 (Cth) sch 1AB pt 4 item 76.

⁵⁹ *Victoria v Commonwealth* (1975) 134 CLR 338, 397.

⁶⁰ Twomey, 'Post-*Williams* expenditure', op. cit., p. 23.

⁶¹ *Williams v Commonwealth* (2012) 248 CLR 156, 319 [402] (Heydon J).

⁶² *Williams v Commonwealth* (2012) 248 CLR 156, 179–180 [4] (French CJ); 235 [146] (Gummow and Bell JJ); 250–251 [196], 267 [240] (Hayne J); 346 [498] and 348 [503] (Crennan J); and 373 [591] and [594] (Kiefel J).

the Queensland Government. Funding for school chaplains is not within a discernible area of Commonwealth responsibility.⁶³

Similarly, Gummow and Bell JJ noted that:

the States have the legal and practical capacity to provide for a scheme such as the NSCP. The conduct of the public school system in Queensland, where the Darling Heights State Primary School is situated, is the responsibility of that State. Indeed, Queensland maintains its own programme for school chaplains.⁶⁴

Crennan J held that:

contrary to the submissions of SUQ, the fact that an initiative, enterprise or activity can be ‘conveniently formulated and administered by the national government’, or that it ostensibly does not interfere with State powers, is not sufficient to render it one of ‘truly national endeavour’ or ‘pre-eminently the business and the concern of the Commonwealth as the national government’.⁶⁵

Drawing on the reasoning outlined above, it is difficult to see how the provisions which purport to provide legislative authority in relation to the ‘Mathematics by Inquiry’ program or the ‘Coding across the Curriculum’ program could be supported by the nationhood power.

The ‘Mathematics by Inquiry’ program relates to ‘the development and implementation of innovative mathematics curriculum resources for school students’.⁶⁶ The ‘Coding across the Curriculum’ program relates to the development of resources that ‘will help engage students in computer coding and problem solving across all year levels in primary and secondary schools’.⁶⁷ There is nothing about the development of educational and curriculum resources that is ‘peculiarly adapted to the government of a nation and which cannot otherwise be carried out for the benefit of the nation’. It is clear that the states already operate in this area. For example, the Western Australian Department of Education has developed the ‘First Steps’ series of teacher resource books in areas such as literacy, mathematics, fundamental movement

⁶³ *Williams v Commonwealth* (2012) 248 CLR 156, 373 [594] (Kiefel J).

⁶⁴ *Williams v Commonwealth* (2012) 248 CLR 156, 235 [146] (Gummow and Bell JJ).

⁶⁵ *Williams v Commonwealth* (2012) 248 CLR 156, 348 [504] (Crennan J).

⁶⁶ Explanatory Statement, Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 3) Regulation 2015 (Cth), p. 3.

⁶⁷ *ibid.*, p. 4.

skills and VET.⁶⁸ First Steps Mathematics, for instance, is ‘organised around sets of mathematics outcomes for Number, Measurement, Space, and Chance and Data’ and ‘will help teachers to diagnose, plan, implement and judge the effectiveness of the learning experiences they provide for students’.⁶⁹ As the statement by Crennan J quoted above demonstrates, the mere fact that an activity can be ‘conveniently formulated and administered by the national government’ does not mean that it will fall within the ambit of the nationhood power.

Given that it appears that neither the external affairs power nor the executive nationhood power would support these provisions it must be concluded that there is a real risk that the programs are unconstitutional and therefore any payments made under them are invalid.

D Implications for the future

In *Williams (No. 2)* the High Court (again) rejected the Commonwealth’s arguments about its own executive power. As a result, it would be prudent (and in accordance with the rule of law) for the Commonwealth to now accept these limitations and to change its practices accordingly. It is no longer tenable to continue ‘business as usual’ or, as has been suggested, to rely ‘on a combination of the unlikelihood of a constitutional challenge and the need for standing’⁷⁰ in order for particular initiatives to be challenged. At the very least, it would be appropriate for the Commonwealth to comprehensively and systematically review all of its spending initiatives to ensure that they are *clearly supported* by a head of legislative power. As former Chief Justice Spigelman has noted it is not appropriate for the Commonwealth to ‘proceed on the basis that an arguable case is good enough’.⁷¹ Moreover, given the limited nature of the decision in *Williams (No. 2)* there also remains the broader question as to whether the process established by section 32B to authorise spending initiatives (including the purported authorisation of over 400 non-statutory funding schemes in the initial tranche of regulations)⁷² is constitutionally valid. These broader questions (and the

⁶⁸ Western Australian Department of Education, *First Steps: Steps Resources*, <http://det.wa.edu.au/stepsresources/detcms/portal/>.

⁶⁹ Western Australian Department of Education, *First Step Mathematics*, <http://det.wa.edu.au/stepsresources/detcms/navigation/first-steps-mathematics/>.

⁷⁰ Andrew Hemming, ‘Williams v Commonwealth: much ado about nothing’, *University of Queensland Law Journal*, vol. 33, no. 1, 2014, pp. 239, 242.

⁷¹ Spigelman, *op. cit.*

⁷² The initial tranche of regulations was enacted by Parliament in Schedule 2 to the FFLA Act. However, if the plaintiff’s broad submission in *Williams (No. 2)* is accepted then these regulations (despite being enacted by Parliament) may be invalid. See Ronald Williams, ‘Plaintiff’s Submissions’, Submission in *Williams v Commonwealth (No. 2)*, no. S154 of 2013, 28 February 2014, 21 [87]; Attorney-General (WA), ‘Annotated Written Submissions of the Attorney General for Western Australia (Intervening)’, Submission in *Williams v Commonwealth (No. 2)*, no. S154 of 2103, 14 March 2014, 4 [18]–[19].

benefits of establishing spending schemes in primary legislation) are discussed in further detail below.

IV Spending money unconstitutionally

Before considering these broader issues it is appropriate to consider the Commonwealth's immediate response to *Williams (No. 2)*. In response to the decision invalidating its chaplaincy program, the Commonwealth announced that it would invite states and territories to participate in a new program. The Commonwealth would provide funding to states and territories for the new program, so long as they agreed to certain conditions.⁷³

A Unconstitutional payments not recovered

Importantly, the government also announced that all the payments that had been made (unconstitutionally) under the invalidated program would not be recovered by the Commonwealth:

It follows from the court's judgement that Commonwealth payments to persons under the school chaplaincy program were invalidly made. The effect of the decision is that these program payments, totalling over \$150 million, are now debts owing to the Commonwealth under the Financial Management and Accountability Act. However, under that act, the Minister for Finance has the power to approve a waiver of debt of an amount owing to the Commonwealth which totally extinguishes that debt. I am advised by my friend Senator Cormann that he has today agreed to waive the program payments made to date. That decision will provide certainty to funding recipients that these debts will not be recovered in consequence of that decision.⁷⁴

The Australian National Audit Office confirmed that the invalid payments made under the chaplaincy program became debts owing to the Commonwealth following the decision in *Williams (No. 2)* and that on the day that the decision was handed down (19 June 2014) the Minister for Finance waived those debts (totalling \$156.1 million) under paragraph 34(1)(a) of the FMA Act.⁷⁵ This also meant that the chaplaincy program could continue for the remainder of 2014 (even after the decision

⁷³ Senator the Hon Scott Ryan, Parliamentary Secretary to the Minister for Education, 'National School Chaplaincy Programme to go ahead', Media release, 27 August 2014, <https://ministers.education.gov.au/ryan/national-school-chaplaincy-programme-go-ahead>.

⁷⁴ Senate debates, 19 June 2014, p. 3412 (George Brandis).

⁷⁵ Australian National Audit Office, *Audits of the Financial Statements of Australian Government Entities for the Period Ended 30 June 2014*, ANAO Report no. 16, 2014–15, p. 41.

invalidating the program) because service providers had already received payments from the Commonwealth for the entire year.

B Commonwealth avoiding the constitutional limits on its power

As Benjamin Saunders notes,

[i]t seems highly problematic for the Commonwealth to be able to avoid constitutional limits on its power merely by waiving debts owed to it after invalid payments have already been made. This is clearly a strategy that could be employed in the future.⁷⁶

Saunders suggests that there is a balance to be struck in relation to payments that are invalidly made. On the one hand, if the Commonwealth were under a duty to recover the unconstitutional payments this would potentially be ‘highly unfair to those organisations who have relied on the payments’, and if such organisations were sued to recover the payments they may have a claim in restitution against the Commonwealth for services provided in consideration for payment. On the other hand, there is a legitimate question as to whether it is appropriate for private law principles of restitution to effectively take precedence over the Constitution.⁷⁷

The case law in relation to claims in restitution against a government party arising out of a void contract ‘is sparse and the principles not very certain’.⁷⁸ The House of Lords has pronounced that where a government contract is void for lack of power the ‘consequences of any *ultra vires* transaction may depend on the facts of each case’.⁷⁹ Much of the limited (potentially) relevant case law relates to local authorities in England (which possess only those powers conferred upon them by statute and therefore their power to contract extends only to agreements which are incidental to their authorised functions).⁸⁰ In this context, where services have been provided to a public authority under an *ultra vires* ‘contract’ there has generally been some difficulty in allowing a claim in restitution against the government party. This is because to allow a claim is often contrary to the same policy which causes the law to hold the contract itself void: it requires the public entity to pay for something which it

⁷⁶ Benjamin Saunders, ‘Williams [No 2] Symposium: some curiosities and further thoughts on Williams [No 2]’ on *Opinions on High* (10 July 2014), <http://blogs.unimelb.edu.au/opinionsonhigh/2014/07/10/saunders-williams-2/>.

⁷⁷ *ibid.*

⁷⁸ Nicholas Seddon, *Government Contracts: Federal, State and Local*, 5th edn, Federation Press, Annandale, NSW, 2013, p. 100.

⁷⁹ *Hazell v Hammersmith and Fulham Londonborough Council* [1992] 2 AC 1, 36 (Lord Templeman).

⁸⁰ Sue Arrowsmith, ‘Ineffective transactions, unjust enrichment and problems of policy’, *Legal Studies*, vol. 9, no. 3, 1989, p. 308; *Ashbury Railway Carriage and Iron Co Ltd v Riche* (1875) 7 HL 653.

is not permitted to purchase at all.⁸¹ Thus, the English case law appears to point towards non-recovery by the non-governmental ‘contracting’ party in cases where the government entity acts beyond power; however, the law in this area is uncertain.

In any event, as noted above it is clear that, when considering whether it is appropriate for the Commonwealth not to recover payments that are invalidly made, a choice has to be made between competing interests. On the one hand, the non-government ‘contracting’ party has provided services to the government such that, if the payments for services are recovered, the Commonwealth will have been able to obtain the benefit of the services for free and the non-government entity would be financially disadvantaged. On the other hand, if the payments are not recovered the Commonwealth has been able to spend money that it is not entitled to spend under the Constitution.

In this context, the importance of adhering to the provisions of the Constitution must be taken as being more significant than considerations in relation to local government bodies acting outside their statutory remit. As Guy Aitken and Robert Orr note, the Constitution ‘is the fundamental law of Australia binding everybody and everything, including the Commonwealth Parliament and the parliaments of the States’.⁸² Furthermore, the High Court has noted that the Constitution’s status as the fundamental law of Australia rests on the ‘sovereignty of the Australian people’—that is, on the Australian people’s decision during the 1890s to approve the Constitution, and on their continuing commitment to remain bound by its terms. This popular sovereignty is reinforced by section 128, which provides that the Constitution can only be changed if the people of Australia approve of the change.⁸³

It is therefore suggested that where a payment is held to be unconstitutional it is not appropriate for the Commonwealth to avoid the constitutional limits on its power by choosing not to recover the invalid payments. While this is undoubtedly a regrettable outcome for the non-government contracting parties, it is the only outcome which respects the Constitution’s standing as Australia’s fundamental law. It would also ensure that the Commonwealth cannot rely on an ability to waive debts as a ‘back up plan’ to avoid the consequences arising from the making of constitutionally invalid payments. As a result, the Commonwealth may choose to more closely examine whether its spending schemes are supported by a firm constitutional foundation—this can only be positive from a rule of law perspective because it would ensure that the Commonwealth does not ignore the constitutional limits on its power.

⁸¹ Arrowsmith, *op. cit.*, p. 310.

⁸² Guy Aitken and Robert Orr, *Sawyer’s: The Australian Constitution*, 3rd edn, Australian Government Solicitor, Canberra, 2002. p. 22.

⁸³ *ibid.*, p. 23.

V The limited nature of the decision

As noted above, the fact that the High Court did not need to consider the plaintiff's broader arguments in *Williams (No. 2)* is important as it underscores the remaining uncertainty surrounding the constitutionality of executive spending schemes. The joint judgement of the High Court noted that it was not necessary to consider certain arguments advanced by the plaintiff:

if, as Mr Williams' arguments based on *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan*⁸⁴ suggested, s 32B does present some wider questions of construction and validity, they are not questions which are reached in this case and they should not be considered.⁸⁵ Rather, it is enough to consider whether, in their operation with respect to the agreement about and payments for provision of chaplaincy services, s 32B and the other impugned provisions are supported by a head of legislative power.⁸⁶

The Commonwealth Attorney-General highlighted the limited nature of the decision in *Williams (No. 2)* on the day the decision was handed down. In this regard he noted that the Court:

did not consider the broader question of whether division 3B of the Financial Management and Accountability Act was a valid law. It merely decided that, insofar as that act purported to validate the school chaplaincy program, it was ineffective because the school chaplaincy program was not supported by any constitutional head of power.⁸⁷

A Remaining constitutional uncertainty in relation to section 32B and the FFLA Act

In a 'Litigation Note' published following *Williams (No. 2)* the Australian Government Solicitor (AGS) seems (at least at first glance) to suggest that Mr Williams' broad argument (i.e. that the legislative response to *Williams (No. 1)* is wholly invalid) was outright rejected by the High Court:

⁸⁴ (1931) 46 CLR 73.

⁸⁵ See, for example, *Lambert v Weichelt* (1954) 28 ALJ 282, 283 (Dixon CJ); *Wurridjal v Commonwealth* (2009) 237 CLR 309, 437 [355] (Crennan J); *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 199 [141] (Hayne, Kiefel and Bell JJ).

⁸⁶ *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416, 457 [36] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

⁸⁷ Senate debates, 19 June 2014, p. 3412 (George Brandis).

Section 32B is not invalid

The plaintiff contended that s 32B of the FMA Act is wholly invalid. However, the Court held that s 32B of the FMA Act is supported by every head of legislative power that supports the making of the payments that s 32B deals with.⁸⁸

While the AGS goes on to note that it was not necessary for the Court to consider the plaintiff's wider questions of construction and validity, given the importance of section 32B to the validity of a very wide range of government initiatives it may have been useful to specifically highlight the plaintiff's 'wider questions of construction and validity' which could, in the future, be important to determining the validity of section 32B in its entirety. This is because *Williams (No. 2)* leaves many broader questions unanswered.

Of course, one obvious question is what other Commonwealth spending programs are constitutionally invalid and therefore at risk? Twomey specifically notes the remaining constitutional uncertainty in relation to section 32B and also why it is unsatisfactory for the Commonwealth to continue to rely on this process (and the associated regulations) to authorise programs that do not fall within a Commonwealth head of power:

the status of s 32B was left in even greater uncertainty. At the very least, it must be read down so that it does not support what would appear to be a significant number of programs described in the regulations which do not fall within a Commonwealth head of power. This leads to the unfortunate outcome that while the statute book says that certain programs are authorised, they are in fact not authorised and expenditure upon them is invalid. Such a gap between what is stated on the face of the law and its constitutional effectiveness has the tendency to bring the law into disrepute.⁸⁹

Moreover, there 'also remains the bigger question of whether s 32B is valid at all'.⁹⁰ In this regard, there is uncertainty in relation to the extent that the parliament can delegate to the executive the power to make the legislation that authorises further executive action.⁹¹ This uncertainty remains because the Court did not need to reach the question of whether section 32B involved a delegation of legislative power that

⁸⁸ Australian Government Solicitor, *op. cit.*, p. 3.

⁸⁹ Twomey, 'Déjà Vu', *op. cit.*

⁹⁰ *ibid.* As noted above, this broader constitutional uncertainty is also relevant to the validity of over 400 non-statutory funding schemes purportedly authorised in the initial tranche of regulations.

⁹¹ Evans, *op. cit.*, p. 167.

was so excessive or vague that it transgressed the Constitution,⁹² nor did the Court need to consider whether the provision was invalid because of the ‘necessary role of the Parliament in supervising expenditure of public money’.⁹³

VI Benefits of establishing spending schemes in primary legislation

Noting the above, it may be prudent for government advisers to clearly highlight the fact that, in addition to the need for programs to be supported by a head of legislative power, there is some constitutional uncertainty in relation to the process for authorising spending initiatives by regulation. This is particularly important as judicious government officials may wish to take such matters into account when structuring new government spending programs. After establishing that a proposed initiative is within the legislative competence of the Commonwealth Parliament, officials may wish to establish the legislative authority for their programs through statute. Such an approach would remove any constitutional uncertainty (of the type discussed above) in relation to the validity of the program, increase accountability in relation to the expenditure of public money, and ensure that spending initiatives are well-considered from a constitutional, policy and financial perspective.

A Democracy and accountability

Importantly, from a democratic and accountability perspective, establishing legislative authority for spending initiatives through statute would answer the High Court’s concerns expressed in *Williams (No. 1)* which emphasised the importance of the role of the parliament in supervising the expenditure of public money. For example, Gummow and Bell JJ expressed concern in relation to the NSCP because there was only a limited engagement of the institutions of representative government.⁹⁴ Their Honours noted that parliament was engaged ‘only in the appropriation of revenue, where the role of the Senate is limited. It [was] not engaged in the formulation, amendment or termination of any programme for the spending of those moneys.’⁹⁵

In this regard, it is important to note that direct spending schemes through executive contracts between the Commonwealth and private parties have been used over many years to implement a broad range of executive policy objectives *without the support of legislative authority or any parliamentary oversight*. Significantly, these executive contracts (which are often used in a regulatory manner to influence and control the

⁹² Cheryl Saunders, ‘Williams [No 2] Symposium: Cheryl Saunders on the executive power of the Commonwealth after Williams [No 2]’ on *Opinions on High* (25 June 2014), <http://blogs.unimelb.edu.au/opinionsonhigh/2014/06/25/saunders-williams/>.

⁹³ Graeme Hill, ‘Williams [No 2] Symposium: Graeme Hill on narrowing the issues’ on *Opinions on High* (23 June 2014), <http://blogs.unimelb.edu.au/opinionsonhigh/2014/06/23/hill-williams/>.

⁹⁴ *Williams v Commonwealth* (2012) 248 CLR 156, 235 [145].

behaviour of funding recipients)⁹⁶ now account for between five and 10 per cent of all Commonwealth expenditure.⁹⁷

As a result of the legislative response to *Williams (No. 1)*, this position, in practical terms, is virtually unchanged—there remains no effective parliamentary engagement in the formulation, amendment or termination of executive spending schemes. Despite constitutional uncertainty, the executive continues to rely on the legislative authority purportedly provided by existing items in the FF(SP) Regulations⁹⁸ (and the process in section 32B to add new items to the regulations) to implement its policy objectives through executive contracts. This process for adding new items involves no formal parliamentary engagement beyond scrutiny by the Senate Regulations and Ordinances Committee and the potential for disallowance. Even where new schemes are added to the regulations, there remains no formal consideration by parliament of the underlying policy rationale for these schemes. Very little (if any) detail in relation to how the schemes will actually be conducted or administered is provided to the parliament and, as a result, the parliament is unable to properly consider the appropriateness of a particular scheme or to propose amendments to a scheme.

The Senate Standing Committee for the Scrutiny of Bills has recently expressed concern in relation to the process established in section 32B to authorise spending schemes. The Public Governance, Performance and Accountability (Consequential and Transitional Provisions) Bill 2014 moved section 32B from the FMA Act to the new *Financial Framework (Supplementary Powers) Act 1997 (Cth)*. In commenting on this bill the committee noted the decision in *Williams (No. 2)* and:

restate[d] its preference that important matters, such as establishing legislative authority for arrangements and grants, should be included in

⁹⁵ *ibid.*

⁹⁶ Cheryl Saunders and Kevin Yam, 'Government regulation by contract: implications for the rule of law', *Public Law Review*, vol. 15, 2004, p. 53; Seddon, *op. cit.*, pp. 40–1; Gabrielle Appleby 'There must be limits: the Commonwealth spending power', *Federal Law Review*, vol. 37, 2009, p. 97.

⁹⁷ Shipra Chordia, Andrew Lynch and George Williams, 'Williams v Commonwealth: Commonwealth executive power and Australian federalism', *Melbourne University Law Review*, vol. 37, no. 1, 2013, p. 190.

⁹⁸ In this regard it is important to note that many of the spending schemes already in the FF(SP) Regulations are described in very broad terms. This means that new spending initiatives may be able to be instituted by the executive under these broadly framed items without the need for new regulations (and therefore any parliamentary scrutiny at all). Examples of broadly worded schemes include: '421.001 Regional Development; Objective: To strengthen the sustainability, capacity and diversity of regions through focused stakeholder consultation and engagement, research, policy development, and program delivery activities' and '421.002 Local Government; Objective: To build capacity in local government and provide local and community infrastructure, and to improve economic and social outcomes in local communities'. See Amanda Sapienza, 'Using representative government to bypass representative government', *Public Law Review*, vol. 23, 2012, p. 165.

primary legislation to allow full Parliamentary involvement in, and consideration of, such proposals.⁹⁹

B Consideration of constitutional issues (and federalism)

As well as answering the High Court's concerns in relation to parliamentary scrutiny of public money, establishing schemes in primary legislation has the incidental benefit of ensuring that there is structured consideration of potential constitutional issues. This would ensure, among other things, that the 'federal character of the Constitution'¹⁰⁰ is at least contemplated because there would be formal consideration as to whether the Commonwealth has the power to legislate in relation to a particular proposed scheme.

At the Commonwealth level government bills are drafted by the Office of Parliamentary Counsel (OPC). Importantly, the constitutional validity of each bill is considered by OPC as part of the drafting process. The OPC Drafting Manual states that:

Constitutional law is extremely important to drafters in OPC. There are two main aspects to this. First, every provision of every Act must be supported by a constitutional power. Secondly, there are a number of constitutional prohibitions that must not be contravened.¹⁰¹

OPC Drafting Direction 3.1 covers a range of constitutional matters. It notes that prior to submitting bills to the legislation approval process, a Senior Executive Service bill drafter must give an assurance that he or she is satisfied that the bill is constitutionally valid (and if he or she has any concerns or reservations about constitutional validity these must be set out). To assist in this regard, OPC has developed a constitutional checklist for use by bill drafters. The checklist is used as a tool for ensuring that the consideration bill drafters give to the constitutional validity of the legislation is systematic and thorough.¹⁰² Thus, if a spending initiative is established through primary legislation the chance of such a program being constitutionally invalid is diminished (assuming, of course, that any constitutional issues identified during drafting have been appropriately addressed).

⁹⁹ Senate Standing Committee for the Scrutiny of Bills, *Eleventh Report of 2014*, 3 September 2014, p. 558.

¹⁰⁰ *Williams v Commonwealth* (2012) 248 CLR 156, 179 [4] (French CJ).

¹⁰¹ Office of Parliamentary Counsel, *OPC Drafting Manual*, October 2012, pp. 15–16.

¹⁰² Office of Parliamentary Counsel, *Drafting Direction No. 3.1: Constitutional Law Issues*, October 2012, p. 19.

As noted above, it appears that some schemes that are purportedly authorised by the FF(SP) Regulations may not be supported by a head of legislative power. It is therefore unclear whether the same level of constitutional scrutiny is applied in relation to new programs added to the FF(SP) Regulations.

In any event, it is clear that bills are subject to a higher level of parliamentary and public scrutiny than delegated legislation and therefore constitutional issues are more likely to be identified by interested stakeholders where a program is established by primary legislation.

C Consideration of policy and financial issues

Even if there were no constitutional uncertainty in relation to a particular program, ensuring full parliamentary involvement in the formulation, amendment and termination of new spending initiatives through the process of enacting a statute would enable these programs to be fully considered from a financial and policy perspective. Bills seeking to implement spending initiatives would be able to be scrutinised by parliamentarians representing a broad range of electors and interests, and may be considered by Senate committees thereby enabling advocacy groups, experts and the broader public to provide input into the structure of proposed spending schemes. As Cheryl Saunders notes, full parliamentary consideration of spending initiatives is not only positive from a democratic and accountability perspective, but is also positive for the executive because:

At a time of financial constraint there is much to be gained from procedures that ensure that spending programs are not undertaken hastily, that there is a broad-based commitment to them, that they are well designed and implemented and that money is well spent.¹⁰³

VII Conclusion

The decision in *Williams (No. 2)*, while limited in some respects, was important in a number of ways. Of course, it represents an important development in our understanding of Commonwealth executive power, at least to the extent that it reaffirmed principles espoused in previous decisions. The decision is also of interest because it detailed the High Court's apparent frustration at the Commonwealth's continuing refusal to accept limitations on its executive power and reiterated that the executive power of the Commonwealth cannot be equated with the executive power in Britain.

¹⁰³ Cheryl Saunders, 'The scope of executive power', p. 30.

At a practical level, all payments made under the chaplaincy program became debts owing to the Commonwealth following *Williams (No. 2)*. The Commonwealth's decision to waive these debts raises important questions because by doing so the Commonwealth has, in effect, invalidly spent over \$150 million. Noting the Constitution's status as Australia's fundamental law, it is suggested that where a payment is held to be unconstitutional it is not appropriate for the Commonwealth to, in effect, avoid the constitutional limits on its power by choosing not to recover the invalid payments.

Williams (No. 2) (again) made it clear that Commonwealth spending initiatives with no connection to a head of legislative power are (in most circumstances) invalid. It is therefore no longer tenable to continue 'business as usual'. In this regard, it would be appropriate for the Commonwealth to comprehensively and systematically review all of its spending initiatives to ensure that they are *clearly supported* by a head of legislative power. As former Chief Justice Spigelman has noted:

It is not permissible to approach the Constitution on the basis that whatever is in the institutional interests of the Commonwealth must be the law. It is not consistent with the rule of law that the Executive and the Parliament proceed on the basis that an arguable case is good enough, as distinct from a genuine, predominant opinion as to what the law of the Constitution actually is ... The Constitution is a document which is to be obeyed. It is not an envelope to be pushed.¹⁰⁴

In addition to the clear need for spending initiatives to be supported by a Commonwealth head of legislative power, the limited nature of the decision in *Williams (No. 2)* means that there is constitutional uncertainty in relation to the extent that the parliament can delegate to the executive the power to make legislation that authorises executive spending schemes. In this regard it is particularly important to note the significance that the High Court has attributed to the role of the parliament in controlling and supervising the expenditure of public money.¹⁰⁵

It has been suggested that the requirement in *Williams (No. 1)* for increased parliamentary oversight of the expenditure of public money 'may have come at a high practical cost in terms of governmental efficiency'.¹⁰⁶ Of course, as the High Court

¹⁰⁴ Spigelman, *op. cit.*

¹⁰⁵ *Williams v Commonwealth* (2012) 248 CLR 156, 258–259 [216] (Hayne J); 351–352 [516] (Crennan J).

¹⁰⁶ Geoffrey Lindell, 'The changed landscape of the executive power of the Commonwealth after the Williams case', *Monash University Law Review*, vol. 39, no. 2, 2013, p. 386.

has explained, it is difficult to see how perceived ‘inconvenience’ could ‘bear upon the resolution of an important question of constitutional law’.¹⁰⁷

Moreover, it has been suggested that ‘[d]emocratic considerations need to be counterbalanced by the additional need for governments not to be hamstrung and prevented from acting decisively and promptly in the face of pressing popular demands’.¹⁰⁸ This is also an interesting argument given that in the Australian *democratic* system it is the parliament (particularly the Senate),¹⁰⁹ not the government, that is most effectively able to represent a broad range of ‘pressing popular demands’. If a government is unable to ‘act decisively’ because it cannot secure passage of a bill to support a spending initiative, such an outcome does not indicate that the government is being ‘hamstrung’, rather it is likely to indicate that what is proposed by the government lacks broader popular support (noting that governments regularly win office with only around 40 per cent of the vote).¹¹⁰ As has been demonstrated, increased parliamentary oversight of the expenditure of public money is positive not only because it enhances democracy and accountability—it also ensures that spending initiatives are well-considered from a constitutional, policy and financial perspective.

¹⁰⁷ *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416, 464 [65].

¹⁰⁸ Lindell, *op. cit.*, p. 386.

¹⁰⁹ The party composition of the Senate almost invariably reflects the party disposition of voting in the electorate more closely than does the House of Representatives (where government is formed). The electoral system of the House of Representatives regularly awards a majority of seats (and government) to parties which secure only a minority of electors’ votes (occasionally less than 40 per cent) and on several occasions less than those of the major losing parties. See Harry Evans and Rosemary Laing (eds), *Odgers’ Australian Senate Practice*, 13th edn, Department of the Senate, Canberra, 2012, pp. 10–18.

¹¹⁰ Harry Evans, ‘The case for bicameralism’ in Nicholas Aroney, Scott Prasser and J.R. Nethercote (eds), *Restraining Elective Dictatorship: The Upper House Solution?*, University of Western Australia Press, Crawley, WA, 2008, p. 73.