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**Republicanism, Responsible Government
and Human Rights**

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This issue of *Papers on Parliament* brings together in published form five lectures given during the period from February to June 1995 in the Senate Department's *Occasional Lecture* series. This issue also includes papers by Mr Harry Evans and by Mr Peter C. Grundy.

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Human Rights—The International Dimension

*The Hon. Justice Michael Kirby AC CMG**

A Question of Rights

The subject of a Bill of Rights is interesting and important. Some commentators have unkindly suggested that, if we wait a short time, the High Court of Australia will provide a catalogue of fundamental constitutional rights which, so far, the people of this country have obdurately declined to adopt in their constitution, at least in express terms.¹ Others have

* President of the Court of Appeal of New South Wales. Chairman of the Executive Committee of the International Commission of Jurists. Special Representative of the Secretary-General of the United Nations for Human Rights in Cambodia.

¹ D. Rose, 'Judicial Reasonings and Responsibilities in Constitutional Cases' (1994) 20 *Monash University Law Review* 195; A. Fraser, 'False Hopes: Implied Rights and Popular Sovereignty in the Australian Constitution' (1994) 16 *Sydney Law Review* 213; L. Zines, 'A Judicially Created Bill of Rights?' (1994) 16 *Sydney Law Review* 166.

suggested that the adoption of such a Bill of Rights is now necessary to put a brake on judicial invention and to give a legitimacy to the process which judicial creativity lacks.²

I have addressed these topics in previous addresses in Brisbane,³ Canberra,⁴ and also at the Australian Rights Congress in Sydney on 16 February. These addresses, recording my views, are available to any who are interested. Instead of repeating to you what I have previously said on the subject, I have decided to address a topic which is related, but distinct. In some ways it is more immediately important, and urgent. I refer to the growing impact of international human rights principles and of the institutions which define and apply them.

This question came to the fore as a result of the debates which accompanied the passage of the *Human Rights (Sexual Conduct) Act 1994* (Cth).⁵ But that law was simply the latest of a number, under successive federal governments and parliaments, which have presented the topic of these remarks for consideration in the Parliament, and by the people, of Australia. The quandaries were already there in the 1920s when Federal Parliament enacted the Air Navigation Act to give effect to the ratification, including on behalf of Australia, of the *Paris Convention* of 1919 regulating international aerial navigation.⁶ It was certainly there when the Parliament enacted conservation legislation under which the Governor-General, pursuant to the *World Heritage Convention*,⁷ made regulations protecting an area of national park in Tasmania.⁸ But there was something about the passion and emotion of the recent debate which called forth the most strongly voiced reservations yet expressed about what was seen by some as a worrying, even undesirable, legislative trend.

Some of the commentary was ill-tempered and confused. One writer to the *Sydney Morning Herald*, after citing scripture, said:

The fact that the United Nations wishes to confer obligations on this country to make way for sodomy and to give family status and rights to sodomites needs no recognition and there is no right alternative for the government of this country but to stand resolutely and in proper dignity against the UN Human Rights Commissioner in this matter...Every right minded and principled person stands

² G. Griffith, Lecture, Monash University, reported *The Age*, 6 May 1994, 5; cf., H. Charlesworth, 'The Australian Reluctance about Rights' (1993) 31 *Osgoode Hall Law Journal* 195.

³ Address to Young Presidents, Brisbane. Reproduced *Australian Lawyer*, December 1994, vol 29 # 11, 16.

⁴ Address to Seminar on a Bill of Rights for the Australian Capital Territory, 22 August 1994.

⁵ See (1994) 3 *Human Rights Defender* 1; (1994) 5 *HIV/AIDS Legal Link* 1.

⁶ See *The King v Burgess* (1936) 55 CLR 608.

⁷ *Convention for the Protection of the World Cultural and Natural Heritage* (UNESCO).

⁸ See *The Commonwealth v Tasmania* (1983) 158 CLR 1. (*The Tasmanian Dams Case*).

up firmly in support of the Tasmanian Government's steadfastness regarding this issue.⁹

One journalist declared:

The rights of Australians as individuals have been tossed aside by those who favour the rights of cultures. That some of these cultures embrace the idea that some humans are superior to others because they belong to one caste or another is ignored. That others are based on a foundation of sexual inequality is disregarded. In this utopian non-judgmental climate, the politically correct have deemed it unacceptable to question Third World cultures, even when some practices clearly violate individual rights.¹⁰

The same writer observed:

The Federal Government has acted with its usual pusillanimity when confronted with a noisy minority in this case acting against the democratically elected State Government. The issue is not about [the Coalition] leadership, it is about the basis of our Federation.¹¹

One letter writer even worked the Queen into this debate:

It appears to many to be quite hypocritical of the 'republicans' to push for the severance of ties with Great Britain, which are now only of maternal nature, whilst successive Federal...governments have signed UN protocols and covenants which make us answerable to UN committees of a dubious democratic nature, which have not been elected or sanctioned by the Australian people.¹²

Yet behind some of the emotive language lies the expression of serious concern which requires the attention of those who are generally sympathetic to the incoming tide of international human rights law and its influence upon Australia. John Hyde, writing in the *Australian* said

There is something amiss with a polity that, to achieve its aims, enters treaties with undemocratic committees of the United Nations, the International Labour Organisation or whomever, to overrule the processes by which it itself is governed. This was not the intention of those who drafted the constitution; nor is it the wish of Australians today...Because foreign treaties are so numerous, their

⁹ Letter by Gavin Alderton, *Sydney Morning Herald*, 26 August 1994.

¹⁰ Piers Akerman, *Telegraph Mirror*, 25 November 1994.

¹¹ *ibid*, *Telegraph Mirror*, 30 August 1994, p.12.

¹² Letter by Bailey, *Courier Mail* (Queensland), 28 November 1994.

terms so general and their implementation after signature within Canberra's discretion, misuse of the external affairs power is a big threat to our Federal structure.¹³

To the same effect were the remarks of Senator Rod Kemp who concluded:

Involving UN committees in Australian domestic disputes will inevitably, over time, undermine our own legal institutions...Australia's major constitutional problems [are]...the expansive use of the external affairs power, the ruthless use of ILO and UN treaties to over-ride States and the ceding of sovereignty to foreign committees. The present generation of Australians do not want their laws made in London or at the UN.¹⁴

The Premier of Victoria wrote to the *Melbourne Age* to protest against its support for the Federal Sexual Privacy Bill:

The rights of individuals are what the States protect. Let the people in each State decide what they want for their own community, through the ballot-box, and through the constitutional and democratic way of bringing about change.¹⁵

The former Prime Minister, Mr Malcolm Fraser, also criticised the process of the use of international conventions:

In one case, in December 1992, the Governor-General was asked to ratify a treaty only hours before the dissolution of Parliament. No media release was issued. This particular convention, ILO 158, has been ratified by only 17 countries. Of major industrial states, only France and Sweden have ratified this convention. It has also been ratified by the Cameroon's, Cyprus, Gabon, Malawi, Niger, Uganda, Venezuela, the Yemen Republic, Yugoslavia, Zaire and Zambia. [A]re Australians to be masters of their own affairs or are Australians to give away their sovereignty to United Nations committees? The point becomes all the more relevant when you look at the membership of these committees. The membership is appointed by governments that often ignore the decisions of the committee and yet Australia binds itself and feels required to obey.¹⁶

¹³ J. Hyde, the *Australian*, 2 September 1994.

¹⁴ R. Kemp, 'Let's Make our Own Laws', *Herald Sun*, 30 August 1994, p.15.

¹⁵ G. Kennett, Letter to the *Age*, 29 August 1994, p.12.

¹⁶ M. Fraser, 'UN Poses Biggest Threat to our Sovereignty', the *Australian*, 17 August 1994. Contrast E.G. Whitlam, 'National and International Maturity' (1992) 46 *Australian Journal of International Affairs* 29.

There are similar statements by many thoughtful Australian politicians and ex-politicians. Not all of them are members of the Coalition side of politics. For example, the former Senator Peter Walsh observed in this connection:

I am not and never have been a monarchist, but find it ironic that so many contemporary Australians determined to protect us from the non-existent threat of English tyranny, fall over each other in a scramble to surrender Australian sovereignty to a rag-tag and bobtail of unrepresentative United Nations committees, accountable to nobody.¹⁷

Rather more bluntly, the Hobart *Mercury* reported that one member of the Tasmanian Legislative Council, the Hon. George Brookes, expressed the hope that the State Government will ‘tell the United Nations to go to buggery’.¹⁸

There are undoubtedly questions here for serious reflection. They derive from the democratic and federal nature of our Constitution; from our traditional willingness to leave our human rights to be determined, from time to time, by parliaments elected by our people and upheld by independent courts. They concern the suspicion of an island people who have long seen themselves as something of a geographical oddity in an alien part of the world: vigilant to defend the culture and rights brought here by the settlers. Such a people, inheriting an often xenophobic attitude to foreigners, fall naturally enough into a suspicion of things done by overseas committees. That suspicion is fuelled when the committees are those of the often inefficient United Nations and made up of people whose commitment to the kind of values which Australians share is generally thought to be doubtful.

Let me therefore concede at the outset that this is a legitimate debate about matters of genuine and proper concern.

The International Perspective

A week from now I will present my latest report to the Commission on Human Rights of the United Nations, sitting in Geneva. This will be my third report as the Special Representative of the Secretary-General of the United Nations for Human Rights in Cambodia. I was appointed to that post in December 1993. It has taken me on five missions to Cambodia. The missions are exhausting and sometimes even a little dangerous. They have to be squeezed into my extremely busy court duties. I see, and report upon, aspects of Cambodian human rights which are discouraging and even depressing: the abiding problems of security; the ever-present reminders of the genocide; the landmines which claim daily victims; the poverty, low expenditure on health and education; the new peril of HIV/AIDS; corruption; the poor standard of some elements of

¹⁷ P. Walsh cited in M. Fraser, *op. cit.*, n 16.

¹⁸ As reported *Star Observer*, 17 June 1994, p.14.

the media and the intolerance of criticism of some officials. All of these problems I endeavour to chronicle accurately and report with, I hope, constructive suggestions for improvements.

But I also report upon the many advances which are made daily in the rebuilding of Cambodia. You rarely hear of these in the Australian media; good news is said to be of little interest. You do not hear of the judge in Battambang who works long hours, with paper and pens in short supply, to bring justice and order to his people. You do not hear of the prison governor in Siem Reap who has reorganised his prison and provided benefits of education and recreation for the prisoners. You hear nothing about the brave human rights groups who speak up for rights and demonstrate their concerns in a way that would have meant death not so long ago. You do not hear of the newsstands which are full of papers and journals where formerly the authorities controlled and allowed just a few, or of the hospitals which are being reconstructed. You do not hear of the brave French doctors of *Médecins sans frontières* who perform their heroic work and teach their Khmer colleagues to carry on. And you do not hear of the fine Australian soldiers helping in the task of landmine clearance. A government with democratic legitimacy is in place: the King acts with constitutional propriety. He agreed to my request to help lead the national struggle against HIV/AIDS. So in the midst of discouragement, every day, I see in Cambodia people who defy recent history and are an inspiration, offering a daily commitment to upholding human rights and human dignity.

These people are assisted and sustained in highly practical ways by dedicated officers of the United Nations—UNESCO, helping to safeguard the treasures of Angkor; ILO, stimulating labour-intensive works programmes; WHO, advising on malaria control, clean water and the fight against AIDS; FAO, helping with high yield rice grain and technical advice to improve irrigation and crop production; UNDP, in countless programmes of development; and everywhere the UN volunteers, young people, giving a time of their lives for Cambodia.

The Centre for Human Rights in Phnom Penh helps me in providing virtually daily guidance to the Government and National Assembly of that country. It is not done by reference to our personal whims or idiosyncrasies. The guidance is given by reference to the great charters of the United Nations which have laid down the post World War framework for the respect for fundamental human rights. Most of those charters seem terribly familiar to us of the English-speaking democracies. Fortunate are we who can take most of those rights for granted.

It is no coincidence that they seem so familiar to us. Most of them were written in the late 1940s and early 1950s by lawyers of the Anglo-American tradition. Things that parliaments at Westminster and Australia struggled and fought for over centuries are by no means so assured in a country such as Cambodia. These international instruments are far from seen as a threat to sovereignty. They are the guiding stars to human respect and dignity, to the control of oppression and to the repair of a strife-torn country of much suffering.

I believe that the Government of Cambodia knows that, in my work there for Cambodia and for the United Nations, I have no cause to pursue other than the cause of principle. I speak to Cambodia and to the United Nations with a single voice. I tell the good news; but I fearlessly

expose the bad. I offer advice and technical assistance (which may or may not be accepted) to bring law and policy into line with universally accepted human rights principles.

My reports on Cambodia must be given twice a year: once in March to the Commission on Human Rights in Geneva and then, in November, to the General Assembly in New York. The experience of doing this is, I must say, a humbling one. The hall is huge. It is packed with the great variety of humanity. Virtually every nation on earth and many inter-governmental and international agencies are there. It is an amazing scene.

It is, of course, an imperfect place, just as our world is imperfect. Doubtless at the tables sit not a few who have little real commitment to fundamental human rights or whose agenda puts any such concerns below others. But one after another, the UN Special Representatives and Special Rapporteurs are heard. They have complete freedom to speak as they see things. They call dictators and tyrants to account before the bar of the international community and the judgment of humanity. Those whom I have known are courageous. They are people of experience, sensitivity and integrity. For the countries upon which they report, human rights is not just a matter of theory or an esoteric constitutional issue. It may be a matter of survival for a dissident or a person from a minority group.

It is the pressure of these almost continuous sessions of international scrutiny of human rights which has helped bring about the fundamental changes we have recently seen in South Africa, in Malawi, in Palestine and elsewhere. It is there that reports are made on particular countries and on abiding themes of importance to global human rights. Pressure is applied to countries such as Cuba, China, Haiti, Iran, Iraq, Sudan, Afghanistan, Burma and the states of the former Yugoslavia. Once, in the name of 'sovereignty', they would have ignored such pressure. In front of the world community, that is now impossible.¹⁹

Pressure is also applied to Equatorial Guinea, to Indonesia in respect of East Timor, to Papua-New Guinea in respect of Bougainville, to India and Pakistan in respect of Kashmir, to China in respect of Tibet. Pressure is even applied to Australia in respect of our long neglected Aboriginal people. Of course, the pressure sometimes fails. In an electric moment, immediately following my last report on Cambodia, the Rapporteur on Sudan was denounced by the government of that country. Some voices have even declared him an 'Enemy of the Believers' for his forthright condemnation of the attempts of the Government of Sudan to force the sharia law on the Christian people in the south of the country. But the important point is that the representative of Sudan was obliged to answer to the world and to very specific criticisms.

The lesson of recent decades is that this requirement may eventually have a beneficial effect. It gives a voice to the oppressed. It lifts the hopes of those who would otherwise be without hope. In the one big room, the essential inter-dependence and ultimate unity of humanity is brought home to all. In a world of jumbo jets, of instantaneous telecommunications, of global warming

¹⁹ See Commentary, 'The United Nations Commission on Human Rights: 50th Session' (1994) 52 *The Review* (ICJ), 66.

and of AIDS we are forced to see human rights as they are: a cause of international concern. Anyone in doubt about this—and in particular any member of a national parliament—should take the opportunity to observe this process in action. It is still in its early historical phase. Doubtless it has many inefficiencies and weaknesses. But it grew out of the awful revelations of the last world war and the flash, brighter than a thousand suns, which lit over Hiroshima. Suddenly it was perceived that international peace and security were interrelated with human rights. Security would have no lasting reality unless built on universal respect for fundamental rights. So long as that is not assured, our world will continue to be an angry and a dangerous place.

We in Australia, who enjoy so many blessings of nature, history, law and democratic institutions, cannot be entirely cut off from the international moves for the protection of universal human rights. In our continental country, we are part of the world. The thought that we can pull up the drawbridge and shut out the influence of this global development of such potential for the coming millennium is as unrealistic as it is unworthy.²⁰

The Path of Gradualism

Some, at least, of the concerns that have been voiced in Australia about the growing influence of international human rights principles upon our law can, I think, be adequately answered.

Firstly, the international committees which are frequently criticised stand in an entirely different relationship to the Australian legal system from that of the Privy Council in London. By our Constitution, the Privy Council was part of the Australian judicial hierarchy. No United Nations committee and no international court has the same power. So far as the committees are concerned, their decisions derive only from the power which we, as a nation, have accorded them. Their decisions are not self-executing. As in the case of the decision of the UN Human Rights Committee on the complaint of Mr Toonen against the Tasmanian laws,²¹ the decision is only translated into action in Australia by the authority of an Australian law-maker. I do not comment on the constitutional validity of the *Sexual Conduct Act*; that will be for the High Court. But the authority of the statute rests upon a decision, duly debated, of the Australian Parliament. No Australian law was changed, as such, by the decision of the United Nations committee.

Secondly, the United Nations committee has, it is true, members from a number of states which do not share all of our perspectives on human rights; but they are states of the world we live in. The members of the committee are elected for their individual expertise. When serving, they do not act as representatives of their country but in a personal capacity. They must make a solemn

²⁰ A. F. Bayefsky, 'Making the Human Rights Treaties Work', in L. Henkin and J. L. Hargrove (eds) *Rights: An Agenda For the Next Century*, ASIL, Washington DC, 1994.

²¹ United Nations, Human Rights Committee, Communication No 688/1992. Nicholas Toonen and AustralianDoc: CCPR/C/50/D 488/1992 (4 April 1994).

and public declaration to that effect. The Toonen decision was unanimous. This suggests that, even in a matter as controversial in some countries as the rights of homosexuals, nationality and legal tradition had little final influence. The members from cultures as different as Australia, Jordan and Venezuela shared a similar juristic analysis and conclusion.²² The decision of the committee may be criticised on its merits, as it has been, by experts in international law who think that it went too far²³ or not far enough.²⁴ Some criticism was directed to the inability of Tasmania, as such, to be heard directly by the committee. But that was simply the result of the fact that, by the Australian Constitution, the Commonwealth is the international representative of Australia. In fact, the federal authorities consulted Tasmania. Extracts from Tasmania's submissions were included in the Australian statements to the committee; but rejected.

Thirdly, the notion that Tasmania's democratically elected Parliament should have the right to override fundamental rights, globally declared and relevantly held applicable, begs an important question. I share the view that it would have been preferable for the people of Tasmania, through their Parliament, to have accepted the justice of repealing the sections of the Tasmanian *Criminal Code* which threatened to punish, and which stigmatised Mr Toonen and other homosexual and bisexual men. After all, there is now an Australia-wide legal standard on this matter. International human rights courts had earlier declared what fundamental respect for human rights required of the law on this subject.²⁵ Scientific enlightenment had made it clear that to punish or stigmatise a person on the grounds of sexual orientation is as wrong, and indeed wicked, as to do so on the grounds of gender or race and as irrational as to do so on the basis of left-handedness. But Tasmania has an unusual electoral system. The prospect of a change of mind in the Upper House seemed remote, at least in the short term. Australia's international obligations have been declared. We were either to ignore the declaration and justify it by reference to our Constitution and politics — or we were obliged to act to fulfil the duty we ourselves had accepted.

Fourthly, the democratic argument and the complaint about loss of 'sovereignty' have an undoubted appeal to a proud people with a long constitutional history of their own. But I think it is increasingly recognised that democracy is not simple majoritarianism, as we tended to think a few years ago. Democracy, as it is practised at the end of the twentieth century, is a system of government which accords power to persons elected and accountable to the majority of citizens, but upon the condition that they will respect the fundamental rights and dignity of minorities. Professor Ronald Dworkin has explained that human rights are promises to minorities that their

²² H. Charlesworth, 'Protecting Human Rights' (1994) 68 *Law Institute Journal* (Vic), 462 at 463.

²³ See A. Funder, 'The Toonen Case' (1994) 5 *Public Law Review* 156.

²⁴ See G. Selvaner, 'Gays in Private, the Problems with the Privacy Analysis in Furthering Human Rights' (1994) 16 *Adelaide Law Review* 331; W. Morgan, 'Protecting Rights or Just Passing the Buck?' (1994) 1 *Aust Journal of Human Rights* 409.

²⁵ See *Dudgeon v United Kingdom* (1981) 3 EHRR 40; *Monnell and Norris v Ireland* (1988) 10 EHRR 205 and *Modinos v Cyprus* (1993) 16 EHRR 485 (decisions of the European Court of Human Rights). Cf., D. W. Jackson, 'Judging Human Rights: The Formative Years of the European Court of Human Rights' (1993) 13 *Windsor YB Access J* 217, 236.

dignity and equality be respected by the majority. This is, he declares ‘one feature that distinguishes law from ordered brutality’.²⁶ It seems unlikely to me that Australians would accept a State law that criminally punished people because they were of Jewish or Chinese ethnicity or because they were women or because their skin was dark. Seen in this light, the limits of democracy are ultimately reached. Far from being a surrender of ‘sovereignty’, measures taken to uphold minority rights, authoritatively declared by an expert international committee, may be seen as an exercise of sovereignty. Those who talk of ‘sovereign States’, or for that matter ‘the sovereign Federation’, indulge in metaphors which are not sustained by the Australian Constitution as it has been interpreted. Ours is a complex sovereignty. In 1901 we divided up great power by adopting the Federal system of government. Yet we did not adopt the other means of dividing power by an entrenched, written bill of rights. But that did not mean that our people did not enjoy fundamental rights. Increasingly, these rights are becoming clear, both from the declarations of the High Court and the stimulus of international treaties. This movement has caused many commentators to call for an Australian constitutional bill of rights. At least such a measure, if approved, would have the legitimacy of acceptance by the Australian people.²⁷

Fifthly, a little known change that has come about in recent years parallels the passage of legislation through Parliament to give effect to international standards. I refer to the impact of international human rights jurisprudence upon Australia’s court decisions. As Justice Brennan pointed out in *Mabo*,²⁸ it is inevitable that, over time, the influence of the *International Covenant on Civil and Political Rights* will be brought to bear upon the perception by Australian judges of what judge-made law requires. If there is a gap in the common law, or if a statute is ambiguous, it is both inevitable and right that Australian courts, in today’s world, should fill the gap, or resolve the ambiguity, by reference to any applicable international rule. Better that the judge should do this than that the judge should rely upon personal, idiosyncratic values or upon distant analogies derived from distant judges in a distant country from distant times. This is simply the next natural phase in the development of the Australian common law as it adapts to the world of internationalism. Fortunately, our brilliant system of law has a never-ending capacity to respond to new problems and to adapt sensible solutions from new sources.²⁹

Sixthly, for those who say that Australia has nothing to learn from these international developments, which may be useful enough to the poor people of Cambodia and to the oppressed in Cuba, Sudan, Burma and elsewhere, the response comes back: ‘Are we so perfect that we have nothing to learn from the wisdom of others?’ Recent history denies it. The dismissal of judicial officers by Australian governments and parliaments of different political persuasions, federal and state, by the simple expedient of reconstituting a court or tribunal shows that even in a matter so

²⁶ R Dworkin, *Taking Rights Seriously*, 1977, p.205.

²⁷ See M. D. Kirby, ‘The Bill of Rights Debate’, *Australian Lawyer*, vol 29, December 1994, p.16.

²⁸ (1992) 175 CLR 1, 42.

²⁹ See M. D. Kirby, ‘The Australian Use of International Human Rights Norms’ (1991) 16 *University of New South Wales Law Journal* 363.

fundamental as the independence of the judiciary, we in Australia fall down. In the matter of the human rights of homosexuals, the law stood as an oppression to that section of our community in all parts of Australia for more than a hundred and fifty years. It still remains on the statute books of Tasmania. In hindsight, what is remarkable is not that these things were changed, but that they lasted so long.³⁰ It is also notable that this country enjoyed one hundred and fifty years of elected, representative government and not a single parliament of this nation saw fit to explode the manifest fiction that Australia was *terra nullius* when the settlers arrived. It was left to the High Court of Australia in *Mabo* to shatter the fiction and propel our country to a juster law. This is the way a free people, through their constitutional government, strive toward enlightenment. But the point is that sole reliance upon the democratic assemblies may not always ensure that respect is accorded to the fundamental rights of minorities. Occasionally, an external stimulus is useful. One such stimulus in today's world is international human rights law. The instruments of stimulus include such bodies as the UN Human Rights Committee, the International Penal Tribunal just established, the UN Commission on Human Rights (to which I will shortly report) and the team of Special Representatives and Special Rapporteurs, of whom I am one. We should see these instruments as a natural development of the history of our planet to which this much blessed country has an obligation, and a privilege, to contribute.

Lessons for the Future

This said, the concerns of fellow Australians about respect for democracy, the preservation of the Federal compact and local responsibility for human rights matters must not be lightly dismissed. As I have shown, they are views sincerely held, strongly argued and they have a foundation which is legitimate.

How can we reconcile what seems to be the natural tide of history, one that is often, if not usually, beneficial, with the Constitution of this country drawn up for utterly different international circumstances and for a significantly different Australian people? That is a challenge which is before us now.

Of course, we could amend the Constitution by referendum: redefine the external affairs power, reorganise the Federation, abolish the states, revamp local government and incorporate a fundamental bill of rights of our own. Some of these changes, and others, may come about. But in the meantime, it is legitimate to consider reform less drastic and more immediately achievable. The Minister for Foreign Affairs, Senator Evans, who has done a great deal to support the United Nations work in human rights and who is justifiably honoured in Cambodia for his contribution there, has rejected the proposal that Australia's ratification of international treaties should be submitted to parliamentary approval. 'No way, José' was his response to this proposal, which was strange because he was addressing not José but Rod — Senator Rod Kemp. To Senator Kemp's rhetoric: 'We could not have the people at all involved in this', Senator Evans told an estimates committee bluntly, 'Dead right'. Later Senator Evans, before an estimates committee,

³⁰ See for Amnesty's criticism of Australia (1994) 3 *Human Rights Defender*, 1.

agreed that treaties would be tabled in Parliament before action is taken to adhere to them. This was described as a ‘sort of halfway José.’³¹

It is certainly our tradition that the Executive Government, succeeding to the prerogative powers of the Crown, has reserved to itself the right, and the duty, to subscribe to international treaties in the name of Australia. There are arguments for persisting with this tradition. Not the least of these is the frequent need for Australia to act swiftly and with a single voice in matters of international concern. Procedures have been introduced for consultation on new treaties with state governments and, where relevant, with industry and community groups. This is a beneficial development. The question is whether it has gone far enough.

Some important treaties have been ratified with little parliamentary or public debate.³² The growing body of treaty law has an increasing impact on Australian law. It therefore seems legitimate, in some way, now to involve the national Parliament in the superintendence of executive action in respect of treaties. The old rule may have been apt for a time when international law was in its infancy. But nowadays, in economic matters as well as those relevant to human rights, the growth of international treaty law is extremely significant and growing even more important. Whilst I fully understand the politics of resistance to parliamentary scrutiny and would regret a move to the United States requirement of advice and consent of the legislature, which has proved such a reinforcement of isolationism, there is surely an intermediate position. Parliamentary scrutiny is not the same as parliamentary approval. Scrutiny could be part of the larger function of raising Australian awareness of the growing body and importance of international law. As that law comes to sustain Australian statutes (such as the Sexual Conduct Act), Australian executive action (such as the Tasmanian Dams regulations) and Australian court decision (such as, in part, *Mabo*), it is appropriate that the actions of the Federal Executive in ratifying treaties should be assisted by the voices of the representatives of the Australian people. I do not believe that those voices favour an isolationist Australia. Still less do I believe that they are unaware of the important moves which I have described, in the international community, for the better protection of human rights everywhere. In my view we can trust the Australian people,

³¹ See Australian Senate, Estimates Committee, *Hansard*, 29 November 1994, 157. See also the tabling by Senator Harradine, on 23 August 1983, of a proposal for a Standing Committee on Treaties, reintroduced on motion in each session since 1983 and the introduction by the Australian Democrats of the Parliamentary Approval of Treaties Bill 1994 (Cth). The Bill would provide a system of Parliamentary disallowance of subscription to treaties disapproved by Parliament. On 21 October 1994, Senator Evans and the Federal Attorney-General (Mr Michael Lavarch) issued a statement reaffirming ‘the Government’s commitment to responsible and transparent treaty making’, stating that the Government was ‘happy to take further steps to strengthen the flow of information to Parliament’.

³² The Government’s action of depositing the instrument of accession to the First Optional Protocol to the ICCPR before the tabling of the instrument in Parliament was described as ‘extraordinary...without any public debate or even public awareness of its existence, let alone its scope and significance’. See A. Twomey, Parliamentary Research Service Background Paper No 27, 1995, *Procedure and Practice of Granting and Implementing International Treaties*, 9 February 1995, 9. In 1961 Prime Minister Menzies announced that, in general, the Australian Government would not proceed to ratify or accede to a treaty until it had lain on the table of both Houses of Federal Parliament for twelve sitting days. See *Commonwealth Parliamentary Debates*, 10 May 1961, 1693. This practice should be restored.

and their representatives in Parliament, to understand that it is possible to reconcile our Federal Constitution and the growing province of international law. In their genius, the Founders provided the means to do so. It takes legislators and judges of understanding to ensure that the Constitution continues to serve Australia and its people in a time when human rights, like so much else, assumes an expanding international dimension.

No-one, least of all a member of parliament or a judge, should forget that the external affairs power in the Australian Constitution appears, both by express terms and by its location in the document, as an element of a constitution which is federal in its basic character. Although the grant of power is large indeed, it is not uncontrolled. It is the function of successive parliaments and of the High Court, to chart the boundaries of the power in new circumstances. Amongst the new circumstances are the growing sense of national identity of Australians, the changing role of Australia in its region and in the world, the changing features of international law and the role of the United Nations and other international or regional bodies. To say this is simply to say that our Constitution adapts to the changing nation and world in which it must operate. We have institutions, working in constant symbiosis, which provide the solutions for changing times. Should these solutions sometimes prove unacceptable we have the remedy in our own hands. Those who enjoy the temporary responsibility of exercising power in Australia should not forget the federal character of the Constitution. That character itself protects our freedoms. But they should also have a view of our changing world and a vision of the future so that they see Australia as it is — part of a world of increasing economic and human interdependence.

In January this year it was my privilege to meet Rigoberta Menchu, Nobel Peace Laureate. Her journey to international recognition began on the steps of the Spanish Embassy in Guatemala. There she saw her father shot down by military oppressors as he sought to present a petition about human rights. Later she saw her two brothers killed in a similar way. Later still she was brought with remaining members of her family to see her mother killed. She was required to stand there as the dogs were set upon her mother's body. She stood until it was dark and the military and the dogs had departed. She then picked up the remains of her mother and took them home for burial. Yet, despite all this, she continued her peaceful demands for reform, justice and human rights. Not peace at any price; but peace founded on recognition of universal human dignity. She went on to learn Spanish so that she could communicate her story. Then she learnt English. She went to the United Nations. She was asked how her life had prepared her for the United Nations. She pointed out that her early life had involved her shepherding sheep. It was a good preparation, she declared.

We can learn from such people, new shepherds, to have insight into our own failings. As good international citizens we can contribute to a better world where the suffering of Rigoberta Menchu, and people like her, is a source of astonishment, pain and determination to redress. Such a world will not come soon; it will not even come in our lifetime. But it will surely come in the millennium which we are about to enter, and every one of us, parliamentarian, judge and citizen, of this fair land has a duty to assist, and not to impede, the coming.

At the conference in Mexico City, Rigoberta Menchu read a number of her poems as a way of communicating her thoughts. So I rose and, in my speech, I read to the assembled people a poem

of one of our great poets, Oodgeroo of the Noonuccal, Kath Walker, upon whom it was my privilege to confer an honorary degree when I was chancellor at Macquarie University. This is what the late Oodgeroo wrote, *A song of hope*:

Look up, my people,
The dawn is breaking,
The world is waking
To a new bright day,
When none defame us,
No restriction tame us,
Nor colour shame us,
Nor sneer dismay.

Now brood no more
On the years behind you,
The hope assigned you
Shall the past replace,
When a juster justice
Grown wise and stronger
Points the bone no longer
At a darker race.

... ..
See plain the promise,
Dark freedom-lover!
Night's nearly over,
And though long the climb,
New rights will greet us,
New mateship meet us,
And joy complete us,
In our new Dream Time.

To our father's fathers
The pain, the sorrow;
To our children's children
The glad tomorrow.

Questioner — I would like your permission to refer to the subject of a bill of rights for Australia but also to the remarks that you have made today. You pointed out that there has been a wide call for a bill of rights from all over Australia and it has been generally assumed that a bill of rights will give us a lot of rights that we do not have now. You would be well aware that some people have pointed out that some of the proposed bills of rights destroy rights which we have held for a long time, traditionally, and which are most important to our existence as human beings.

I have here a newspaper report concerning a proposed bill of rights to declare a fundamental right to — among other things — freedom of association and to be free from all forms of discrimination. I would like to put it to you that those two rights are incompatible. If the contemplated freedom from discrimination contemplates the fortification and, perhaps, the advancement of existing anti-discrimination laws, then this is going to be a repressive move, for the reason that anti-discrimination laws destroy freedom of association. Let us note in passing that freedom of association requires not only that we shall be free to come together and meet each other; it also requires that we shall not be compelled to associate with people we do not want to have anything to do with.

Under anti-discrimination laws, people are forced into an association — employers with employees, landlords with tenants. Restaurant owners are forced into an association with diners they do not want to serve and clubs are forced into an association with members they do not want to have. How many people in this room realise that, because anti-discrimination laws in this territory provide that there shall be no discrimination on the ground of political conviction, a Jewish club can be compelled to take neo-Nazis as members?

May I conclude by asking you what influence you have to prevent such a provision ever going into an Australian bill of rights so that people may one day alter this state of affairs if they wish to, and I do think they will wish to?

Justice Kirby — First of all, it is true that freedom of association is not mentioned either in the United States Bill of Rights or in the Canadian Charter of Fundamental Rights and Freedoms. On the other hand, we in Australia generally think we have the freedom to associate with whom we like and that that is something that should be respected and protected.

One of the best things that has happened in Cambodia since the UNTAC period has been the flowering of human rights groups — these are wonderful, brave people, most of whom have lost members of their family — associating together, speaking up and demonstrating for human rights. But they do not feel safe unless they have an act which says that they can have an association and which permits them to do this or that. I always tell them that in our legal tradition you can do what you want to unless there is a law stopping you. But in the Cambodian legal tradition you have got to have a law which permits you to do it, which is a very different way of looking at human rights and other things.

About two days out of three in my life the problem that is presented in the court of appeal is fairly simple: you get the facts; you find the law; the law is clear; you apply the law to the facts; pull the lever; and there is the decision. Most people think that is what it is like on three days out of three. It is not. On the third day, you reach a problem upon which the law is silent or upon which the statute, with all respect to the Clerk, is very ambiguous, and then we have to try to find out what the law is and that gives judges a tiny bit of latitude.

The point I make is that obviously in human rights matters, in balancing two fundamental rights, judges will have to draw the line — just as today, in one out of three days, we are drawing the

line as to where the law stands and what it means. That is what we are paid to do. Drawing the line between the right of free association and the right not to have discrimination on the grounds of gender or race is a matter of line drawing and that jurisprudence would develop over time. There would be some in our community who would say, ‘You can have a club but, at least in a general club, it should not be allowed to exclude women.’ I saw in yesterday’s *Age* that there is an ancient club in Melbourne, all of whose members were said to be eighty-three and to have voted in favour of having women in the club. The question that was raised was: ‘Why did they take such an awful long time to do it?’

It is true. The point you make is right. In any matter of constitutional decision and in any matter, especially of bill of rights decisions, there will be lines to be drawn. Those lines have to be drawn — one hopes and tries in a consistent way — by independent judges striving to reach the right conclusion and one which will not be set in concrete but which will change with the perception of social circumstances over time.

I made the point that I am inclining in favour of a bill of rights, partly because I feel that if we are to have a bill of rights it will be better if it is debated in this Parliament and other parliaments so that elected representatives take part in the debate and the people endorse it and give it legitimacy. I would prefer that to a bill of rights which is donated to us by judges — with all respect, and however distinguished.

The point I made which was not reproduced in any of the media reporting of it was that the bottom line is that it all depends on the package you are offered. It is one thing to be generally in favour of a bill of rights, but it is another thing to be in favour of a particular bill of rights. Therefore, I believe that when we address that issue we have to have at the back of our minds, even if we are inclined to be in favour of a bill of rights, a mental reservation about the bill of rights on offer. In that respect, it is a bit like the talk of the republic. There may be many people who favour a natural progression of our history; they would think that Australia should move towards a republic. But then arise the hard questions: ‘What is the form of republic? What is the form of the head of state? Will the people of Australia be content that the head of state be elected in this Parliament?’ Continued opinion polls, with every respect to any members of parliament who are present, indicate that the Australian people would not be content.

In looking at these issues you have to look at the detail. You cannot just talk in superficial generalities. You have to look at what is being offered to the people before you change the Constitution.

Questioner — As for referendums, we had two referendums in the ACT. Two-thirds of the people twice said ‘no’ to self-government and yet the government — I suppose in its wisdom — said, ‘yes’. So what is the use of a referendum for a bill of rights?

Justice Kirby — Those referenda were advisory whereas the referendum under the Constitution becomes part of the law. For that purpose, the people become part of the law making process.

Questioner — You touched on criticisms that have been made of the United Nations committee, and I would add another. In my understanding, the case for the Tasmanian government was not

put. The Commonwealth, as I understand it, put a case which did not address the arguments which could have been put for the Tasmanian position.

Justice Kirby — Professor Hillary Charlesworth, who is one of the leading Australian international lawyers, answered that point and said that, in fact, in Australia's own submissions there were extensive references to the arguments of the government of Tasmania and that the government of Tasmania was closely involved in the preparation of the Australian argument. I have no knowledge of this, but that is what an informed and respected international lawyer says.

Questioner — Thank you for that information. But, going to a general point of criticism against the United Nations committee, you stated that the committee after all has no legislative power, that it is up to the Commonwealth Parliament to legislate. On the other hand, with respect, you also put before us compelling moral — indeed, one might say technological — considerations which impel the Commonwealth Parliament to adopt a recommendation of the committee. I put to you, in respect of the committee, the point that you made in respect of a bill of rights: we should not look only at the desirable principle; we should look at the actual package offered.

Justice Kirby — So far as the committee is concerned, I was simply seeking to answer the points being made by a number of commentators whom I have referred to in my paper, including Senator Rod Kemp who said that we have not released our rule from London — which I took to be a reference to the Privy Council, the imperial parliament — to be accepting rule from Geneva or New York. You often hear that said.

The point I made was that, whereas a statute from Westminster in the days of the empire was binding in Australia and whereas a decision of the Privy Council when it was part of our judicial hierarchy was a decision that was binding and enforceable by the sheriff's offices of this country, the decision of the United Nations committee, though extremely important and, I believe, usually beneficial, is not self-executing. It then requires action and decisions by Australian law-makers either by the parliaments of Australia, as happened in that case, or by judges who can use international jurisprudence in the ways that I mentioned to fill the gaps and the nooks and crannies of the common law. This is not something to be afraid of or ashamed about. If you look at it historically, it is a natural progression, a natural phase, as the common law moves from a country which was fairly isolated into a country which is part of the world community.

I was first appointed in 1974, so I have been in judicial life of one form or another, federal and state, for twenty years. I have seen governments come and go; I have seen parliaments come and go, and it gives you something of a perspective. That is what I wanted to leave with you today: an appeal to a perspective. If you stand back from our planet, as the orbiting satellites permit us, and see this little blue speck in the mighty universe, and if you stand in the rooms of the United Nations Commission on Human Rights and see assembled humanity, then you come back and put on SBS and hear Mozart's *Requiem* with the rockets and gunfire of Bosnia or Chechnya and all the other evil works of nationalism, you can see the logic of humanity standing outside its planet and seeing our world as it is in its essential unity.

It is an appeal to that perspective that I came along to make today.

An Australian Head of State the Contemporary Debate

Senator Baden Teague

My topic — An Australian head of state: the contemporary debate — is one I accept enthusiastically because it has now become important to the majority of Australians. It is very important to the great majority of younger Australians. I readily concede that the management of the Australian economy is even more important, as is strengthening the foundations of family policy in Australia. These issues will be among the most prominent in the coming twelve months of debate up to the next federal election.

The perennial politics of this Parliament House and the Australian community have always been about economic management. But right now one of the increasingly emerging top-five issues is the republic and the establishment of an Australian head of state. I say it is a top issue because it indicates one's whole attitude to Australia's sense of identity. It is a gateway to being on the same wavelength as those who regard it as important enough to affect significantly the way they vote in the 1996 and 1999 federal elections, and there is rising expectation in the public that this constitutional reform may be achieved by the time of the Sydney Olympics in the year 2000. That is even ahead of the centenary of the Constitution in the year 2001.

As one Liberal senator, let me make my own position clear. I support the establishment of an Australian head of state. I want to get our national symbols right: I think our national symbols are very important. We are one independent, united, sovereign country. Those characteristics were determined long ago. It is entirely right that our head of state should unequivocally reinforce this Australian independence. There is no longer room for ambiguity. It is no longer acceptable for Australia's head of state to live on the other side of the world, to have a priority allegiance to the United Kingdom and to represent actively that country's trade over ours.

Moreover, whilst I fully, and warmly, respect the person of Queen Elizabeth and acknowledge that the constitutional monarchy has served Australia well in the nineteenth century and in the first half of this century, the Australian monarchy has now, I believe, become irrelevant — the monarchy is irrelevant. The monarchy has also begun to be counterproductive to Australian interests, not only in the projection of Australia to Asia and to the world but more especially in young Australians' sense of confidence and clarity about our own integrity as the Australian nation. The monarchy in recent decades has served the benign purpose of ensuring that the established strengths of our Australian democracy, especially the processes of this Commonwealth Parliament and the processes of cabinet government — which is answerable to the Parliament — have not been transgressed by any autocratic interference. To her credit, the monarch of Australia, in recent decades, has not once interfered with the decisions made by democratically elected Australian parliaments or governments. But I will return to this theme later.

In this address I seek to do three things. Firstly, I want to set out my own developing views in support of an Australian head of state. Secondly, I want to consider the public, parliamentary and party processes now simultaneously involved in the increasingly viable proposal to change the Australian Constitution to achieve an Australian head of state. Thirdly, I want to focus on the probable obstacles that will need to be overcome — and I think they will be overcome — to achieve an Australian head of state by the end of this decade.

I begin by outlining the development of my own views. I am a fifth generation Australian. I have served as a senator in the last seven parliaments. I am a Liberal senator. About ten years ago I expressed to my family and friends my view that the time was very fast approaching for all Australians to get to know the Australian Constitution which has served us well in the past and to move on to improve it by changing to an Australian head of state. This would be increasingly called for by a public wanting clearly to reinforce Australia's independence, integrity and sovereignty.

I have three sons; two of them now at university and one here today. One evening, about ten years ago when they were still in primary school, they asked me to explain why a British resident was actually the head of Australia. I explained our Constitution and said that I supported moving to an Australian head of state. This would mean the end of the monarchy. In amazement, but with a dawning sense of enlightenment, the boys together responded, 'What will Nanna say?' You see my much loved mother had for years been slipping to the boys the wonderful pages of the *Women's Weekly*. I say no more. It is interesting that Nanna, my mother, in her late 70s, along with my father, now believe that moving to an Australian head of state is inescapable. Moreover, given the behaviour of the princes and princesses in recent years she has no time at all for them but she will always genuinely admire the Queen and the Queen Mother.

Twenty-three months ago, on the first day of sitting of the current Parliament, I gave notice in the Senate — as shown in the *Hansard*, 5 May 1993 — that I would move a motion about the republic. This motion is still on the Senate *Notice Paper*. I think it is the first of its kind in this Parliament. I gave notice:

That the Senate —

- (a) welcomes a variety of processes to prepare options papers to enable the people of Australia and the Parliament to consider the minimum constitutional changes necessary to achieve a viable federal republic of Australia, while maintaining the effect of our present conventions and principles of government;
- (b) considers that the terms of reference for these options papers should address:
 - i) the option to remove all references to the monarch in the Constitution,
 - (ii) the option to establish a new office of Head of State and the need to consider what that office may be called, including the possible retention of the name Governor-General of the Commonwealth of Australia,
 - (iii) the provisions for the appointment and termination of the appointment of the Head of State, including the option of election by the two Houses of the Parliament on nomination by the Government,
 - (iv) how the powers of the new Head of State can be made subject to the same conventions and principles which apply to the powers of the Governor-General...

It concluded:

[That the Senate...]

c) believes that:

- (i) all of the findings of these processes remain entirely subject to full and open discussion and debate by the people of Australia and the Parliament before proceeding to referenda...¹

I went on to say that such a referendum should not be held in conjunction with an election and that a significant date by which these minimal and constitutional changes, if supported, could be implemented might be 1 January 2001. Finally, I urged sound and unhurried preparation and consideration of the various option papers.

This motion, as I said, is on the *Notice Paper*, still ready for debate at any time in the Senate, but no party whether substantially or even opportunistically has been willing to give it priority for debate. Until recently, the coalition has been too tentative to be ready to be articulate in such a debate. The government members have been too tentative, as the cabinet response to the Republic Advisory Committee Report — the Turnbull report of September 1993 — is in fact still to be announced but is expected soon.

¹ *Notice Paper*, 5 May 1993, The Senate, Commonwealth Government Printer, p.95

The constitutional reform package, which I included in my notice of motion two years ago, is still my preferred option because I believe it is the best one to serve Ausulia and the most realistic benchmark to which the Australian voters are likely to give support in the eventual referendum. In contrast, any radical reform which endangers the actual Australian political structure will I believe, be rejected at any time by the voting public.

Let me now go on to recall my own first speech on this matter in the Senate which was seven months ago. You may recall that there was a great deal of public discussion about the republic in July and we were called upon as politicians to respond. I was one who did. I said in the midst of that debate that on my return to the Senate I would outline my views in the chamber. On the first opportunity, 29 August 1994, I rose and said:

In the few minutes available to me tonight I wish to outline why I believe we should move in Australia to an Australian head of state. Many describe Australia as in transition, in these last few years of the decade, between a monarchy that has served us very well in the past and a republic.²

By the way, I had only ten minutes to give this speech and I had in front of me a few dot points on the back of an envelope. This is, I think, the first speech certainly by a coalition member that advocates an Australian head of state. I said:

I believe that our national symbols are very important. We are an independent nation — a country that has its own independence, its own sovereignty, its own integrity — and our national symbols should reflect that independence. Accordingly, I think it is quite inappropriate that Australia has a foreigner as a head of state, a person who is not a citizen of Australia and who has prior allegiance to the United Kingdom and a range of allegiances to some 12 or 14 other countries. I believe that the time has come for an Australian citizen to be the head of state of Australia and for that person to have no other allegiances but to Australia. In that way, our national symbol, vested in the head of state, will be directly reflecting our independence and sovereignty as the Australian nation.³

There are three reasons why I advocate the change. The first is, as I have outlined, that we should have an Australian citizen as head of state with allegiance to only Australia. The second reason is that the current head of state of Australia has built within it as an institution a gender bias. If the Queen had a younger brother he would now be the king of Australia I believe it is unacceptable in the 1990s to have such a symbol in the head of state no longer reflecting the values of Australia. In fact, we have in Australian law a ban on gender bias for the determining of any official except one — that one official is the head of state. We should now remedy that situation.

² *Commonwealth Parliamentary Debates*, vol. S 166, 29 August 1994, p.530.

³ *ibid*

The third reason is that a religious test for the head of state is no longer to be tolerated. Currently the head of state of Australia must be a member of my church, the Anglican Church. I have no worries about any persons being relaxed as a member of my particular part of the Christian church, but it is abhorrent to me that there is not freedom of conscience or freedom of religion in the position of head of state of Australia. If the Queen were to become a Catholic she would be out of a job. If the Queen were to become a member of some other religion, she would be out of a job. It is against section 116 of the Constitution that there should be a restriction placed on any official of the Commonwealth of Australia. Section 116 applies to all except one person — the head of state. We must remedy that situation.

I went on in the speech to say why I believed we should call this head of state the Governor-General of the Commonwealth of Australia. I said that the head of state should have the same formal powers as the Governor-General, no more and no less. I referred to what I see as the public's resistance to radical change that would in any way affect the structure of politics or democracy in this country and that we should not move to any United States system. I also said that it is my view that the head of state should be nominated by the elected Australian government, as it is now, and be appointed by the Australian Parliament.

I actually argued that it should be by simple majority but I could be persuaded that it be by two-thirds majority. I certainly agree with the aspirations of those who are advocating a two-thirds majority. I have no problem with that. The only reason I was putting forward a simple majority was that it is closer to the status quo. At the moment the Prime Minister nominates the Governor-General and there is no one standing in the way of that appointment then being made. The Queen has always accepted the Prime Minister's advice. What we would be doing is requiring, I think by a new convention, that the Prime Minister consult with cabinet, with the heads of the non-government parties and Parliament, and then nominate one person, the most fitting person of all the citizens of Australia, to be the head of state and for the two Houses of Parliament sitting separately to endorse that one nomination.

I said with regard to state governors that it is clear that this is a matter for the states to determine but, as a federal parliamentarian if I were asked, I would say retain the governors in the states and give them the same powers, no more and no less than they have now. In a parallel way they can be nominated by the Premier of the day after consultation and appointed by the houses of the state parliament endorsing that nomination.

I do not advocate any change to our other national symbols. I said so seven months ago and I still would, because there is no reason to put forward any change to the flag, to the crest, to the flower, or to the anthem. I support the Australian flag; I support the Australian crest and so on.

Finally, we should not have a popular election for the head of state because that would mean the position is contested in a party political way; a way which would be unnecessarily divisive in Australia. I would like to see the position of Governor-General being a symbol of unity as it is now, not having a separate power base or a political base that is in any way challenging to the elected government of the day, but exercising clear powers under the Constitution and the conventions surrounding the Constitution that define the head of state's responsibilities.

At the moment the public seems to favour a popularly elected president but over the coming months there must be increased dialogue to show the implications of that. If the people could see that it would mean party politicising and, I believe, an ineligibility of the best candidates, they would accept the status quo.

I want to consider the public, parliamentary and party processes involved in the republican debate and to deal with them one by one in order, beginning with the public. The Constitution can only be changed by the public. The public will determine the whole outcome, yes or no, in a referendum. For any reform to succeed a majority of Australian voters plus a majority of the Australian States must support the precise proposals for change. Accordingly the public must be involved in knowing, discussing and debating the Constitution. A number of us made sure that the Parliament had printed an easily accessible constitution. Nothing will substitute for this public involvement. The public want to be involved and the public will be involved. It is the duty of all of us to facilitate this and to initiate mechanisms for it. Politicians will need to stand back a pace or two and allow democracy to work.

I strongly support the coalition's decision to commit a Liberal-National government, after the next election, to convene a public constitutional convention to discuss and formulate resolutions for precise constitutional reform including the republic. These resolutions would then require Parliament's consideration, and eventually public referenda. But the public's crucial role in referenda and in the constitutional convention will be preceded and enveloped by a third role; that is, the political impact of the waves and currents of public opinion.

For example, it is my judgment that currently within the coalition party room there consists three groups on this issue. One-third of the coalition favours a republic by the year 2000. One-third genuinely believes that we are best served by the status quo; the remaining one-third is waiting and watching public opinion. This last group, this make or break one-third, wants a dialogue with the public throughout 1995 and 1996. They want to see a clearer demonstration of public opinion on the matters of precise and workable reforms. When precise and workable reforms emerge, and not just general aspirations towards reform, then the public opinion about the package of reforms will need to be measured and understood. It will be at this point, I anticipate, that a clear and explicit majority will emerge in the coalition which will support an Australian head of state. This coalition majority will be needed to ensure that the eventual referendum is successful. The dialogue between politicians and the public will be paramount. The role of public opinion is paramount.

I am a liberal and a democrat. I have an enormous trust in the good sense and the informed judgment of the Australian public. They will not be conned by any fly-by-night proposal for reform. Also, they will not reject any reforms which may endanger the Australian democracy we have come to know and support. The Australian public will embrace change when they see it clearly as a positive improvement and when they see it as establishing a genuinely Australian head of state.

With regard to the Parliament, the Constitution can only be changed if both the Senate and the House of Representatives assent to the necessary constitutional alteration bills. The legislation would be introduced by the government of the day and it would need to be passed by the Parliament to allow public referenda to be conducted. Up to March 1995 the surprising thing is that there has not been a single debate in the Australian Parliament about the republic issue. The Parliament up until now has been silent.

It is all rather paradoxical. All the views expressed by the politicians, Keating, Howard, Fischer, Kernot, and by the many academics, Winterton, Hirst, Irving, are to be gleaned from the newspapers. I have given one speech in the Parliament; I do not know of any other. However, any informed political observer will know that there is now a majority in the House of Representatives and in the Senate to support the establishment of an Australian head of state. There is a majority in both houses to support a republic, but because no precise workable proposal for constitutional change has been articulated, the parliamentary debate has not yet begun.

The articulation of a precise and workable proposal will need to be reinforced by an informed public opinion. Only then will the government of the day propose a constitutional alteration bill. If the momentum towards the public's constitutional convention requires the focus of the years 1995, 1996 and 1997 then the Parliament's formulation of legislation looks like being the focus of 1998

I refer now to the political parties. It is the role of politicians to represent the aspirations of the people. The political parties are constantly changing their policies in order to try to gain the confidence of at least the majority of the people. Political parties are in dialogue with the people. They are flexible, they develop, they grow and they change. Let me state the obvious: a major political party has the overriding objective of winning a majority of seats at the next election in order to form a government. Referenda, for example, are a lower priority. The overriding objective is to win government.

Political parties contain members who believe in all sorts of reforms but a political party will only embrace a reform proposal when it is convinced that the proposal is essential to win the next election. Politicians are driven by the public support for essential reforms. It is my view that the issue of the republic has now become one — I stress — of the essential reforms to win government convincingly in Australia. It may still be just possible to win government on the basis of policies which only address the other key issues.

As I have already mentioned, economic management and family policy are high on the list of these essential issues but it is clear to me that a party which can demonstrate credibility and gain public confidence on all three of these issues — the economy, the family and the republic — will all the more convincingly win the federal elections in 1996 and 1997.

I now refer to the current policies of Australian political parties with regard to the republic issue. The Australian Labor Party is pro-republic but the Australian public does not know what that means. Does it mean something radical that they may reject, or does it mean something workable

that they should discuss? Does it mean 'Keating's republic'? The Prime Minister has often made speeches about the republic. The most substantial was his election policy speech of March 1993; the 'vision-thing'. The kind of positive leadership which sparked a public response and which was one element in the surprising 1993 ALP election victory. I have to say that as a Liberal who felt the enormous pain of losing the unlosable election, and the biggest element of that loss, of course, was the Goods and Services Tax (GST).

The most remembered speeches by Mr Keating about the republic have been those that he has made more recently overseas. They have far too much given the impression of being indulgent and self-sewing and of forcing the pace. Overall, he has coloured 'the Keating republic', as the public refers to it, with the impression of it being only raised when he is overseas and this appears out of place and discourteous. Those who are cynical have already rejected Keating's republic because they gather the impression that somehow it is his plot to be the first president of Australia and they do not want that. In his visit to Germany in March, the Australian Prime Minister promoted the German model of indirect election for the president of the country. Somehow, this came over to the Australian public as Mr Keating's attempt to impress his host the German Prime Minister, Mr Kohl, and they did not take it very seriously.

However, late last year the Attorney-General, Michael Lavarch, outlined a republic proposal that seems to be emerging as the Labor government's soon to be announced initiative. In a quite measured and credible way, the Attorney-General hinted that the Australian head of state should have the current Governor-General's powers and be appointed by two-thirds majority of the Australian Parliament. This emerging definition has not in any way been discounted by Minister Gareth Evans or Minister Kim Beazley and it may well become the cabinet position to be announced in the next week or two as the government's long awaited response to the Turnbull report of September 1993.

The Liberal Party, whilst supporting the Australian Constitution as it is until it is changed and supporting the constitutional monarch as it is until it is changed, has moved very significantly over the past twelve months, especially the past six months, to an open acceptance that there is a variety of views in the public and the party. The party now accepts that all of us should listen to the public and be in dialogue with the public as ideas involved in the republic debate develop.

The coalition leader, John Howard, has fully embraced the unanimous party room outcome of last November, and that is the pledge, on coming to government during the next twelve months, to convene, during 1997, a popular constitutional convention. This popular convention would review the Australian Constitution in a parallel way to the original and creative precedent of the 1890s' federation movement itself. This review would include recommendations for the proposal to become a republic.

The Liberal and National parties have not yet gone so far as to pledge the implementation of the reform proposals that will emerge from this convention. However, the politics are abundantly clear. It is as obvious as day follows night that any popularly articulated republic proposals that emerge from this convention will be unstoppable if the proposals truly succeed in touching the nerve of majority public opinion.

The National Party also supports the constitutional convention. My good friend the leader of the National Party, Tim Fischer, has spoken out very bravely just three weeks ago to undertake that he will accept a republic if that is what the Australian public demonstrate they are determined to have. Tim Fischer won headlines throughout Australia this month by indicating that his own preference would then be a popularly elected Australian head of state rather than one nominated by the government and endorsed by the Parliament. On several occasions over the last twelve months Tim Fischer and I have discussed our views. I regard his popular election model as brave because among all the party leaders he is the only one who takes this direction.

In contrast, the predominant politicians' view, now all the more consolidating, is that the Fischer model is only superficially attractive in so much as it appeals to the democratic principle. The predominant view, and the view I have argued from the beginning, is that a popular election for our head of state would be a fundamental and unacceptable change to Australia's political structure. It would party-politicise the head of state who should rather remain above the fray and be, as the Governor-General is now, a real symbol of unity in the nation and a source of that unity. More seriously, it would set up a party political mandate for the elected head of state to rival the mandate and political base of the Prime Minister and the federal government itself. This would destabilise the good political structure of Australian democracy as we have come to know it and as we see it serving Australia so well.

A third objection to any popular election of a head of state is this: it would rule out most of the best candidates for the job. I cannot imagine that a Ninian Stephen or a Zelman Cowen would agree to be nominated if it meant fighting a party political election and jeopardising the maturity and the unity which ought to be in the foundations of the position.

The Australian Democrats and the Independents are, as far as I know, all pro-republican. The Democrats advocate an Australian head of state with powers similar to the Governor-General and who is appointed by the Parliament. Senator Cheryl Kernot's innovation, however, is to provide for the public to nominate the candidates to be considered for appointment to be head of state. She does advocate, along with a majority of us, that it should be Parliament which determines which candidate will be successful.

Now I come to the final part of my address and I am conscious of wanting to give you the most time for questions. I have just this final, briefest section to go. I conclude by listing a number of the obstacles strewn along the path to a republic; obstacles which I believe can be overcome in these next five years as we approach the Sydney Olympics and the centenary of the Constitution.

The first obstacle is the danger that the Labor government may overbid and adopt too radical a proposal for change — we will know in a week or two. If the Australian head of state proposal is only a Trojan Horse to disguise any undermining of the states or of the Senate, or to change the law to get even with Sir John Kerr, then the coalition will oppose the proposal and the whole country will withdraw into trench warfare. It would mean half a generation would be lost before we gained the promised land. The best guarantee, however, that this can be avoided is that too

many leaders in the ALP really want to achieve an Australian head of state and so they will not throw it away so easily.

The second obstacle is the small risk that the Liberal and National parties might retreat to a ‘head in the sand’ conservatism such as we have never seen in the coalition before. Clearly this is not the case now. The coalition’s openness to dialogue and readiness to engage the public in discussion, and the coalition’s firm commitment to a people’s constitutional convention, is very good evidence that this obstacle can be avoided. The surest guarantee that the coalition will not retreat is its determination to win the next federal election. Public opinion will be the force to drive home the safeguard. The coalition will not allow itself to be exposed to Labor’s taunt — ‘how can you elect the Liberals to government if they have not anything to say about bringing in an Australian head of state?’ Politicians want to win government. If it is the winning of government itself which might be put in jeopardy rather than just the referendum outcome, then the politicians will sit up and listen to public opinion.

The third obstacle is the lingering doubt arising from the feeling of undecided and older Australians that the Queen herself should not suffer personally from any immaturity or discourtesy on Australia’s part. Despite the growing public enthusiasm to achieve by the year 2000 an Australian head of state to stand up in Sydney and on our behalf open the Olympic Games before the whole world, there is an equal sense of resolution that the Queen, who has served us so graciously, should be there as one of our special guests.

But I really am confident that Australia has the maturity to handle this well. We have got five years to do it. The main risk of disaster on this front would arise if the Queen were to be succeeded by one of the princes in any of the next five years because there would be such a huge swing in public opinion to reject the monarchy immediately. Then Australia would really be at risk of discourtesies that ordinarily I believe we can avoid. The best guarantee that we will in fact overcome this obstacle is the clear way the Queen has announced her full approval for Australia to decide its own way in its own time, and that she will accept our decision.

The fourth obstacle is that we may become distracted by the various options available about the details to be incorporated into the proposal for an Australian head of state to ensure that it is workable. There is time today only to list, but not to expand on, some of these options about detail:

1. The name Commonwealth or republic—I prefer Commonwealth.
2. The name Governor-General or president—I prefer Governor-General.
3. The reserve powers—do we rely on the status quo of both constitutional provision and convention, which I prefer, or do we spell out rigorously all the powers of the head of state?
4. The Prime Minister’s single nomination of a person to be head of state — should this require a new convention that the Prime Minister consult with cabinet colleagues and

consult with the leaders of non-government parties, which I prefer, or should it remain the sole initiative of the Prime Minister as it is now?

5. The appointment of the head of state by Parliament—should this be by simple majority, which I advocated a year ago; or by a two-thirds majority, to which I now lean; or by an absolute majority, as is required for any constitutional alteration bill now?
6. The Parliament's appointment — should it be by joint sitting, which I used to advocate; or by both of the houses, the Senate and the House of Representatives sitting separately, which is now what I would prefer?
7. The Constitution's use of the words 'the Queen' and 'the Crown' — how in detail should they be omitted or replaced?
8. The surely obsolete sections 58, 59 and 60 of the Constitution — how can they be translated from the nineteenth century sense of monarchy, except by being omitted altogether?
9. As I have said recently, the state governors should be retained with the same powers, no more and no less, that governors now have. Their appointment can parallel that for the Australian head of state, that is, with nomination by a state premier and endorsement by the houses of the state parliament.

There are many other important details which we could go on to describe.

It is my view that patience, open discussion and clarity of debate will, in good time, lead us all to a sealed majority view of each of these particulars. It is the need to avoid the obstacle of diversion, by detail, from the main objective that we should all have in mind. I strongly believe that the four or five obstacles that lie in the path ahead for Australia, the path to establish an Australian head of state can, and will, be overcome.

In conclusion, the path ahead stretches over the next five years. A lot of dialogue is needed, especially with the public of Australia. As positively as we can, let us get on with it. I welcome any questions.

Questioner — I would like to pick up on your very last phrase 'let us get on with it'. I feel that, whilst I endorse a lot of your ideas, your way of going about it is not really the right way. There are two main questions *ad seriatim*: do we have a republic and in what form? Let us get to the will of the people. I suggest to you that we have a referendum to decide whether or not we have a republic. The obstructions cannot be used to delay it. Let us get on with it and have the force of the people to concentrate politicians minds to get on with the job and to stop all these delays which are occurring.

Senator Teague — Thank you very much for your suggestion. We must listen to each other and it may well be that we can proceed in that way. That is a matter to be determined.

Questioner — I found it very interesting that you found the monarchy undesirable for Australia due to its British nature, its gender bias and its religious bias. I believe that it is the hereditary nature of the monarchy itself that is the real problem that makes it irrelevant in Australia and inconsistent with the way that Australian society works. On the matter of electing or appointing the head of state, the appointment process today for the Governor-General cannot be any more partisan. Therefore, appointment or election through the parliamentary system is going to be just as partisan. With a public election the person elected would have the confidence of the entire Australian public, which is more than the confidence the public has in politicians and parliamentarians in this country.

Senator Teague — I was not trying to be exhaustive in terms of the reasons why Australians would reject an Australian monarchy. I acknowledge that there are many other reasons such as heredity. The whole idea of a hereditary principle or a feudal system is quite out of date.

The point about a popular election is the big question to be resolved. I have dear friends with a very careful knowledge of the Constitution who still advocate to me a popular election. It is clear that the majority of the public want a popular election. I have no doubt. That is why I have concentrated on giving you my reasons and what I see to be at risk in terms of the political structure of Australia and whether we should politicise the head of state because, in my view, a popular election would make that outcome inevitable.

I am going to Ireland again in a couple of weeks. I hope to speak with — I have already requested it — the President of Ireland, Mary Robinson, whom I greatly respect. She is elected by the public. The Irish model is one that is available to us. She handles her job superbly. We expect the same of our Governor-General now on behalf of the monarch, and, as we would, I project, want the head of state to handle the job maturely, with unity and with great sense of substance.

I do not want to conclude on this too early. I can be persuaded, but I want to make it clear why a majority of those who are in discussion about this, in various parties, are currently advocating that the Parliament make the election. It is not that we want to do it; it is not a matter of power. There should be only one nomination and it should be from the elected government.

Senator Kernot's suggestion is that the public assist by making nominations and then the Parliament determines. You are wanting to say, 'no', let the people at large elect, but please can you all help us describe how our problems and objections can be solved. If you can, I am with you and Mary Robinson.

Questioner — Yesterday, Malcolm Turnbull on *Australia Talks Back*, ABC Radio, reiterated his belief, or shall I say his preference, that the powers of the president be either partially or fully codified. I see your position as rejecting that. I believe that the Australian public, before they vote, will want a fairly tight definition to be inscribed in the Constitution of those powers. Would you promote discussion of this issue rather than simply stating your own preference? Secondly, you mentioned that John Howard and the senior Liberal Party members support the

constitutional convention. I understand from newspaper reports that he has undertaken to put recommendations from the convention to the people in a referendum; is that correct?

Senator Teague — The first point that you make is a very important one. It is linked to the question of a popular election. Let me assure you that I am putting forward my view as a starting point in the discussion. I listened to your view that you have summarised from Malcolm Turnbull. In fact, I have discussed that matter with him over the telephone. He put to me that he thinks they should be codified. This was before the Turnbull report. I put to him at that time that I believe we should stay with the status quo as far as possible and that we would be endangering a sound outcome if any proponents of ‘let us get John Kerr’ would use the codification to move away from the status quo. The best way to keep the status quo and to put that matter to rest is to say we will leave the constitutional provisions and the conventions around the Constitution that define the reserve powers of the Governor-General or the head of state exactly as they are. That is the reason. I am starting with the status quo, but if there was a popular election, I think it is inevitable that we would have to codify the reserve powers. These two answers are linked.

With regard to the second part of your question, you are right. The Liberal and National parties — by the way, it is not just the leaders of the Liberal and National parties, it is the whole Liberal and National parties, the whole party room — have this position. It is that whatever resolutions come from a people’s constitutional convention will, we undertake, be put to the Australian public. The only reservation is that the Liberal and National parties, even in government and putting those resolutions, will reserve the right until that time to make up their minds whether or not to agree with them. That is why I made the point that the politics are entirely clear. Proposals that come from that constitutional convention will be unstoppable if they have touched the nerve of Australian public opinion.

Questioner — It seems to me that it would be quite difficult to have an elected head of state without putting the central institution of the democracy, which is the Parliament, to some degree of risk. Given the traditional structure of an executive arm, a legislative arm and a judicial arm of government, what is your view as to whether or not the time has come to contemplate having a fourth arm of government, separate from the executive arm, which we might call a ceremonial arm or some other suitable title? It seems to me that there is a valuable role for a ceremonial arm, by whatever name it be known, separate and distinct from the executive arm with which it has now somewhat merged.

Senator Teague — I hear your word ceremonial. The reason I did not use the word ceremonial, even the word formal — but I do not argue against those who do talk about ceremonial and formal — is that it seems a bit of a put-down. The Australian head of state is a very important position, and the first responsibility of that position is to safeguard the Constitution: that is determined by the people. I have said and I think it will emerge, that the head of state will have all of the powers that we now see vested in and operated by a Governor-General. Whether or not there is this fourth arm of government — certainly we have an executive, legislative and a judicial arm and the separation of these powers — the head of state is related to them all. The head of state is a part of the Parliament. I am not wearing my badge — there is a red badge for the Senate, and a green one for the House of Representatives. On it are three symbols plus the

southern cross — the gold mace of the House of Representatives, the black rod of the Senate, and the Crown representing the third part of the Parliament.

It is envisaged by me, and I think by everyone who is involved in this discussion, that the head of state of Australia will still be that third part of the Parliament. That is one reason why many of my friends argue that the democratic principle should be reinforced and all three parts of the Parliament should be democratically elected by the people. I hear that argument. I would love to accept it, but for the problems that I have set out for you, and to which you were kind enough to allude. It is a matter of 'a rose by any name is a rose'. I mean it is, in a way, a fourth. It is a unique part. All ambassadors — that is, the heads of state — are a unique part. But the head of state chairs the Executive Council and is the head of government in that sense. All laws are signed by the head of state. All judicial appointments are made by the head of state on the advice of the elected government. All of our ambassadors are appointed by the head of state, and they are representing, not just the government of the day, but the whole nation, everyone of us, including an opposition senator. I want all of the wonderful unity, that we now see in our head of state, preserved. If my words then are a 'Yes' to your question, then so be it. I do see the head of state as unique, as involved in and yet apart from, and as sovereign over, the other three parts.

One little rider: no-one envisages that the High Court will have, I think the word is 'justiciable' review power of a decision of the head of state. If the head of state makes a decision, that is it. You cannot then go and sue in the High Court to get it changed. That is why the reserve powers need to be so compressed. In my view, they should be no more compressed than what they are now to safeguard the Constitution. To take the Irish model, for example, the first responsibility of the President of Ireland, Mary Robinson, is that, when she thinks a law is contrary to the nation's constitution, she does not make any decision about it except to refer it to the High Court for a decision to be made. So, there is this interrelationship, and the head of state is to be very much a part of the three arms of government, as you put it, and also very much a part of the people.

Questioner — You have denounced radical, fly-by-night reform of the Constitution, but it is not clear to me how you can actually install an Australian head of state without making substantial changes to the mechanics of the Constitution. By this, I mean that the Governor-General presently has enormous powers, some of these you have referred to, but there are others. Many people do not know he also has the power to approve treaties or to block legislation. It seems to me, and this is probably regarded as a novel concept, the reason that those powers are not exercised improperly is not simply because of the inherent decency of the appointee; it is because if he or she did act improperly, the Queen would dismiss him or her. If you grant nonjusticiable powers to a Governor-General, surely you are opening a massive Pandora's box? Accordingly, I just cannot possibly see how you can maintain the present principles and conventions of the Constitution unless you are going to make radical reforms. In a sense, perhaps, your proposal seems to be a wolf in sheep's clothing.

Senator Teague — Thank you for your comment. I certainly believe that the public will reject any inadequate and unworkable proposition that is put before them, and long may they do so.

And also, that they will reject anything that is fly-by-night or anything that is a wolf in sheep's clothing.

There are two particular answers I would give you: I believe that the head of state of Australia should be dismissible on the same grounds as any member of the High Court. There are some well-defined precedents and definitions. I would take them all on board. The second is that dismissal of a Governor-General would be by the same process of appointment. That is, by a motion before the House of Representatives and the Senate that passes both houses by the same majority that is determined for the original appointment. One of the reasons I originally advocated a simple majority, or if I updated it a little bit, an absolute majority in each of the two houses, was to make that more workable. That is, the dismissal procedure.

If ever a head of state is acting and making decisions that are not justiciable, not reviewable by a court, the only way to deal with that — if it were the view of the appointing power, the Australian Parliament — would be to sack that Governor-General. The existence of that dismissal power in the Parliament is in my view sufficient, or is likely to be sufficient, for it to be a deterrent against any action by the head of state that would be outside of the actual powers and accepted conventions for the head of state.

Clearly the precedents of the order of decisions, involved in the constitutional controversies surrounding the events of 1974 and 1975, have led us to examine very carefully these events.

None of us ever want to see these controversies repeated in Australia. No politician in the current Parliament wishes to see the dismissal of government in the way that we saw in 1974 and 1975. I say that — while accepting the textbook writer's description of how Sir John Kerr acted within the powers of his position, that he felt his decisions to be correct and that he believed he was preserving the public's interest by calling an election — the question of timing, as to the exercising of any of these powers, clearly needs to be carefully addressed, and more so than is the case in the Australian Constitution now. I think that we are all wanting to be a part of the dialogue, so let us get on with it.

ELECTING A PRESIDENT

the elite versus the public *

Harry Evans

The apparent gulf between the opinion-leading elite and the general public on the question of selecting a new head of state now bulks large in the controversy about Australia dispensing with the monarchy. The elite orthodoxy is that an appointed president is necessary to avoid great damage to the system of government, and that an elected president would be disastrous for that system. How can the majority of the public be so stupid that they apparently do not see this self-evident truth (self-evident because so many important people find it so)?

Perhaps in this circumstance the question should be asked whether it is the populace who are so obtuse, or whether there are matters to which the elite are stubbornly blind. Such a situation would not be unprecedented. On a sober consideration of the matter, there are good grounds for concluding that the orthodoxy of the important people is irrational while the apparent instinctive reaction of the majority of the public is well founded.

The elite view may be summarised as follows: the powers of the appointed Governor-General are constitutionally very great but are restrained by conventions attaching to the Crown; in the absence of the Crown and with an elected president, constitutional restraints on those powers would have to be provided. In other words, an appointed president may possess the powers, but an elected president should not.

This thesis is actually a reversal of the constitutional principle arising from, and demonstrated by, western constitutional history. That principle is that extensive powers require election, and appointed bodies can have only limited powers. The House of Lords had its powers taken away because of its hereditary and appointed character; the United States Senate was changed from an appointed to an elected House because it possesses great constitutional powers; the French presidency under the 1958 constitution was soon changed from an appointed to an elected office. If the current powers of the Governor-General are to be retained, this would strongly suggest that a president must be elected; if a president is to be appointed this would

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point to restricted powers for the office. The majority of the public probably instinctively understand this, and the more the opinion-formers dwell on the great powers of the office, the more the public are likely to insist on election.

The elite view is that an appointed president best approximates the existing system of an appointed Governor-General, and an elected president would involve a significant change to the system, particularly by giving a president an independent public mandate. Again, this orthodoxy reverses the actual constitutional situation. It is assumed that the Governor-General in practice is hired and fired by the Prime Minister, but no Prime Minister has yet sacked a Governor-General. The latter theoretically represents the Crown, and in practice it could be politically more difficult to fire a Governor-General than to fire an appointed president. The Crown is constituted independently of the Parliament; the monarch's tenure of office is not dependent on the Houses. He or she has a separate line of political credit, as it were, with the public. Therefore an elected president, with an independent mandate, would most closely approximate the existing constitutional arrangement.

The general public may have an instinctive understanding of this principle also, because they perceive, quite correctly, that the Governor-General is a kind of umpire in the political process in which the politicians are the players. An umpire should not be appointed by the players, but should be independent of them and accountable to the wider society.

The importance of the head of state's role as an umpire, and the necessity of independence from the politicians, can be supported by reference to many past cases involving vice-regal representatives. A recent Australian example is provided by the situation arising as a result of the Tasmanian state election of 1989. The government of Mr Gray did not retain its majority in the House of Assembly, which expressed lack of confidence in him, but no other party won a majority. Mr Gray advised the Governor, Sir Phillip Bennett, to grant another dissolution and general election. The Leader of the Opposition, Mr Field, wanted the Governor to appoint him as Premier to form a Labor government with Green support. The Governor did not do what either major party required. He insisted that Mr Field provide clear evidence of his ability to form a government. When this was forthcoming, in the shape of a coalition agreement between the Labor and Green parties, the Governor refused to grant a dissolution to Mr Gray and required that he resign as Premier to allow the appointment of Mr Field. Neither political leader was pleased with the actions of the Governor, Mr Gray because he lost office and Mr Field because his premiership was burdened by the written coalition agreement with the Greens. The Governor was no doubt fortified in his interpretation and application of the principles of responsible government by his status as the representative of the Crown and by the conventions attaching to that status. Whether a president appointed by, and removable by, the major political parties, an umpire selected by the players, would be similarly fortified by that method of selection is questionable.

The orthodoxy maintains, however, that an election for a president is bound to produce a party politician, who would be unsuited for an umpire's role. There are two unfounded assumptions in this claim. There is no certainty that the electorate would vote for major party politicians in a presidential election with the same resignation as they vote in parliamentary elections. They may well take the opportunity to return a

non-politician. The parties may be clever enough to nominate non-party candidates to take advantage of this inclination. Both of these phenomena have occurred in other countries with elected presidents. Even if a party politician is elected, however, it cannot be assumed that he or she will behave in the same way as party members in a parliament. A distinct, one-person office is different from a parliamentary team situation. Elected presidents in other countries have a way of asserting their independence of their parties. In any case, a party politician may perform an umpire's role better than a harmless nonentity agreed upon by the major parliamentary parties; former players, not selected by the players, may make the best umpires.

An orthodox argument frequently heard is that a president must not be in a position to challenge the prime minister', which a president with an electoral mandate may do. Presumably this means that a president should not exercise the powers of the office other than in accordance with prime ministerial advice. The conventions of responsible government attaching to the Crown and the office of Governor-General, however, require that in some circumstances the powers of the office be exercised contrary to that advice. The duty of a Governor-General is to ensure that a government is constituted which has the support of the lower house or a reasonable prospect of obtaining that support. This duty may involve rejecting the advice of the Prime Minister. The Tasmanian case provides one instance of this. So u-hat must be meant by this argument is that a president must observe the conventions. There is no reason to suppose that an elected president would be more likely to depart from the conventions than an appointed president. The reverse could equally be assumed. In either case a president could not long maintain in office a government which did not have the support of the lower house.

The more sophisticated version of this argument is to the effect that an elected president may change the system of government by exercising in person some of the executive powers, while maintaining a government with a party majority in the lower house. The effect of this, it is said, would be to give rise to a hybrid presidential/parliamentary system such as exists in France.

As with the point about the powers of the office, the repetition of this argument may be counterproductive so far as changing public opinion is concerned. One reason for the public perception of the question may be that there is an instinctive understanding of the fundamental flaw in the current system of government: the excessive concentration of power in the hands of the Prime Minister. Through intense party discipline, the Prime Minister controls absolutely the House of Representatives. One of the institutions which is supposed to be a control on government is thereby eliminated. Only the federal elements of the system, the Senate when not under government party control, state governments of different party complexions, and the High Court interpreting the Constitution when litigation is brought before it, impose some control on the otherwise absolute monarch, the Prime Minister. Occupants of the office who have treated institutions as mere instruments of their royal will and attacked any which stand in their way have served only to draw attention to the undue concentration of power. The electorate, most of whom do not vote directly for the Prime Minister, may be forgiven for thinking that some breaking down of that concentration of power could be desirable, even if it does change the system of government.

There is an implication in the elite orthodoxy that the combination of a parliamentary or cabinet system of government, under which the party or coalition with a majority in the lower house forms the government, with a directly elected president would be a bizarre innovation found only in some obscure corners of the world. An examination of the various relevant systems reveals a different picture.

There are twelve democratic and constitutional republics which have been stable under their current constitutions for twenty-five years or more. They are: Austria, Botswana, Finland, France, Germany, Iceland, India, Ireland, Israel, Italy, Switzerland and the United States of America. Excluded from the list is Singapore, on the basis that in 1993 it radically altered its constitution by changing to an elected president; the direction of the change, however, is significant. The two countries with non-parliamentary systems may also be excluded: the United States, where executive power is reserved for the president, and Switzerland with its unique collegiate executive and rotation of the office of head of state. This leaves ten republics with parliamentary/ cabinet systems, six of which have directly elected presidents: Austria, Botswana, Finland, France, Iceland, and Ireland. It is usual to classify Finland and France as having hybrid presidential/parliamentary systems, but they undoubtedly have in essence parliamentary/cabinet systems, in that a president cannot maintain in office a government which does not have the support of the legislature, as President Mitterrand was constrained to accept. It is more accurate to classify all of the six as belonging to a parliamentary/cabinet group and as exhibiting a range of provisions relating to presidential powers. Contrary to statements frequently made, none of the six constitutions comprehensively codifies the powers of the president; it would be impossible to do so. Some contain more provisions than others concerning the relationship between the presidents and the legislatures and the formation of governments. Elected presidents are to be found at both ends of the spectrum of presidential powers, the ends being occupied perhaps by France and Ireland.

The state of the republics of the world, therefore, offers little support for the orthodox view.

Finally, most people, not being intellectuals, are able to detect the massive contradiction at the heart of the elite orthodoxy: the monarchy must go partly because it is undemocratic, but the people must not be allowed to choose the replacement, because they would stupidly make the wrong choice. There is a decided air of Venetian oligarchy about schemes for an appointed president, which does not go well with the historical political culture of Australia a century after the Constitution was adopted by popular vote.

It has been well said that the opinion-formers should not rule out the option of an elected president because that may be what the people want, and a change to a republic may be rejected without it. To that should be added the equally significant point that the apparent majority view of the people is also perfectly rational and supportable by evidence.

Can Responsible Government Survive in Australia?

David Hamer

Generally, Australians are very critical of politics; they tend to blame the politicians and not our political system. I would not for a moment claim that our politicians are blameless but that does not mean that we should not have a good look at our system to see whether it is working as it is supposed to or whether it could be made to work better.

People seem to live in an astonishing state of illusion about their political systems. Many people in the communist countries seem to believe that they are living in a ‘democratic republic’ when, in fact, it is neither democratic nor a republic. In nineteenth century England, people believed that their system was based on the separation of the executive and the legislative powers whereas, as Walter Bagehot and others pointed out, it was exactly the opposite — it was based on the *merging* of the two powers. These days in Australia, we talk as if we still have the Westminster system of responsible government, as so eloquently described by Walter Bagehot in 1867, whereas, the growth of party discipline since then has produced something quite different. The first step in the reform of anything is to look at it as it really is, and that is what I believe we should be doing with our system of government.

I served for a long time in each House of Parliament and I was by no means always impressed by what I saw. After I left Parliament I spent some time looking at twenty parliaments which claimed to use the Westminster system of responsible government — these included, the United Kingdom; Canada and the ten provinces; New Zealand; and Australia and the six states. I examined these parliaments to see whether any of them had useful solutions to our problems, a few do, and whether there were common unsolved problems which, if we want to improve, we will have to solve ourselves.

I would like to go through the functions of the various parts of our political system, using Canberra as the model, and describe them as I see them, listing their defects and qualities and suggesting practical ways in which we could — if we had the will — make some substantial improvements.

Possibly, the most important role in the lower house, the House of Representatives, is to decide who will form the government after an election; the electoral college role, to use the American expression. I suggest that what is wanted is for the chosen government to be the one preferred by a majority of voters and for the choice to be decisive. There is little to be said in favour of minority governments for they usually result in poor government — ministers constantly looking over their shoulders to see if they are going to survive rather than developing long-term policies. Minority governments also have to yield excessive power to small groups holding the balance of numbers.

The method of choosing this electoral college, the House of Representatives, is obviously important. In nineteen of the twenty parliaments it is done by single-member constituencies; the odd one out being Tasmania, where it is done by proportional representation. New Zealand, too, is about to become odd, for the next election it will use the German system of half the MPs being elected by single-member constituencies and the other half by proportional representation. Whether proportional representation is a sensible way of choosing an electoral college is a matter of opinion. I would point out that its track record is poor in achieving the objectives I have suggested — a decisive choice of government preferred by the majority of voters.

If you are going to use single-member constituencies to achieve the aim of choosing the government preferred by the majority of voters then some crucial rules must be followed. There must be no gerrymanders distorting the boundaries of an electorate to the advantage of a particular party. There must be no malapportionment, that is having small numbers of voters in particular electorates, such as country ones, to give those voters an increased say. And the boundaries must be redrawn if there are significant population shifts.

The Australian federal system meets these requirements excellently; better than any of the other nineteen parliaments but that is not to say it is perfect. It has made a decisive choice of government after every election since the Second World War but on at least four occasions the government chosen would not, by a small margin, have been the one preferred by a majority of voters.

Even if you accept that our electoral college works reasonably well, it still does have serious defects. The three-year term of Parliament is too short for good government. The only surviving three-year parliaments, among the twenty I looked at, are in Canberra, Queensland and New Zealand. The remaining seventeen have four or five-year terms. Even the three-year term can be cut short at the whim of the Prime Minister, to suit his political advantage, which seems to me to be quite unjustifiable. Certainly if, through by-elections or defections, no government possessing the confidence of the lower house can be formed then there has to be an election. Otherwise, the Parliament should see out its full term. Tasmania and New South Wales have taken some steps towards fixed-term parliaments and the referendum held at the time of the last state election put fixed-terms in the New South Wales Constitution. Tasmania has not yet done so.

Another defect is that in Canberra there is no arrangement for extending the life of Parliament if events, for example, a war, made an election very undesirable. The other three national parliaments — the UK, Canada and New Zealand — do have the power to extend their lives by prescribed majorities. If we wanted to extend the life of our federal Parliament we would have to have a referendum which would presumably be as divisive as having the election

which we are seeking to defer. What we need is an arrangement whereby, in certain specified circumstances, a parliament could extend its own life by, for example, a three quarter's majority of each house, the life of the Parliament otherwise being a four-year fixed term. These changes would require constitutional amendments. We should look at them because the present arrangements are very defective.

Unlike the American electoral college, our House of Representatives does not dissolve itself after it has chosen the government. What other things does it do? It is totally useless as a legislature, merely acting as a rubber stamp for the bills produced by the government party. As an example of its performance, during the twelve years from 1976 to 1987, under two different governments, when nearly 2,000 bills were passed, not a single opposition amendment to any of them was accepted — with the exception of two bills which were handled by an experimental procedure, an experiment that was soon stopped by government. That is not democracy; that is a form of party dictatorship. Bills were contemptuously bulldozed under a guillotine — ten bills taking a total of five minutes to pass all stages, for instance

It is almost unknown in the House of Representatives for a bill to be referred to a committee to hear input from the public, although this is quite common in Canada and New Zealand. Not only can the input from the public be valuable but it can also do something to reduce the alienation of the public from the political process. This does not happen in our House of Representatives which has become a mere rubber stamp for the bills wanted by the government party. Of course, the opposition can criticise and, if it wants to, can announce what it would do instead, but the bills will not be changed.

The House of Representatives also totally fails to do anything about the control of delegated legislation — regulations and so on made under the authority of an act of parliament. It leaves the control of this important area of potential government abuse of its powers entirely to the Senate; the House of Representatives has almost totally abandoned its role as a legislature.

In that case, what else does it do? It can set up committees of inquiry which do valuable work and are certainly much cheaper than Royal Commissions. However, as all the committees are controlled by the government party, they do not inquire into matters the government does not want inquired into and these are usually the very ones which should be inquired into. There is an extraordinary provision by which a minister can direct a committee of the house, to which he is supposed to be responsible, to undertake a particular investigation so that, effectively, the committee is working for him. This is a reversal of the principle of responsible government.

The House of Representatives is useful as a place where the government can make policy statements which can then be debated. In fact, far too many government policy statements are made, not to the Parliament as they should be, but directly to the public. Only in the House of Commons in London are there effective measures, enforced by the Speaker, to prevent this happening. It happens all too frequently here.

The House of Representatives provides a place where the opposition can initiate debates on policy or administrative matters — usually critical to the government, of course — and individual members can raise matters which concern them or their constituents. Quite

reasonable time is provided for these, but the ability of individual MPs to watch the interests of their constituents and to see that individuals get a fair go has been overtaken by the increasing complexity of our society. These days, we have a maze of administrative appeals tribunals, human rights committees, equal opportunity commissions and so on, all of which are very valuable but they have nothing to do with responsible government.

The answerability of the government to the House of Representatives is provided by its most public activity: question time. This is not a way of obtaining information — in fact, new members are often advised never to ask a question to which they do not know the answer, for they may be surprised by it. If you want information then put your question on notice as it is far better to receive a written answer. The delays in providing written answers, however, are substantially longer than in most overseas parliaments.

The attitude of the government to the daily oral question time was well summed up by the Prime Minister when he said that question time was not a right; it was a privilege extended by the executive government. It was an interesting comment on the answerability of the government to Parliament. In Canberra, the questions are taken alternately from each side of the House. The ones from the government side, frequently being ‘Dorothy Dixers’, permit ministers to make policy statements without having them debated.

In London, the questions are chosen by ballot. In Ottawa, it is almost unknown for a government MP to ask a question, for there question time is regarded as the opportunity for the opposition to cross-examine the government. In all of the other three national parliaments I looked at, supplementary or follow up questions could be asked if the initial answer was not satisfactory —they could pin the minister down if he was evading the question. Such supplementaries are never permitted in the House of Representatives in Canberra.

Our question time is essentially farcical and will not improve until we have an independent Speaker who is able and willing to enforce relevance and brevity on ministers and permit a reasonable number of supplementary questions. The Speaker must be confident his rulings cannot be challenged. This is the case in most of the overseas parliaments, but here the Speaker knows that if he makes a ruling the government does not like, it is very likely to be overturned —so he does not make them.

Speakers used to be, and still are in some parliaments, very prestigious figures. In 1597 the Speaker of the English Parliament described the requirements of his office as voice great, carriage majestic, nature haughty, and purse plentiful. These days the requirements might be better described as the ability to keep order in the house as best one can, but not to antagonise or frustrate the government, particularly the Prime Minister. It is highly desirable to develop an independent Speaker with the necessary power, independence and determination. The tradition of the job, being the important perk for the government party, is so entrenched that I do not see any chance of this happening in the future.

The dominant activity of the House of Representatives, after it has chosen the government, is, in fact, electioneering for the next election. You often hear criticisms of the length of the US presidential campaign, which is five months. Our election campaign starts from the first meeting of the Parliament after the previous election — that is nearly three years.

The fundamental problem is whether it is reasonable, with tight party discipline, to expect the same group of people to make a decisive choice of government, and then be an effective critic and scrutineer of the actions of that government. I submit it is not. That is the incisive change in responsible government since the middle of the nineteenth century.

What has developed, as far as the House of Representatives is concerned, is an elective party dictatorship. There is a certain attraction about an elected government being able to implement its programs without being delayed, frustrated or embarrassingly questioned by a legislature. 'Let the elected government govern; it is answerable to the voters at the next election and that', people say, 'is enough'. But is it enough? There are grave dangers in giving uncontrolled power to any group.

It is worth remembering that Adolf Hitler was elected and the powers he used were constitutional under the Weimar Republic. No-one would suggest that gross abuses of power practised by Hitler could happen here — the rule of law is too well established — but there are disturbing common features in all elective dictatorships. It is worth listing them.

Firstly, the answerability of the government to the electorate is defective with the government able to choose the time of the election and probably able to manoeuvre certain advantageous election issues to the fore at the time of the election.

Secondly, the government's answerability to the lower house is also defective, with its ability to suppress information and inquiries which are to its disadvantage; sometimes by refusing to provide information by invoking executive privilege, a very suspect concept; sometimes by using party numbers to head off threatening inquiries; and sometimes by throttling the parliamentary budget so the resources simply are not available for a proper investigation.

The third danger in an elective dictatorship is the power to make appointments to courts, to the senior ranks of the bureaucracy and to management positions in the hundreds of government-controlled organisations. There is grave danger in this power being used party politically and a prolonged elective dictatorship usually results in serious corruption which, once established, is very difficult to eradicate.

The fourth objection to an elective dictatorship is the inability of the Parliament to exert proper control over defence and foreign affairs. I will return to this point in a moment.

The fifth and final objection is the total government control of the legislative process. This may result not only in badly drafted and inefficient laws but also in discrimination against unpopular minorities. Conversely, elective dictatorships may sometimes give unreasonable benefits to pressure groups in the hope of recruiting their votes in the inevitable election.

These five objections to elective dictatorships, each bad enough in itself, are devastating in sum. Of course, the dictatorial power of a lower house is not absolute. There may be a constitution, though Britain does not have one and constitutions are not much of a defence unless they are entrenched. Constitutions which can be amended by Parliament itself are not much use against abuses of power. In Canberra, we do have an entrenched constitution, but it can now be amended by the government — without even consulting the Parliament; a point I will return to in a moment.

Then there are the constraints on the elective dictatorship of the lower house by the upper house, but these survive in only eight of the twenty parliaments I looked at and two of these — the House of Lords and the Canadian Senate — have their power effectively limited because they are not elected. On the whole, the upper houses have been surprisingly slow to move in to fill the gaps in the areas abandoned by the lower houses.

Our Senate performs relatively well. Its control of delegated legislation, which the Representatives totally ignore, is the best in the British Commonwealth. This all-party committee has high prestige, and when it proposes to disallow a regulation the government jumps. The Senate has also set up a Scrutiny of Bills Committee, with independent legal advice, which examines the legal aspects of all bills which are presented to Parliament. When the committee was proposed, it was not surprising that the government opposed it, saying in effect: 'the government and its advisers look carefully at all bills. Why should the Parliament want to get in on the act?' This is an interesting reflection on their attitude to a legislature. Fortunately, Liberal senators were prepared to revolt and the committee was set up. It is a great success, raising significant queries on about half the bills presented.

I mentioned earlier that public input into bills is an important part of the legislative process. About 20 per cent of bills are referred to Senate committees for public examination and as a result are frequently greatly improved. On the subject of inquiries and the matters of government policy or administration, Senate committees are prepared to examine matters which the government does not want examined which, as I said before, are usually the very ones which should be examined. Committees have been much less effective in supervising the many organisations. There are hundreds of them — government business enterprises, commissions, boards and so on — through which ministers exercise considerable power. The lack of effective parliamentary scrutiny in this area is a matter of concern.

The Senate does have weaknesses. Eighty per cent of bills are *not* sent to committees and these bills are often controversial ones which would benefit most from public examination by a committee. The government, of course, does not want its bills examined by a committee — get them through quickly without amendment are the instructions of Senate ministers. The government often manages to do deals with minor groups holding the balance of power in the Senate; the government will accept some of the groups' amendments in return for their support for *not* referring the bill to a committee.

I now refer to two things the Senate should not do. It should not try to take over the electoral-college role of the House of Representatives by forcing the government to a premature election by refusing supply. If there were fixed terms for Parliament this problem would disappear, for there would be no point in refusing supply if there could not be an election. If it is thought that the government party might be pressured into passing an artificial vote of no confidence in itself, then we should adopt the New South Wales solution of removing from the upper house — the Senate — any power over votes for the ordinary annual services of the government. 'Ordinary annual services' would require tight definition and this vote would have to be presented separately, neither of which has been done in New South Wales.

The Senate should also pass the budget as a package. The budget is such an interwoven mix of economic, political and social measures that to have a legislature tinker with it is a recipe for disaster. The Senate should insist on two conditions for this budget passage.

Firstly, the government must present its proposals in a comprehensible form so that the legislature and the public can see what particular activities actually cost. The present vote system of providing money to the government was introduced in the reign of King Charles II to prevent him spending the navy estimates on the appropriately named Duchess of Portsmouth. The system was changed in the reign of William III to prevent him spending money on his friends. The system has continued to the present day and it is marvellous at concealing the true cost of various government activities. It is true that the recent development of program budgeting has reduced some of the problems, but we still have some way to go.

Secondly, it should not be acceptable for a government to introduce in the budget completely new programs of revenue raising or expenditure and expect them to be automatically passed by the legislature. Such new programs should be considered in principle and agreed to by the legislature before being incorporated in the budget. The government would not like this at all. It likes the drama — the surprise and publicity — of a budget. Such a system is very bad, legislatively.

If the Senate is to take over the legislative role abandoned by the Representatives some changes must be made. The Senate was originally conceived as a states house with continuity achieved by fixed six-year terms, but it has never been an effective states house. If it is to become the sole legislature, it has to be elected at the same time as the government; that is, fixed four-year terms.

The proportional representation system by which the Senate is elected results in a house which is far more representative of the mix of community views than is the lower house which is elected for a different purpose. The constitutional requirement for equal representation from each state does create distortions, but not significant ones. If you regard the Liberal and National parties as a single party, the voting patterns across Australia are remarkably consistent — unlike Canada for instance — and if you eliminated the equal states representation requirement you would not make any significant difference to the composition of the balance of parties in the Senate.

If the Senate is going to become an effective legislature, there will have to be some better method of resolving deadlocks over legislation between the two houses or, more accurately, between the Senate and the government. The present system of a double dissolution just does not work. In such an election the cause of it is lost. If you ask most people during an election why an election is being held, they would not have the faintest idea. It would be a very brave or cheeky person who would claim that the re-election of a government, after such an election, meant that the community endorsed a particular piece of legislation which was the cause of the election.

Conferences between party-balanced delegations from each house — much used in America — is a useful system, far better than the government doing secret deals with minority groups in the Senate. Such conferences have been used only three times since Federation — successfully each time.

But such negotiations will not always work and there must be some way of resolving a conflict between the executive, if it wants a particular bill in a particular form, and the legislature which does not like it. The only effective way I can see to focus the voters'

attention on a particular bill is to have a referendum which would be a great deal cheaper and a great deal more effective than a double dissolution. This, however, assumes that the Senate has become an effective legislature, but it still has some way to go before it is. Why has it not gone further? One reason is that it does not sit nearly enough days.

The House of Representatives sits for about 65 days a year, compared to the 170 days of the British House of Commons, and the 175 days of the Canadian House of Commons. Bearing in mind that the electoral college role is quickly over; that committees making investigations, which are agreed to, accepted, or ordered by the government can meet while the house is not sitting; and that the only remaining role of the house is electioneering, many people might feel that 65 days are enough. The trouble is that this pattern of brief sittings is followed by the Senate which sits for a few more days, but not nearly long enough to get through its business in an efficient way. It is ridiculous for the Senate to kow-tow to the executive in this way. Of course ministers would much rather that the Senate did not sit longer, for the sittings provide publicity for the opposition and take ministers away from their administrative work. The trouble is that the aspiration of nearly all senators is to become a minister. The government does not want more than minimum scrutiny of its actions, and the opposition, which hopes and expects to be in government itself one day, does not want to have any new constraints when its turn comes. So they will never agree to go far enough in these areas.

The whole aspiration pyramid in the Senate is skewed in the wrong direction. There ought to be members of the government there to scrutinise and criticise. The Senate will not become an effective legislature until ministers are removed from it. If you think this would be a remarkable act of self-abnegation by senators, the compensation should be that the chairs of major Senate committees should be given the status and privileges of ministers, for they are, or they should be, at least as important. If the chairs were fairly divided between the various parties — and the Senate has made a start in that direction — you would have a situation where the major Senate figures owed their positions, not to the party in government, but to their own status in the Senate, and it would start to develop as an important legislature. But while ministers remain in the Senate, you will continue to see the Senate spending far too much of its time duplicating the electioneering role of the House of Representatives, and in the process handing far too much legislative power to the minor parties and the independents holding the balance of power.

If you think that obtaining these benefits for the chairs of major Senate committees would be difficult, it is worth noting that the Senate has to approve any increase in the number of ministers. This gives it considerable leverage.

That brings me to the question of the ministry, about which much could be said, but I have time to make only a few points. Bagehot thought that the cabinet was a House of Commons committee and responsible to that House which makes the presence of upper house ministers in the cabinet who are not personally answerable to the lower house something of an anomaly. There is no mention of the cabinet or the Prime Minister in the Australian Constitution, but the cabinet obtains its legal powers through its control of the Executive Council, and its administrative powers through its control of the Public Service. It also obtains its powers through its control, direct or indirect, of the hundreds of government business enterprises and so on over which Parliament keeps a very inadequate watch.

There are always worries about the quality of ministers. Some sub-standard ones remain in office because of the political embarrassment of removing them; others remain because they do more damage out of the ministry than in it. This particular problem was well summed up by President Lyndon Johnson who had a rather earthy turn of phrase. He was asked why he did not sack J. Edgar Hoover who was a rather troublesome head of the FBI and was becoming a serious nuisance. 'Sack Hoover?', said Johnson, 'I could never do that. I would much rather have that man inside my tent pissing out, than outside pissing in' which is very Johnson, from memory.

Of course, if a minister is becoming a political embarrassment he has to go. A good example is the removal of war minister Profumo in Britain who was forced to resign ostensibly because he had misled the House of Commons but actually it was because of the political damage caused by the revelation of his association with a prostitute named Christine Keeler. She was also being used by the Soviet Naval Attaché. A contemporary poem ran:

Now see what you have done, said Christine.
You've upset the whole party machine.
To lie in the nude is not at all rude,
But to lie in the House is obscene.

However you look at it, the pool from which ministers are drawn is rather small. The British and Canadian prime ministers have the useful ability to bring talented outsiders into the ministry by appointing them to the House of Lords or the Canadian Senate; our Prime Minister has no such option. Some countries such as Holland and Sweden allow ministers who are not MPs to be appointed, although they do attend and are responsible to Parliament for anything dealt with by their departments. The Dutch and the Swedes believe that answerability to Parliament is more important than voting membership of it. In fourteen of the twenty parliaments I looked at, the appointment of such outsiders as ministers would be constitutional, but it would have to be a brave prime minister or premier to do it, for he or she would face a very angry backbench. In Canberra, a constitutional amendment would be required but I cannot see it being attempted, whatever the attractions. I hope that one of the parliaments, where it is constitutional, will try it out and show the benefit of a constitutional amendment.

I would like to mention two other matters about the ministry. One concerns the cabinet's exclusive power over foreign affairs and defence — powers which historically are anomalies. With defence, if there is a surprise, something like a Pearl Harbour attack, of course the government must have power to act, and the actual conduct of a war has to be in the hands of a small body, whether it is called a war cabinet or not. If our defence force is being moved to a position of danger or involved in fighting, why should not parliamentary approval be sought — after all cabinet is supposed to be responsible to it. To take the Gulf War as an example, our ships were moved to the Gulf and engaged in active operations without Parliament being consulted at all. Parliament was only consulted after the war had started because the Senate, not controlled by the government, threatened to have a special meeting to consider the matter, otherwise Parliament would not have been consulted at all. Of the four countries I looked at, Canada is the only one which produced a procedure by which the government has adequate emergency power, but is required to get parliamentary approval at the first opportunity.

With foreign affairs, none of the four parliaments has yet taken action. Clearly the negotiation of a treaty is the responsibility of the government, but why should not the ratification of a treaty be subject to parliamentary approval? This is particularly important in Australia, for the High Court has held that, if an international treaty is entered into in good faith, this gives power to the federal Parliament to pass laws to implement the treaty, even though it has no such powers under the Constitution. This effective amending of the Constitution by the government, without reference to either the Parliament, the states, or the people, is an outrage.

Another important power of the government which needs review is the power of appointment. An enormous range of appointments is available to the government: judges, public servants, directors of business enterprises and so on. An ever-present danger is that these appointments will become politicised, but Canada is the only country which has set up a system of parliamentary review of such appointments. But even in Canada they do not review judicial appointments, and this is where the greatest danger lies. We talk about the separation of judicial power, but in fact all federal judicial appointments are made by politicians. I do not think anyone would like us to adopt the American system where nominees for the Supreme Court and other federal courts are questioned by a Senate committee, and the legal standing of the candidate is much less important than attitudes on controversial matters such as abortion. There are also quotas — a black judge, a Jewish judge, a female judge and so on — and a president would break the pattern at his peril.

When President Nixon was trying to win votes in the South, he nominated a Southerner for the Supreme Court. In its very open way, the American Bar Association examined the record of the nominee, Judge Carswell, and pronounced him a below-average lawyer. Nixon, nevertheless, persisted with the nomination, and in debate in the Senate one of Nixon's supporters said, 'Sure Judge Carswell is a below-average lawyer, but don't below-average lawyers have some right to representation on the US Supreme Court?' I do not think we would want to go that far, but I think we need some system whereby a list of appropriately qualified lawyers is produced by a non-political body, and the government is forced to choose from that list.

Another anomaly is that the government controls the resources available to the Parliament, which is, with a slight exaggeration, rather like a burglars' collective deciding what resources should be available to the police. The situation was put clearly by a minister for finance: 'I explicitly do not accept the proposition', he said to the Senate, 'that the Parliament determines how much money the Parliament will get. The executive government has the financial responsibility, and in the end the executive government will determine that question.'

Of the twenty parliaments I looked at, the only one which has solved this difficult problem is at Westminster. Their solution depends on MPs being prepared, if it comes to the crunch, to hack the institution of Parliament rather than their party.

Turning to the controversial question of the head of state, I think I should make it clear at the outset that I think an Australian republic is inevitable. The questions are not whether, but how and when. With the great conservatism of the Australian voters in referendums on constitutional matters, I am certain that the only practical solution is the minimalist one with a president taking over the role of the Governor-General. This is not without its problems,

notably, with the method of appointment and the powers of the new head of state. Despite suggestions going back to the 1930s, the powers of the Governor-General have never been codified, although he certainly must have some powers.

The questions we must decide are: whether the Governor-General has the right to reject a request from a Prime Minister, who has lost the vote of confidence, for an election; whether the Governor-General has the right and the duty to find someone else who might possess the confidence of the lower house if the Prime Minister has lost that confidence; whether the Governor-General should have the power to dismiss a Prime Minister should that Prime Minister persist in grossly unlawful or illegal conduct, or, if the Prime Minister refuses to ask for the summoning of Parliament within the statutory time. These are all vexed questions, but as we saw in 1975, the lack of clarity on them is dangerous.

But if we wait until we try to make the transition to a republic, and then put these proposed powers of the new head of state to referendum, I do not think it would have the slightest chance of passing, no matter how eminent the panel drafting the list. There would be such a constant quibble about the various powers and objections and events, that people would vote 'no'. I do not think there would be a chance of getting a new list through a referendum at that stage. I think the only workable solution is for the Parliament to draft a list of the necessary powers, for if the Parliament were prepared to act with commonsense, it should be able to draft a workable list of powers, although the power of dismissal would be a bone of contention between the parties. Yet even here there may be a window of opportunity. The Labor Party wants an easy transition to a republic and the coalition wants the retention of the power of dismissal in certain circumstances, so a deal may be possible.

If a resolution listing the necessary powers of the Governor-General was passed by both houses and supported by both the government and opposition, I am quite sure that the Queen would find no difficulty in incorporating that list into her instructions to her representative, the Governor-General. We could then have a number of years trial of these powers, so that when the time came to incorporate them into the Constitution, the conservatism of the voters would be recruited in favour of their adoption. They would be familiar with the powers.

It is clear that the President will have to be elected. Again, I believe that we should try out a system with the Governor-General. At the moment the Governor-General is personally selected by the Prime Minister, and can, in practice, be fired by the Prime Minister. The Prime Minister puts forward a single name to the Queen. But I believe we should work out a sensible method of election; the name of the person so elected being the one the Prime Minister puts forward to the Queen.

I personally favour having a panel of leading citizens to put forward a suitable person to be confirmed by a two-thirds vote of each house to eliminate blatant political selections. Also, the person must be prepared to serve. You would not want to have a situation like that when General Sherman was being considered for nomination as a United States presidential candidate. He telegraphed the meeting, 'If nominated I will not run. If elected I will not serve.' You would not want to elect someone on that basis. There are many different ways of electing a head of state. I accept that. Let us choose one, try it out with the Governor-General and make it part of our system before the transition to a republic. I admit that a lot of changes are necessary. How are they to be brought about? Some, such as the ending of appointments of Senate ministers, could be done by the government; others by negotiation between the

Senate and the government. Some would require acts of parliament, and others constitutional amendments.

How do we start? I believe the key is the elimination of ministers in the Senate because once that is done the rest will follow. The Senate is now a proud institution and would not accept obscure impotence. Once it started redefining its role, the path I have outlined would inevitably, I believe, be followed.

Winston Churchill is supposed to have said that the Westminster system of parliamentary democracy is the worst conceivable form of government, except for all the alternatives. Well, he may be right but that does not mean we should not try to improve what we have. Let us begin that now.

Questioner — What is your view of the possibility of the Speaker of the House of Representatives not being a member elected by the people? Would that in fact achieve what you wanted to do or would the Speaker have to have a sort of private police force to cope with Wilson Tuckey and a few of the other people?

Mr Hamer — Wilson Tuckey is a member of my party so I will not comment on that. There are others. The position the Speaker is in is a mess. The only parliament where it works reasonably well is at Westminster in London where the Speaker is chosen after consultation between the Leader of the Opposition and the Prime Minister. Once appointed, the Speaker — he or she, it is a woman at the moment — remains there until he or she chooses to retire. The Speaker is not opposed at elections. So they have enormous prestige and power and they can use discretion.

Take for example one of the problems I was suggesting which is that of supplementary questions. In the House of Commons they have a different system of questions whereby the member submits a written question and the minister gives a reply to that written question, and then supplementary questions are allowed. The first one goes to the member who asked the question, and they continue until, in the opinion of the Speaker, the subject is exhausted. If our Speaker tried that, there would be a riot everyday. The government would be saying, 'you let too many questions go'; and the opposition would be saying, 'you stopped just as we were getting somewhere'. The role of Speaker requires an enormous degree of prestige.

If you could use someone of adequate prestige from outside the chamber that would be good, but frankly, I cannot see it being done for the same reason that applies to an independent Speaker. It is regarded as such a perk for the government. In the Labor Party — by the way, both sides are responsible for doing this — the chair of a meeting is traditionally a position of enormous power at a trade union meeting and they more or less see the role of the Speaker in that way.

We should change but I do not see us doing it. It is a matter of deep regret that we do not. The other objectionable thing is alternating the questions from one side of the chamber to the other. If you ask a question of a minister and he is getting in trouble, of course, as soon as he sits down a member of the government party is called. If this member is in the least organised, he will ask a question of the most talkative minister. This minister will give a twenty minute discourse on something, by which time the other minister will have arranged

his briefing notes and be prepared to return to the theme — which by this stage has been lost. After twenty minutes on a different subject, you just cannot get any coherence.

Our question time is awful, and also very embarrassing because it is televised and it does not present a good image of Parliament, but you may accept that the House of Representatives has in fact a very small role — it has chosen the government, and thereafter it is merely a legislative rubber stamp, going through all the bills. You could probably put them all in a great heap and stamp the whole lot together — this is part of the electioneering process. I do not think it is desirable to have three years of electioneering but we have it. I do not know how to stop it. So what I am trying to do is work within the framework of what is possible and what I believe is possible.

Questioner — As a past Speaker of the Victorian Parliament, I have some interest in the question and answer that we have just had. It seems to me that it is not quite as simple as sometimes put and that it is very much a matter of the culture which develops in the particular chamber. For example, it is put that the Indian Speaker is the most powerful Speaker within the Westminster system and that really arises from the force of personality of the first Indian Speaker and the culture which developed from that. Certainly in Victoria, and I think it is true in other chambers, the extent to which the Speaker exercises his potential authority can have a major impact on how the house actually operates.

I will ask you a question about question time because, as you have indicated, our question time is a bit different from other nations in that ours are oral questions without notice and because they developed from a ruling that was made in the first House of Representatives in July 1901. The then Speaker said, apparently in response to a question about which he had no notice, that he would allow questions without notice and it was up to ministers if and how they answered them. That to me seems to be the basic weakness in our question time which leads to all the other problems we have. If we are serious about ministers being answerable to Parliament then there must be an obligation on ministers to answer and to answer directly rather than to avoid and evade, as now happens. I wonder if you could comment on that please?

Mr Hamer — I agree with nearly all of that. The system of oral answers to questions emerged in the UK House of Commons in the 1840s. They started to have a daily question time — oral questions — and that was adopted by all our state assemblies as they were set up from the 1850s onwards. But in the 1880s, the UK system was changed to have written questions produced, because the Irish Party was becoming very difficult and trying to disrupt proceedings. In order to reduce disruption they introduced a system of written questions. It has not been copied in many of the other parliaments. Canada has oral questions as we do.

I think the UK system is not bad but I do not want to criticise the Victorian Parliament because I think there are different traditions in the different parliaments — I was dealing specifically with the federal Parliament — but it does depend very much on how ministers see question time being used. If there is no serious attempt to answer questions and the Speaker is unwilling or unable to force the minister to be relevant, question time is going to continue as it is. I think if you go to the Senate here, where the President is not controlled by the government in the sense the government has not got the numbers in the Senate, and if the President made a blatantly political decision he could expect trouble from the Senate as a whole. I think question time in the UK runs much better; they do allow supplementaries

there. But the House of Representatives here is dug deep into what I believe is a very undesirable pit and I just do not know how they are going to get out of it. If you have any good suggestions I would like to hear them.

Questioner — In the context of all the manifest difficulties and inadequacies you pointed out in our parliamentary system, where in fact is the pay-off and who benefits? Is it sufficient to start to move the inertia that maintains the present status quo?

Mr Hamer — I argued, and I feel quite strongly about it, that you are not going to change the House of Representatives much. It is set in its ways. I think it is an insoluble problem. If you have a party majority in the lower house it is just unrealistic then to expect it subsequently to be an effective critic of the government it has just chosen; it will never do it. I do not see how you are going to break down party systems.

I would suggest that the way to get the Senate to take on the role that I have suggested — the role abandoned by the House of Representatives — and to stop duplicating unnecessarily the electioneering role of the lower house, which is a total waste of time and damages very much its performance as a legislature, is to remove the ministers from it. How you remove the ministers from the Senate is a thing that vexes me. You will not get the senators to volunteer. We can hope that discussion of the issue and the problem is getting sufficient community support to start academics, political societies and so on to apply some pressure. It is not impossible.

Of course senators want to remain ministers but there would be quite a lot of support among members of the House of Representatives stopping senators from being ministers, not slightly self-centred of course, but it would be possible to mobilise support. At the moment, however, there is no pressure because people really do not understand our system. They think it is something quite different. They do not like the manifestations of it, but they think there is something wonderful going on underneath. It is not bad but it is not good and I am trying to suggest ways it might be improved.

Questioner — You have traversed a number of very necessary reforms for our parliamentary system and touched briefly at the end on some issues associated with the republican debate. I hope I am wrong but I very much fear that if this talk is reported at all it will be reported as ‘Senior Liberal Thinks Republic Inevitable.’

Mr Hamer — That would be an accurate statement.

Questioner — It would be an accurate statement as far as it goes but, I submit, not an accurate summary of your remarks this afternoon. I wonder whether you would comment on this focus on the republican debate and the consequent polarisation of views. Those people who oppose the republic therefore have to argue that the present system is flawless; those who support a republic then have to argue that the present system needs to be radically reformed. This polarisation has made it much more difficult to talk sensibly about the kind of organic evolutionary rather than revolutionary changes to the parliamentary system that you have mentioned earlier.

Mr Hamer — I entirely agree. I do not want to enter into the republican debate. I merely mentioned that as the background to what I was saying. I think politicising the republican

debate is deeply regrettable. I think we should be looking at it very calmly and I do not think it is imminent in any way. I think it is a long way off but I feel we will eventually come to it.

What I want to do is get our system working better and I want to recruit both parties to it. I believe we need now to define the powers of the head of state, to leave them in their undefined state is wrong. I think the present system whereby the Governor-General, the head of state, is chosen by the Prime Minister and can be dismissed by the Prime Minister with no security of tenure is also wrong. Let us fix those things that need fixing. I was only trying to recruit those who want to see a republic by saying that such changes will make the transition to a republic later on easier, but the argument for such reforms is not the republican argument: it is the argument to make our system work better.

Questioner — There is an argument around which links the institution of monarchy and other institutions in the country with the general stability of Australia. Could you comment on that?

Mr Hamer — You mean the contribution the monarchy makes to our social stability?

Questioner — The institution of the monarchy, generally, to the stability of this country. Whether this is sometimes overlooked in the argument towards republicanism?

Mr Hamer — I think a badly conducted republic — a badly organised republic — could be extremely unstable. I think there is the real danger of deep divisions developing in our society as we go down that path — as we move towards becoming a republic.

The personality of the present Queen is very highly regarded by a large proportion of the Australian public and is a useful element in our social stability. I think the transition to a republic is inevitable because I do not believe the same thing will apply as generations move on. The present system will undoubtedly see out the present Queen's life. After she leaves I think the situation will be very different. She has made a great contribution to it. We also have to look at the changing nature of Australian society; when our Constitution was written, about 95 per cent of our people were of British origin. That is not so now and I do not know whether the people, for example, from southern Europe feel as strongly about the monarchy as do the people of United Kingdom origin.

Questioner — But they take all the benefits?

Mr Hamer — Yes, of course, you take the benefits of society. I am trying to be balanced on this. The present Queen has been an admirable monarch but I am not sure that the next generation will regard her as highly as she is today.

Parliament and the Auditor-General

John Taylor

Introduction

The title of this lecture, 'Parliament and the Auditor-General', reminded me of a quotation which goes back a very long way in my own career and which applies to the relationship of the Auditor-General with the Parliament and the Auditor-General's very close relationship with the executive. The quotation reads:

Oh wearisome condition of humanity!
Born under one law, to another bound:
Vainly begot, and yet forbidden vanity
Created sick, commanded to be sound.

If the analogy is not clear, I suppose I was thinking about the Joint Committee of Public Accounts, which is a bipartisan and/or multi-partisan committee. It has a majority of Labor members commanding us to be sound and suggesting ways that we could recover our health. But we continued to remain sick because the doctor would not give us the medicine.

I have divided my presentation into nine parts. The first one deals with the tensions underlying the external audit of the executive government and its bureaucracy. By the way, I say 'its bureaucracy' because it no longer is our bureaucracy. The bureaucracy used to be at the source of what I call institutional dissent. In other words, they would say, 'No, Minister; that would not be a good idea' or 'Minister, that would be a very brave thing to do.' I think those days have gone. There are undoubtedly people with greater skill in interpersonal relations than I have who are still able to give the right advice in a way that does not upset people. But to me the day Tony Cole left was the signal that even insiders were not able to say what they really should say, particularly to a parliamentary committee. This is very sad. For the second part I look at the principles underlying external review. If I had the time, I

would look at some of the relevance of those principles to the way an audit office should be operating. For the third part I set out what I believe executive governments should stand for — what we should expect from them. For the fourth part I cover the roles of Parliament — the lower and upper houses — and the government. The fifth part of my talk is a criticism of external audit review and I go into some detail there.

The thing that really is very difficult to get across on television, or indeed in print, but is much easier on radio is that it really is not black and white. It is not hate them or love them. It is a very complex relationship between the Parliament, the Auditor-General, the executive and the bureaucracy. The nuances are subtle and we all rely upon each other. Indeed, I know that some of the people I criticise — and criticise strongly — love their dogs, treat their families well, are intelligent and are quite nice and charming people to be with. I just happen to disagree with their view of the accountability system. But it is not a matter of personality — at least as far as I am concerned.

I think the criticism of external audit is something that should be looked into and dealt with in an effective way. One of the overall criticisms I make of the way the government has dealt with external audit and with the audit office — long before I got near it — is that there really has not been a coherent, intellectually sound analysis of the pros and cons of actions. It seems to me — I have seen some of the cabinet submissions — that it is, ‘This is what we want to do. Full stop. No further correspondence will be entered into.’

Being rather older and like some of the people now involved in advising, I came through a school where we would have actually involved the audit office in the preparation of the cabinet submission. There may well have been differences of view, but these would have been given to ministers to make a judgment about rather than submitting one recommendation with other people’s views in the back, which suffer as much as you would suffer from a television cut. That seemed to me very sad and it was a fairly early indication that the old idea of checks and balances was falling down or being weakened within the bureaucracy as well as elsewhere.

The sixth part of my lecture looks at the control of information as a tool of autocratic power, and the seventh part deals with the Joint Statutory Committee of Public Accounts (JCPA) report itself.

1: Tensions underlie external audit of the executive government and its bureaucracy¹

Tension between executive government and *effective* external reviewers not answerable to it appears inevitable. This is so regardless of country, system of government, period of history, or form of reviewer. In Australia as one nation it began for the external public audit with our first Auditor-General, Mr J. W. Israel, ISO (1901-1926) who before Federation was Auditor-General for Tasmania. More recently the underlying tension was intensified and became

¹ This paper is based in part on sections of a presentation made to a public seminar of the Commission on Government, Western Australia, dated 29th March 1995.

more out in the open as a result of two decisions by the executive affecting the work mandate of the Auditor-General.

The first of these decisions was to give the Auditor-General the right to undertake efficiency audits. This was a bone of contention from the first, mainly because neither the executive nor the bureaucracy were comfortable with the resultant pressure which necessarily resulted for them after the more comfortable *status quo ante*. And partly because this might better have been integrated into a wider ranging and interlocking set of accountability changes which would have flowed from the Royal Commission on Australian Government Administration 1976 (chaired by Dr. H. C. Coombs) had its approach been followed. While RCAGA emphasised ‘...new delegatory methods by which the Treasury and the Public Service Board in particular should in future help to co-ordinate the activity of departments..’ it crucially sought also to balance these changes through improvements to other bodies, including the Auditor-General. In its words, ‘we should re-emphasise how necessary also is a renewed vitality for some ancient instruments of restraint, of which the most important is the office of the Auditor-General’.²

It therefore recommended a more inclusive approach to accountability:

...with the Auditor-General establishing under his own chairmanship a committee comprising representatives of the heads of Treasury, Public Service Board, Prime Minister and Cabinet and Administrative Services, to assist him in the development of his role in the audit of efficiency.³

As well as seeking successfully the empowerment of the Auditor-General to conduct efficiency audits throughout the Commonwealth government administration (such power now being wound back), RCAGA sought to give him greater freedom, resources and a closer relationship with the parliament.⁴ The long-term result of the ‘gift’ of efficiency auditing was a perceived threat to the reputation of ministers and senior bureaucrats before the Parliament, the media and thus the electorate. Self-interest apparently dictated responses which included rather than a more open approach, criticism of his individual reports, denial of the existence of his resource difficulties and continued restraint by the executive on his operations.

Quoting without disparagement RCAGA’s use of the words ‘restraint’ and ‘co-ordinate’ in connection with the activity of central agencies invites criticism from current administrative reformers who do not accept that devolution and ‘letting the managers, manage’ in the circumstances of the public sector, are more likely to work if there is a complementary acceptance of the reality of an element of shared responsibility for outcomes between the centre and the ‘front lines’. And that thereby service-wide as well as individual agency effectiveness etc. will be enhanced rather than the reverse by a more balanced, realistic approach to personal accountability.

² *Royal Commission on Australian Government Administration*, Australian Government Publishing Service, Canberra, 1976, s.375, para. 11.4.1.

³ RCAGA 1976, p.379, para. 11.4.13.

⁴ RCAGA 1976, p.371, para. 11.3.17; p.374, para. 11.3.21 (j) & O(ii); p.375-379, paras. 11.4.1-11.4.13.

Responsibility forced down the administrative system and out to the so-called ‘coal face’ requires complementary action in the centre, for example, to act rather than stand back from actions (even potential actions) before they go awry or to help avoid bad rather than good practice being the exemplar. As a result, there have been practical difficulties as well as costs which could and should have been avoided.

The second decision causing an inevitable heightening of tension was the introduction of individual financial statements for departments and other entities which, up to that time, had formed part of the audited statements of the Minister for Finance. The change was a sensible discipline on departmental management, but the Department of Finance (DoF) took the view that this could be done without any extra work by the Auditor-General. However, each new set of financial statements required a judgement on the facts whether they presented a ‘true and fair’ picture, and some factors only became significant or ‘material’ when considered as part of a single department’s statements alone. This required more work than in the past and in some departments and entities it was found that uncertainties hitherto not significant made it irresponsible to give a clear audit opinion.

In the light of the apparent lack of knowledge by DoF of the audit and resource implications of the new requirements, it was not surprising that heads of department were confused about their new personal responsibilities for financial management reporting and about the related legal responsibilities of the Auditor-General for the audit opinion. In the past, major responsibility for financial reporting had been shared, in practice, between DoF and an entity’s accounts staff. Some departmental heads, used to private resolution of conflict, felt under unfair pressure when faced with the possibility of a public qualification of their financial statements especially when, in their opinion, nothing had actually changed (even though they were now, legally, in much the same position as those in the private sector always had been). The relationship between some of them and the Auditor-General became even more troubled when a number found that they were unable to satisfactorily convince the Auditor-General that their accounts should not be qualified.

The upshot of these two decisions — taken within or causing a changing environment wherein on the one hand the Auditor-General sought a closer focus on what Parliament wanted and, on the other, ministerial support for the office waned — was that resistance to and challenge of the auditors became more prevalent and from a higher level; and unhelpfulness generally seemed the rule in some non-audit areas of need.⁵ The conclusion that can be readily reached from events is that the relationship between an effective Auditor-General and executive government inevitably will be difficult and in the light of the necessary inequality in power between them, dangerous for the determined Auditor-General. Support from Parliament and the media for the Auditor-General is necessary for retained or regained viability. While good relations are to be preferred, an Auditor-General who is seen under the current regime as getting along well with the executive and its bureaucracy is suspect. Grudging respect is the most one should expect, because publicly reported audit is a particular threat in the ‘bear pit’ of politics.

⁵ Thankfully, at the working level where departmental and other staff generally welcomed the opportunity an audit review often gave to improve the way things ran, co-operation continued usually to be good; as it did with a number of heads of entities, including many with experience of the private sector, who welcomed the chance thereby provided to competent management. But others seemed more affected by the possibility of public criticism and tried hard to deflect or otherwise stymie reviews.

Commonwealth attitude to public external audit as seen by some public auditors

J. W. Israel, ISO, the first Auditor-General for Australia

At Federation, the Auditor-General was paid above heads of departments but by 1918 was the only senior official not to have had a pay rise.⁶ⁱ The intentions of the founding fathers with respect to the role and status of the Office were not to last long. It is disappointing that parliament did nothing to stop the downgrading, implicit in this treatment of *its* servant, of its own ability to command information and therefore, perhaps unwittingly, to have acquiesced in its own downgrading vis à vis the executive. Similarly with changes to the Audit Act, Mr Israel complained at one point that he had been waiting sixteen years for changes he believed desirable to the Act.⁷ This puts the current wait of six years into a perspective of general carelessness about the function by governments and bureaucrats. Only public pressure and committed politicians can change this treatment for the better. One could go on about Mr Israel's difficulties. Instead we will look briefly at the views of my two most immediate predecessors about their treatment by the executive and the bureaucracy.

K. F. Brigden, AO, the tenth Auditor-General for Australia

The well known JCPA Report 296⁸ stemmed from warnings expressed by these predecessors. Mr Brigden, formerly Taxation Commissioner, wrote in a report tabled in the Parliament in 1984 that

Audit independence and audit effectiveness can amount to much the same thing. If an auditor does not enjoy independence from the bodies subject to audit it will be only a matter of time before some measure of control by auditees becomes apparent. When that happens, the effectiveness of the audit process will inevitably suffer. In practical terms, impairment of the auditor's independence is synonymous with impairment of audit effectiveness.

It is timely to question whether the independence of the Auditor-General and the Australian Audit Office from the executive arm of government is not more apparent than real.⁹

⁶ An unintended compliment.

⁷ Note that our later wait could be eighteen years if we count from RCAGA 1976: but in fairness one can distinguish between the force of recommendations from the JCPA and those from RCAGA, which though compelling in logic and analysis, were ahead of their time and seen as somewhat of a risk (despite the example of the GAO). By the time JCPA Report 296 was published there were more examples to reassure the executive of the practicality of the proposals with respect to the ANAO. In about 1976 Elmer Staats, Comptroller-General and head of the GAO, visited Australia to talk to relevant officials and groups; around 1988 Ken Dye, the Canadian Auditor-General performed the same service. Sir John Bourne of the UK National Audit Office visited the JCPA in the last eighteen months or so. All have the freedom from the executive sought for the ANAO by the JCPA.

⁸ Report 296, Joint Committee of Public Accounts, *The Auditor-General: Ally of the People and Parliament Reform of the Australian Audit Office*, Australian Government Publishing Service, March 1989.

⁹ Contained in The Auditor-General Audit Report No. 43 1993-94, *Parliament's Right to Know: Legislation to replace the Audit Act 1901*, p. 43. It was originally part of a *Report of the Auditor-General upon the Financial Statements prepared by the Minister for Finance for the year ended 30 June 1984* at para. 5.2.

J. V. Monaghan, AO, the eleventh Auditor-General for Australia

Mr Brigden's successor was formerly a Treasury officer and later Commissioner of the Public Service Board, who in 1987 when Auditor-General wrote to Parliament as follows -

...Not to put too fine a point on it, the future of the AAO's performance auditing function is clouded by the question mark that hangs over the adequacy of its resource provision.

...One cloud on the horizon is the thrust of continuing erosion of the AAO's audit mandate through modification of the statutory requirement that public enterprises be audited by the Auditor-General.

...Continuation of some recent trends could well see the AAO in for a turbulent time. I hope that this will not prove to be the case.

...Ultimately, of course, it is for the community to determine whether the Commonwealth is to continue to have a robust, effective and independent external audit institution; or, perhaps, to make do with some docile client of the Department of Finance. If it is to be the former, the pre-requisites are a strong and clear audit mandate, and resourcing arrangements that do not prejudice the institution's independence.¹⁰

Resource constraints imposed by the executive can slowly and insidiously poison independence. They may do this in a way that makes it difficult to prove cause and effect and which may also causes problems which can harm the reputation auditors-general strive so hard to preserve; the professional standing of their offices. This danger has been clear to many expert, disinterested witnesses from outside the public sector. One of these, Mr Fergus Ryan, found in a report on the Auditor-General of Victoria that

The involvement of the Executive in the process of approval of the Offices' budget is again, in my view, inconsistent with the concept of the Auditor-General's role in the accountability of the Executive to the Parliament. There is a clear risk in theory that the effectiveness of the Auditor-General could be constrained by an Executive which chose to do so through a denial of adequate funding.

He recommended therefore that

In order to ensure that the Auditor-General is able to meet effectively the needs and expectations of Parliament, I consider that Parliament should be responsible for approving the budget of the Office, and should fund it directly by way of specific appropriation.¹¹

¹⁰ Report No. 43, pp.27-42 inc. Originally in *Annual Report of the Australian Audit Office 1986-87*.

¹¹ Fergus Ryan, 1992, *Report on Performance Audit of the Auditor-General of Victoria pursuant to Section 48B of the Audit Act 1958*, L.V.North, Government Printer, Melbourne, October 1992, p.15.

It is not only auditors-general who have difficulties with the Commonwealth. The *Sydney Morning Herald* of Saturday May 6, 1995 reported the 'mild-mannered, former academic and Brisbane silk, and chairman of Queensland's Red Cross' and the latest chairman of the Criminal Justice Commission in that State, Mr Rob O'Regan, as saying of the Commonwealth:

I am amazed at the ferocity of the Federal Government's attacks...Something must be making them very uncomfortable...

(Bodies like ICAC and the CJC) were fashionable after the exposure of quite a lot of corruption and maladministration during the '80s but I think many politicians and senior bureaucrats now find it irksome to have a permanent commission keeping an eye on them.

2: The principles underlying external review

Do we need an independent external public audit official?

A look at the past would help decide. Long before the failures of the 1980s, Pliny the younger revealed the mistaken activities of public officials in his writings so many centuries ago, and at the time through audits. Much later a more recent letter questioned:

...You say that people in authority are not to be snubbed or sneezed at from our position of conscious rectitude...

I really don't know whether you exempt them because of their rank, or their success and power...I cannot accept your canon that we are to judge Pope and King unlike other men, with a favourable presumption that they did no wrong. If there is any presumption it is the other way, against the holders of power, increasing as the power increases...Power tends to corrupt, and absolute power corrupts absolutely. Great men are almost always bad men, even when they exercise influence and not authority, still more when you superadd the tendency or the certainty of corruption by authority. There is no worse heresy than that the office sanctifies the holder of it.¹²

Thus thought Lord Acton, moralist, politician and historian of whom Matthew Arnold said 'Gladstone influenced all around him but Acton; it is Acton who influences Gladstone'¹³ The force of Acton's view is unaltered even if we believe that 'our' side when in power would not act in an unprincipled way. Even if this were to be so, is it reasonable then to assume that principled behaviour would continue with long 'rule' or with new (i.e. 'different' from 'our') 'rulers'? Acton reviewed the behaviour of past Popes and Kings and concluded not. What does commonsense in the light of recent Australian political history in some of our states tell us? Surely it tells us that an informed parliament, one that is not kept from relevant

¹² *Historical Essays & Studies*, John Emmerich Edward Dalberg Acton, Macmillan and Co. Limited, 1907, Appendix.

¹³ *Encyclopædia Britannica*, 15th Edition, vol.I, p.76.

information, is one way to keep good government. Acton's analysis of history suggests a practical way of avoiding a blight being brought down upon an unsuspecting people.

May I ask (rhetorically) any doubters to explain why there was a Royal Commission into WA(Inc) and now a Commission on Government in that State; why the State Bank of Victoria had to be sold to the Commonwealth Bank; why the State Bank of South Australia contributed to the political demise of a Premier; and why there was the Fitzgerald enquiry in Queensland.

To believe that no powerful politician ever would act unfairly or against the public interest, if it were known to them that exposure would be avoided, is to put politicians and bureaucrats in a class of their own. In the above quotation Acton told his correspondent and now, a century later, tells us that if autocracy in our governments is to be avoided or reduced there must be effective checks and balances on political and administrative behaviour; and that the longer such curbs are weak or absent, the harder blight is to contain or avoid.

Yet autocratic behaviour is sometimes confused with 'appropriate' leadership; and in some societies appears to be welcomed.¹⁴ Even in free societies one hears that leaders have to be *strong* and to *lead* as if citizens are children or, worse, sheep or horses to be led by the nose or driven to the sale yard or maybe the knackery; that voters *cannot be trusted* in sensitive areas to take the *right* decisions (these are better left to the experts) — views of the community that are inappropriate, surely, in a free and strong democratic land?

It is clear from the experience of the tenth, eleventh and twelfth auditors-general for the Commonwealth of Australia that there is strong opposition to the very concept of apolitical, independent, expert analysis and public reporting by the Auditor-General on the use of public power and resources. This reluctance applies also to the implementation of anything which would help or encourage our National Parliament to have an effective role in the protection and nurturing of the Auditor-General unless the executive is forced into it. Such reforms as have been introduced domestically and overseas in public external audit and reporting have been because of a powerful political patron or because a scandal or public calamity so great as to force action on the unwilling. (Even in such circumstances a tactic can be to hold reform off until the furore dies; people do forget; and governments do not always consider the long term good of the community when self-interest is involved. When the bureaucracy shares that self-interest it is a difficult alliance for an Auditor-General to have to face.) It is not unknown for political and bureaucratic forces to join in an unlikely alliance, re-grouping to weaken the forces of reform — no doubt, in their view, for the best of motives. I would not be so tactless as to mention any of the States in this regard but it is certainly true of the Commonwealth across its history: immediate post-Federation; post-RCAGA; and post-JCPA Report 296.

Mandate

One working definition of full mandate is that the Auditor-General should be able to report to the Parliament on the use of all public power and public resources by the executive whatever their legal form otherwise evasion of public audit will occur. The definition has to be sufficiently broad to catch all uses of public power and/or resources and the onus must be on

¹⁴ Which may be why one English cleric, Dean Inge, thought that votes should be weighed, not counted.

the executive to have the audit opportunity made available, with sanctions, effective legal sanctions, on Ministers for non-compliance.

Components defining mandate include:

1. Type of coverage — ‘efficiency’¹⁵ and/or financial statement audits.
2. Extent of coverage e.g. Government Business Enterprises (GBEs), departments, committees, commissions, trusts, superannuation funds, companies, subsidiaries, panels, partially privatised bodies, statutory authorities etc.
3. Ability to report/and to whom.

Audit Report No. 43 sets out well the Commonwealth situation in principle at the time of writing — and it is principle which should determine the detailed application most suited to the particular circumstances found in Western Australia¹⁶

Review of GBEs

The area which the government is keenest to remove from oversight of Parliament through the Auditor-General is that of government activity in the commercial/market sphere, particularly GBEs.

Why should the Auditor-General’s mandate be extended to cover GBEs, companies and other ‘commercial’ type government activities?

Is it common sense to have the Auditor-General review GBEs or such other bodies as claim to be ‘commercial’ yet which continue to benefit from either or both public power (e.g. the protection of special legislation) or public resources. The fact that the closer an organisation is to the market, the less need there might be for such review (i.e. beyond financial audit), compared with, say, departments of state, does not mean that at no time would such a review be necessary. Being in the market does not mean a body is efficient, it merely means it can ‘go broke’.

But on top of that, politicians and bureaucrats do not use their own money, they use taxpayers’ and will spend money on so called ‘commercial’ projects long after private, free to act shareholders would have called it quits.

Neither ministers nor bureaucrats are the real shareholders when the public has majority or even minority shareholdings — they act in trust for the real, dragooned shareholders, whose interests the Parliament represents and therefore has a right to be informed, and it is the Auditor-General, not anyone else, who should do this.

As Report No. 43 put it:

while different considerations exist for individual GBEs, they are not in the same position as private sector bodies because of

¹⁵ Including performance indicators.

¹⁶ Auditor-General No. 43, pp. 6-9, paras. 2.1-2.21.

- the limited nature of the marketplace for most GBEs
- the inefficiencies which can exist within any profit oriented private-sector business (the bottom line does not guarantee efficiency, even in the private sector)
- the conflict which can arise between private and public sector objectives
- the absence (where there is no stock exchange listing) of the competitive pressure experienced in the private sector based on stock exchange listing and borrowing requirements
- preferential funding as a result of explicit or implicit government backing
- absence of choice by the public-sector shareholders — the taxpayers — to withdraw their funds, and
- the Parliament's right and role in a democratic society.¹⁷

While some public-sector agencies have tried to introduce meaningful analogues of competitive pressure to the public sector, a government body, however commercially oriented, cannot be subject to exactly the same competitive pressures as apply to the private sector. Such bodies are protected from hostile takeovers and do not, as a matter of course, have their performance reviewed by market analysts or institutional investors.

Even more importantly, as mentioned above, the public sector's ultimate shareholders (the citizens) have no choice — they must trust management and governments to act in their best interests without the flexibility of the private investor to invest or not, or to withdraw their money at any time.

Government bodies should therefore not be treated as if all private-sector checks and balances apply. Ministers, accountable as they are to the Parliament and the electorate, also require assurance that all goes well in their portfolio responsibilities. It follows that accountability in the public sector must be different from, but not less than, that in the private sector if the taxpayers/shareholders are to be protected.

While it is true, of course, that publicly owned commercial bodies are accountable usually to ministers, those ministers to the executive, and the executive ultimately to the Parliament, this is insufficient, particularly as any good private-sector manager will agree, that tensions often arise between the objectives of achieving appropriate 'bottom-line' results and being a good corporate citizen. The ANAO only has supported the approach of 'letting the managers manage' so long as accountability is not eroded and information is still available therefore to the public and the Parliament.

No matter how commercial these bodies may be, they owe their existence to the Parliament and have even stronger obligations than their private-sector counterparts to be good corporate citizens and this will be no different at the 'commercial' end of the public sector. Under the proposed provisions of the Auditor-General Bill, the Parliament will have diminished access to information about their operations and activities, particularly in relation to their public interest responsibilities. A threshold question is: will GBEs be subject to the full range of necessary accountability requirements in the future? I believe not.

¹⁷ *ibid.*, p.7, para. 2.10.

It is true that in general there is a cost to the operations of an enterprise in observing public accountability requirements, including being subject to performance audits by the Auditor-General. However, the direct audit costs would be only a fraction of total costs and are far outweighed by the benefits of added public accountability.

At page 8 of Audit Report No. 43 it is recalled that:

In Queensland, the Electoral and Administrative Review Commission, after considering the Commonwealth Government's response to Report 296 [ie rejection], in 1991 indicated:

The Commission firmly believes that the Auditor-General's role is most unlikely to affect the competitiveness of a GBE and considers these claims to be overstated. The competitive strength of an organisation is determined by the quality and price of its product, marketing strategies, and competent management and staff, not by the identity and effectiveness of its external auditor...The Commission considers, therefore, that the Auditor-General should have the authority to undertake a performance audit into the activities of any GBE which may be established by the Parliament.¹⁸

In Western Australia itself, the Report of the Royal Commission into Commercial Activities of Government and Other Matters in 1992 commented that the Auditor-General was:

...the public's first check and best window on the conduct of government¹⁹

The Royal Commission recommended:

All public sector bodies, programmes and activities involving any use of public resources, be the subject of audit by the Auditor-General.²⁰

3: What executive governments might stand for

Among the values, principles and actions which might reasonably be expected of government are integrity in their decisions and in the way these are portrayed; honesty, fairness and respect in the way they treat citizens; equity in the treatment of need or, in the case of taxation, means; support for the rule of law, for the independence of the judiciary and for independent officers with statutory duties; respect for the role of the 'loyal opposition'; government in the interests of the nation as a whole, not special interests, 'mates' or, in the

¹⁸ Queensland, Electoral and Administrative Review Commission, *Report on Review of Public Sector Auditing in Queensland*, Brisbane, September 1991, p.91.

¹⁹ Western Australia, *Report of the Royal Commission into Commercial Activities of Government and Other Matters*, Perth, 12 November 1992, para.3.16.

²⁰ WA Royal Commission, para.3.17.

words of Patrick Cook, ‘just a bloke I owe a favour whose name for the moment escapes me’²¹ but ever mindful of the needs of the individual; and fair and apolitical administration of efficient, economical and effective programmes.

4: Roles of parliament, the lower, and upper houses, and the government.

The two party system with its strict discipline on parliamentarians’ voting behaviour acts against the viability of a parliamentary democracy in which individual parliamentarians make up their minds on issues on a number of criteria apart from what the whips say is to happen. Nevertheless, such behaviour is not unknown (as we shall see) particularly when matters of conscience are concerned but remain rare; it is examples of individual members or senators who have to support a vote against their judgement which abound.

It is against such a background that we have to consider the practicality of making recommendations which assume that a lower house (e.g. the House of Representatives) is able to act as a parliament in the above sense. We have no choice, I believe, if we accept that an informed group of parliamentarians is better for us than the reverse i.e. if we want informed back-benchers and, indeed, ministers more effective in their supervision and support or otherwise of government action; if we want to support the members and senators of all persuasions who care about what they do; and if we care about our democratic way of life. But there is also the Senate where, to get their way when they disagree with each other, the two main parties have to rely on support from combinations of Democrats, Senator Harradine and/or the WA ‘Greens’.

If the government were to support increased support systems for, say, the Parliament’s committee structure, a new and interesting day for democracy would dawn — but not by any means as radical as is likely to happen in New Zealand under its electoral changes. Suffice to say that the current Australian government is not interested in such reform and will do nothing if not forced. Whether the Parliament can take greater effective review responsibility in the absence of executive support remains to be seen.

Criticism of the role of the Senate comes from powerful sources. The most vocal and significant proponent of the desirability of a more formally and symbolically independent Australia, the Prime Minister, is at the same time the official most denigrating of and threatening to the Senate. This is quite disturbing in itself, and a strange inconsistency for the Senate is an institution which is particularly Australian in its development and role. As J. R. Nethercote has written, ‘The Senate has to be seen purely in an Australian context, as a distinct creation of Australia’s Constitution-makers’. It is also a body in which we find the most democratic representation of voters’ intentions at the polling booths and the most independence and resolve when it comes to attempting to protect the people from executive

²¹ See the *Bulletin*, 7 July 1992, ‘Not the News’ by Patrick Cook, in which he summed up the disillusionment of many in his page of additions and amendments to a fictitious Act for the prevention of corruption and abuse of their Office by elected representatives, by their families and friends and ‘the bloke’ referred to in the body of this text.

excesses.²² Far from being ‘unrepresentative swill’, the minorities hold the balance of power only when the majority of members, bound by party loyalty, cannot agree to agree.

It is unfortunately that underlying too much of political debate in public life from some quarters is a disregard for fact, history, logic and practicality. Much of it seems to be based on expediency and naked self-interest. This appears to be a tendency to attack or sneer at those, including independent reviewers and review agencies (but also business organisations), not yet cowed or which have resisted control by the executive government and its bureaucracy. The reason for the unpopularity of the Senate with the executive and sections of its bureaucracy is plain — the Senate is independent, not a rubber stamp nor rotten borough, and when it wants to be, very effective.

Is there a case for the Auditor-General to be allowed a monopoly by Parliament?

In a democratic society, the rationale for an official such as the Auditor-General having wide and secure mandate derives from the need for the Parliament, in itself lacking in resources and information as compared with executive government, to be in a position to call the executive to account for its actions or inactions

Could Parliament do this through private auditors?

The answer is theoretically ‘yes’ but in practice ‘no’. If the Parliament wants to keep an effective interest in what is being done with power or resources provided by it to the government in the interests of the community as a whole,²³ it must have a clear and formally independent and accountable channel through which it is advised regularly, consistently across programmes, by an official who is independent and apolitical and who can report ‘without fear or favour’; who has a clear, unambiguous, legal requirement to look across the public sector as a whole; who has power to allocate available resources according to assessment of risk; who has command of appropriate resources which are independent of the executive, with wide powers of access; and who has the power to report to the Parliament and others relevant as necessary/appropriate. This position or official cannot, in practice and by definition, be privatized; the accounting profession takes a similar view as have the independent auditors of the ANAO.²⁴

It should be recognised note that this does not and, I believe, must not, rule out an appropriate working relationship, even form of partnership, with the private sector, provided there is no ambiguity about the ultimate responsibility of the Auditor-General for the audits.

²² The *Sydney Morning Herald*, March 14, 1994, p.13, ‘Senate is a people’s house, too’. J.R. Nethercote’s adaption of his parliamentary research paper.

²³ A principle which is a foundation of our democracy and which gives some protection for us from arrogant governments; as do a free, professional and enquiring press, independent judiciary and apolitical, professional public service.

²⁴ Evidence to JCPA; statement on Australian Rail Corporation Bill; Report to Minister for Finance of the Independent Auditor; personal communications.

5: Criticism of external audit review

A recent example of the public attitude of some in Canberra appeared in a well written, succinct and seductive article in *The Canberra Times*²⁵ which set out the alleged disincentive effects on risk taking and therefore on innovation and improvement in the public sector caused by criticism allegedly arising from ‘parliamentary tactics’ and ‘popular prejudices’ (e.g. in the way Senate Estimates Committees operate).

I would leave the Senate committees to speak for themselves but the article then repeated criticisms, used elsewhere by senior bureaucrats, of the way auditors-general also have annoyed them — by ‘bean counting’ (Barings also may have taken this view to their cost!); focussing on failures rather than successes; and, heaven preserve us, seeing ‘facts as secondary to a good story’. (I would add I know from personal experience that some bureaucrats also are very unhappy about easily understood audit reports and press releases too.)

As the Auditor-General — when the particular audit examples mentioned in the article were published, (viz. reports suggesting some lack of either knowledge of, or control over, the use of some government credit cards and of shambles and aggressive game-playing at some bureaucratic levels over performance pay) — I have to agree with the suggestion in the article that facts sometimes are seen as secondary to a good story. But I disagree that the reports of the Auditor-General were examples of this. In my opinion this ‘myth making’ approach to criticism was clearly the prerogative of the government and bureaucracy as their response to what had been found in these audits showed.

Parliament represents the shareholders

The article suggested that better government would result from attitudinal change to risk and failure, implying that there was an attitude supported by both parliamentary committees and auditors-general that failure must be avoided at all costs. This is, of course, simplistic as will be apparent to those who have lived through WA (Inc). (Has Canberra forgotten already Tricontinental, the State Bank of South Australia and WA (Inc)?) The truth is that if the public sector could act in matters of risk like the private sector, it (or that particular part of it) probably should be privatised. Failing that, those working in the public sector have to accept, whether they like it or not, a different, sometimes more intrusive and public form of external review, for they are using public power and public resources usually taken from, rather than volunteered by, the taxpayers (unlike the private sector). One cannot as a citizen move one’s public investment out of the public departments, commissions, boards, organisations, panels, companies and so on, or even out of partially privatised bodies, as one could if these were totally private operations. Nor do market rules of value apply, with their effective, if ruthless and sometimes too narrow disciplines on suspect management. But, of course mistakes occur and public servants and politicians will get blamed. What is important is to know that mistakes have occurred and that they have a positive effect on future behaviour. Those involved — including bureaucrats — just have to live with the political spotlight.

Power, like taxes, comes from the people

²⁵ Ross Claire, *The Canberra Times*, 2 March 1995, p.13, *The roles of success and failure in the public sector*.

Although this may be news to some in Canberra, the divine right of kings no longer applies either. The executive government, even under the realities of party discipline, still ultimately governs a free people only because those people are prepared to delegate that power. It follows that, whether bureaucrats like the questions asked of them by a Senate Committee or not, it is the closest thing to a shareholders' meeting they are ever likely to get near and they have to put up with the rough as well as the smooth or find another occupation where there are no external forces affecting their cosy world. But where is that? It certainly is not in the private sector.

Of course, external review, including by the Senate, should be careful, if it can, not to stunt innovation or sensible risk taking. But in looking at actual cases, I have seen no evidence that the ANAO, whose activities are quite puny compared with the size and importance of the public sector activity it tries to review, has had such an effect even in the areas actually reviewed. Quite the reverse. (The same would be true of the Senate.)

Identification and acceptance of failure is essential for learning and improvement

It was also suggested in the article that there was a pre-occupation with failure. No Auditor-General known to me believes that failure can always be avoided, even by them. Failure, we regret, is part and parcel of our striving as human beings. But it is Jesuitical to argue that this should lead one to conclude that failure should be ignored by an external reviewer. The vast majority of us learn by recognising, not ignoring, mistakes. How mistakes are treated by others is another matter again, (and not a matter to concern an Auditor-General any more than a policeman should 'second guess' the judiciary) but my experience suggests that there are powerful bureaucrats (but, thank God, not all) who would be satisfied with nothing less than praise, and praise only — forget criticism. But should taxpayers and other citizens, who provide the wherewithal, be happy with this as part of a 'new accountability' with emphasis on internal review and evaluation?

Nor, of course, should we waste scarce resources having audit offices take seriously another complaint that they should concentrate more on spreading the news of good practice (which in practice already is done within resource constraints).²⁶ Others are more than happy to do that, surely? It is a misunderstanding of the role of external audit to see it as some sort of consultant to government and the bureaucracy to be used on demand to help them. Because it fits the aims of a good auditor help is given, but it is not a *raison d'être* — that is to report the significant facts publicly of the use of public power and public resources in order to encourage improvement.

The abovementioned article is dealt with in some detail because it is an example a superficially reasonable litany of complaints about the role of the Parliament and the Auditor-General which can appear to provide some vestige of the intellectual justification (usually lacking) for giving even more freedom for the executive and its bureaucracy to act with less intrusion from the Parliament and its ally, the Auditor-General. Upon closer examination it is less than convincing.

The question is not whether auditors-general are imperfect

²⁶ For example, The Auditor-General Audit Report No. 33 1992-93 Efficiency Audit, *The Sale of Aussat and best practice for the sale of Commonwealth Assets*, AGPS, Canberra. 1993.

More stark and less clever are the often less overt criticisms directed against the work of auditors-general, and about their personal motivation, some of which are set out below. Before looking further at these I must make it clear that I do not believe audit offices are without fault. For example, the JCPA review leading to Report 296, just as with RCAGA 1976, found a need to improve the ANAO and it would be unreasonable (especially in view of monopoly effects) to argue that everything should fall to the executive and the Parliament to correct or that every blemish of an audit was their fault. But, like ministers and other public officials, auditors-general have to face up to their imperfections and try to minimize their impact on the body politic.

Objective evaluation is essential of criticism made of auditors-general

All allegations of inadequacy in public external audit require careful evaluation. From recent experience, allegations will range from irrelevant to important and from valid through merely incorrect perceptions or misunderstandings to the plainly maliciously untrue. Charges of audit nit-picking are a hardy perennial, appearing to come from people whose last brush with a public sector auditor was in a corridor in 1980, and with a private sector auditor at a tennis club dance. Other critical phrases which spring to mind include weak and irresolute; too powerful; prone to obfuscation in report writing; uncommunicative; headline hunting, publicity-seeking, press release producers; tardy; trivial; unprofessional and unbusiness-like, uncommercial in experience; expensive; impractical; lacking credibility; naive; irresponsible; head-strong; pushy, too big for boots; unrealistic; not actually requiring special help; political; in the pocket of Parliament, JCPA, the Senate, Mrs Bishop, the Democrats, or the Liberals; against the government; wrecking the reforms by criticising too soon (sic) i.e. after a decade!; and inhibiting risk management by revealing inadequacies in its implementation (such inadequacies existing usually through a lack of proper risk assessment).

These items usually can be sorted into one of two broad categories represented by:

- 1) publicity seeking / issuing press releases / briefing press and parliamentarians
'political'
too powerful
- 2) nitpickers
lacking detailed knowledge
unprofessional
unhelpful
lacking in 'commerciality'

The essence of the categories might be described as follows:

- 1) Information is revealed — an act of which the complainer disapproves whether because of the target audience, the content of the revelation and/or its style.

This is the key complaint - lack of control over information (or over the Auditor-General).

- 2) Leading from the first, (or which is said to cause the allegedly incorrect presentation of information) is alleged lack of professional skills and/or behaviour.

In reflecting on these criticisms, one must remember that the main complaint from the executive and its bureaucracy is about *the disclosure of information about their performance*, the basic job of an Auditor-General, which suggests that the motivation of the criticism might be questioned. While control of information is power, dissemination of that information does not alter the executive's ability to take or not take decisions required for any change to the *status quo*. The audit information complained of is contained in a publicly, formally tabled report which has been prepared, usually, from information provided by those being audited, seen in draft form by and discussed with those affected, and with their comments or rebuttals usually also included. A report is advisory only, and may have to pass the gauntlet of parliamentary committee review at which any critics can (and often do) press their cases. It is clearly against the interests of the Auditor-General to do anything to allow legitimate criticism of his work as unprofessional.

The second category of criticisms falls completely when one realizes how the executive has refused, on the advice of the bureaucracy, to assist the Auditor-General in improving the capacity of his Office as recommended by the various reviewers. If they really thought that there was a need for change, they would help achieve it. The real motivation is self preservation.

Audit vulnerability to politically motivated attack requires expensive review/consultative methods (unlike private sector unpublished reports)

Much time which would not have to be spent in preparing a normal private report on the same subject, is spent because reports of the Auditor-General's reports are so publicly contestable. Because his reports are so vulnerable to criticism aimed at clouding the real issues (usually coming from ministers or bureaucrats defending their personas), excessive care has to be spent on disputed areas and, particularly with a hostile executive and resource constraints, the Auditor-General has to watch carefully that reports do not lean too far towards areas of agreement or that the contentious issues are 'toned down'. The importance of the support one may get from a 'multi-partisan' parliamentary committee's approach to reports cannot be overstated.

6: Control of information as a tool of autocratic power

Control of information; Executive versus Parliament

The tension between the Auditor-General and the executive mirrors that between the executive and the Parliament. In each case party discipline exerted by the governing party acts to diminish the power of the Parliament to intervene to protect effectively its rights over those of the political parties. Some powerful politicians infer that under our system of 'representative government' Parliament has no rights other than those granted to it by the ruling party, and these only on loan.

There are not many examples of party discipline being flouted to assert the Parliament's ultimate sovereignty, but the introduction of freedom of information legislation by the Fraser government provides some insight into the power of principle on some senators and the power of party discipline or possible preferment upon others. It suggests that it is easier in politics to subscribe to 'the people's rights' when one lacks the power to do anything about

them. Yet it is apparent that those who defied party discipline in this case, so as to improve the rights of the people at large, were able — because of the issue — to influence effectively their own reluctant governing party. But, regretfully, pragmatism once in power in now *de rigueur*. This does not auger well for the implementation of the most central reforms of the role of the Auditor-General and his Office.

Freedom of Information (FOI) Legislation

Politics currently (maybe always?) involves more ruthless pragmatism than benevolent idealism or concern for the greater or wider public good. This sometimes seems to be rationalised on the ground that party and national interest coincide. However the introduction in the Commonwealth of FOI legislation showed how there can be a productive interplay between political pragmatism (here arguing in a self-interested way for less revelation) and political principle (as in the wider case that the public had a right to know more).²⁷

In 1978 during the Fraser Government, Liberal Senator Alan Missen chaired the Senate Standing Committee on Constitutional and Legal Affairs to which was referred in June the first draft of a freedom of information bill; a bill which owed its existence to Missen. The referral itself resulted from criticism of the bill by Missen published by the *Age*, which supported him with an editorial which included the following words:

This newspaper's worry — which Senator Missen appears to share is that the traditional reluctance of the bureaucracy to divulge information, coupled with the natural tendency of politicians to conceal what could be embarrassing, will override the principle that the public has a right to know what Governments are doing. A Freedom of Information Bill should mean what its title says. This one does not.²⁸

Like the later JCPA Report 296 on the reform of the external audit function, which also affected the provision of information to the public, Missen's Committee came up with a unanimous report recommending improvements (in this case) to the proposed legislation. Missen said:

...if our democratic system of government is to be properly responsive to the views of those whom we have been elected to serve, the Government's legislation must be strengthened. It must be broadened to ensure that the public's right to know, formally acknowledged for the first time in legislation, is indeed a reality.²⁹

One of the Opposition members of the Missen Committee was Senator Gareth Evans. He criticised the rejection or deferral by the Fraser Government of two-thirds of the Committee's recommendations saying:

²⁷ Anton Hermann, *Alan Missen: Liberal Pilgrim, A Political Biography*, The Poplar Press, Canberra, 1993, p.125.

²⁸ *ibid.*, p.125.

²⁹ *ibid.*, p.126.

Every recommendation of major significance and importance, designed to produce freedom of information legislation which would not be a feeble exercise in cosmetics but which would work a genuine improvement in the quality of our democracy has been rejected.³⁰

It is easy to understand how he must have felt, for everything he then said could apply equally to the government responses to the recommendations of JCPA Report 296 and to the most recent Bill when Senator Evans played a key role in damping down Senate unhappiness about the government's treatment of Report 296 and about difficulties found by those not in government in obtaining information at the time of the enquiries into sports grants as well as more generally.

Principle over party: Missen and others cross the floor

In February 1981, because the Government did not propose to pick up the recommendations of the Missen Committee, he foreshadowed that he and a number of his Liberal colleagues would cross the floor to provide the Opposition with the numbers to amend the legislation in the Senate. Senator Evans, for his part, announced that the Labor Party would introduce all the Committee's recommendations after July (when a new Senate would be controlled by Labor, Democrat and Independent senators) if, as he then put it, the Government '*runs for cover*'.³¹

In April the Government introduced an FOI Bill stimulating Missen to issue a statement criticising it under the title, '*The Seven Deadly Sins of Omission*'. Missen and five Liberal Senate colleagues duly crossed the floor in May leading to a defeat for the Government. After negotiation, the Government was able to pass a stronger Bill before it lost control of the Senate (if one ignores its loss of control over FOI!) in July. Another current Minister, Senator Tate, took over the chairmanship of the committee from Missen with these changes.

Attitude of current executive to control of information through external audit

For over a decade the Government has resolutely turned its back on principles it espoused in Opposition which, to quote Senator Evans in referring to FOI, '*...would work a genuine improvement in the quality of our democracy...*' By this I do not refer to the changes by the Government to FOI but to its attitude to the more important strengthening of the Parliament's ability to hold government to account for its use of public funds and power which a properly reformed external audit function would support. As with the Missen Committee, the JCPA was chaired by a member of the governing party and reported unanimously. The juxtaposition of the treatment of and attitude to the FOI legislation when in opposition and to external audit by important reformers in the senior ranks of government is disappointing; but this just has to be accepted as part of the human condition (particularly in the rough and tumble of political life). The obduracy and arrogance of government in its attitude to the obvious need for stronger checks and balances reflects a breathtaking insouciance — the executive may as well have been on the planet Mars for all the warning effect on it of the mismanagement, to be tactful, which occurred in the 80s in governing circles in Melbourne, Brisbane, Adelaide and

³⁰ *ibid.*, p.127.

³¹ *ibid.*, p.127.

Perth. The existence of Commonwealth Ministers and their offices in some of those cities, with (in)judiciously placed liaison staff said to have been in at least one Premier's Office, together with, at least in the southern and western states, presumably shared political ideals, apparently did not help communication (as far as an outsider can tell) about what was going so quietly but very badly wrong.

Some suggest that these events were not relevant to the Commonwealth. It certainly cannot be argued with any conviction that the Commonwealth is insulated from arrogance and autocracy in public office. It may be true that the Commonwealth has had in the past the benefit of a public service of independence and quality as well as a different, less personally tempting area in which to operate but in the end Acton will out. The long term effects of this contemptuous attitude to checks and balances generally (in this case, to those provided by Parliament) will reduce future benefits to the Australian community as a whole. It is both telling and a matter for concern that the Commonwealth has been able to resist for so long reforms aimed at improving the workings of Parliament, the more so because it has done so in the face of well based, multipartisan committee reports at a time when the States have found it necessary to change their audit offices for the better in many ways.

Looking at the immediate future, if there is to be effective improvement in the Commonwealth it will be because of the power of the Senate and of public opinion using as a lever affairs such as the so called sports rorts or whiteboard affair.³² And then only if deals are not done to negate the effectiveness of changes. Even in the absence of political deals, the bureaucracy can white-ant parliamentary engendered reforms not supported by the executive, for example by using resource or other restraints (accommodation, travel, staffing); or the Parliament itself can lose interest (for it is a difficult area which would put more responsibility on members and senators).

Vested interests against improved information flows

Despite the pressures for improvement produced by a variety of Royal Commissions, the passage of time dims memories and allows those who prefer to control the flow of information to the Parliament, the media and therefore to the people, aided by those in the bureaucracy who prefer a more quiet life, to moderate what might have once been thought inevitable. The Commonwealth example shows how effectively it is possible, through a co-operative approach by the executive and the bureaucracy, to stymie the strengthening of a strong review role for the Parliament.

The easiest way to impede excellent parliamentary invigilation and therefore its ability to expose faulty or corrupt administration is by minimizing the independence and powers of the Auditor-General. It is not a matter which will be resolved only, if at all, by reason and logic. As the Commonwealth has shown so well, self-interest of the executive and the bureaucracy are stronger. The realities of party politics or bureaucratic self-interest cannot be allowed to diminish this protection for our liberty offered by a strong, effective Parliament, able to call a government to account when needed.

³² The Auditor-General Audit Report No 9 1993-94 Efficiency Audit, *Community Cultural, Recreational and Sporting Program*, AGPS, Canberra, November 1993.

This is not to infer the executive shouldn't be allowed to govern — that is its role but it must not be unreviewed. Equally neither the Parliament nor the Auditor-General can govern. Parliament provides power and resources to the executive to use for particular purposes and has the right and obligation to review their use. The only power of the Auditor-General is to report in a nonpolitical, objective manner the facts to the Parliament on the way such power and resource is actually used by the executive and the bureaucracy.³³

7: JCPA Report 296 of March 1989

*The JCPA's findings*³⁴

After the inquiry into the audit office which followed the warnings given by Mr Brigden and Mr Monaghan, the JCPA found that at a minimum the ANAO had major problems: at worst it was in a state of crisis. Its problems included:

- a bare adequacy of resources for audits of financial statements and insufficient resources for performance audits
- discrepancies between performance audit legislation and resources
- one of the most important auditees of the ANAO was at the same time the Government's principal adviser on the resources of the ANAO, appearing to compromise the independence of the Auditor-General
- loss of major auditees
- loss of experienced staff, and
- an image problem with the accounting profession.

The JCPA noted that the reasons for these problems were out of the control of the ANAO and resulted from:

- parliamentary complacency leading to a dulling of its capacity to perceive that the ANAO had difficulties
- the ambiguous relationship between the Auditor-General and executive government which had led to both parliamentary and government neglect
- the lack of mechanisms in place to permit the Parliament to assume responsibility for the ANAO
- the ANAO giving a higher priority to the economy of its operations than to re-appraising its contribution to government
- a lack of public awareness of the importance of auditing in government

The JCPA recommendations

In recognition of the above points the JCPA recommended to the executive that a wide ranging set of reforms be made to improve accountability and the role of the Auditor-General and his relationship with the Parliament. The committee recommended in particular:

³³ But even this ability is seen as too much by governments determined to manage their public image and therefore wishing to control the public availability of pertinent data and its analysis.

³⁴ Joint Committee, pp.243-245.

- a. reaffirmation of the necessity for the Auditor-General to be free of political control
- b. a new Audit Act so as:
 - i) to clarify the relationship between the Auditor-General and the Parliament and to affirm the service role of the ANAO to Parliament.
 - ii) to establish the ANAO as a statutory authority
 - iii) to give the Auditor-General the authority to determine the terms and conditions of employment of staff, and
 - iv) to indicate which Commonwealth agencies the Auditor-General was to be external auditor
- c. the Auditor-General to continue to have responsibility for performance audits
- d. establishment of an Audit Committee of the Parliament to permit better parliamentary influence over the ANAO's estimates and to pursue a general oversight role of the ANAO on Parliament's behalf.

In making these recommendations in 1989 the JCPA indicated that the new legislation and formation of the Audit Committee were immediate necessities.³⁵ The legislation has yet to be passed, while the Audit Committee does not exist. It is now 1995 not 1989.

Executive reaction to JCPA Report 296 and later Senate pressure

The Government's reaction was not even *'the feeble exercise in cosmetics'* that Senator Evans labelled the Fraser Government's approach to FOI. There was an injection in funds to allow a resumption of efficiency auditing but the quid pro quo was a Minister for Finance agreed review which cost the office sixty staff. A desultory review of the yet still to be implemented new legislation began with a rejection of a request to treat the separate Auditor-General Bill without waiting for final decisions on the more complex two other parts of the legislative package. I came to the conclusion that the recommendations which caused the ANAO difficulty would be implemented with alacrity and zeal and everything else dragged out until forgotten unless merely rejected immediately.

After some five years the Government appeared to respond to Senate pressure over the sport rorts/whiteboard affair, which threatened a wider Senate enquiry into that sorry matter, by agreeing to what seemed a realistic accountability package. Senator Evans told senators that there were 'specific commitments' to 'consider' measures recommended by the JCPA in Report 296 'in order to put beyond any doubt the Government's willingness to act in all the ways I have stated to improve the quality of administration and accountability in this country'.³⁶ Although I do not suggest that Mr Evans had any hidden agenda, the word 'consider' in this parliamentary context should not mean 'we will think about the matter and then reject the crucial parts' just as 'consultation' with the Parliament over the appointment of an Auditor-General should not mean 'we will tell you whom we intend to appoint, "hear" what you say and then do what we like'.³⁷ I can only conclude that others overruled a more

³⁵ The Auditor-General No. 43, pp. 1-2.

³⁶ *ibid.*, pp.23-24.

³⁷ There was, I understand, no consultation at all over the most recent appointment of Auditor-General.

principled approach to the serious, considered and multi-partisan approach taken in the JCPA by government and non-government representatives alike.

The Bills as drafted did not meet the spirit of the package in any material way, particularly the prospect that the expected outcome of the legislation would be ‘a model for increased independence for the Auditor-General’. The Government in fact rejected all eighteen amendments passed in the Senate. This was a callous and arrogant rebuff to the rights of our Parliament and to our right as citizens of Australia to have the use of our power and our resources by the Government reviewed. It was a response appropriate to a junta careless of the views and needs of the Auditor-General but also of its own members, of the Senate, of the Parliament itself and of the right of citizens to be well-informed in an apolitical and objective way. If it did nothing else, the sports rorts/whiteboard affair showed how well parliamentarians can work in our defence if they have the facts. Therein, of course, lies the rub for the executive.

8: Conclusion

The treatment of Commonwealth auditors-general by the executive and its bureaucracy parallels (and perhaps reflects) the Parliament’s unwillingness or inability to exercise its potential and actual power as compared with that of the executive. One result of party discipline has been that for many decades the Parliament, with few exceptions, has acquiesced in being tied to the executive’s chariot wheels.³⁸ It seems impossible for some party members to distinguish between areas which are properly ‘parliamentary’ in character and which therefore are inappropriately dealt with as matters party discipline. A change of attitude, while a necessary pre-requisite, is not enough to improve the balance of advantage between the Parliament and the executive to a point more fair to the Parliament and the people represented by it. For example, more infrastructure support for the Parliament is required if it is to perform better its review role. Criticism by bureaucrats of the way Senate estimates committees act rings hollow when committees cannot not be given the infrastructure support they deserve, even from the Auditor-General who, I believe, while independent of the Parliament, has a duty to support and supplement the resources available to the Parliament. (Auditors-general and parliamentary committees working separately yet with a common focus have been very effective).

For over a decade the Commonwealth has avoided its own members’ requests to improve the way accountability is put into practice because of a reluctance to reform the ANAO. If the executive and its bureaucracy genuinely believed their own complaints about the office they would have supported, not stymied, its reform. Less selective perusal and adaptation of some of the innovative suggestions about improving accountability structures made by the Coombs Royal Commission on Australian Government Administration, for example, would have been time better spent than that wasted on blocking genuine widespread improvement in this area of governance.

Good government is fostered by an appropriate balance of forces. Leaving aside the role of the judiciary, the media’s interplay with executive government and with parliamentarians is

³⁸ One Minister for Finance said that as far as he was concerned the Senate could create as many committees as it wished; it just wouldn’t get any more staff for them (personal communication).

at times not without influence. The current deliberate and possibly tax-payer funded political manipulation of sections of the media should be resisted; and requires at the very least a balancing by the opening up of better access by the Parliament to basic information (as well as analysis). There should be concern that the current official accountability dogma ignores, nay abhors, the principle of such balance in its narrow view of the administrative world.

Central (economic) bureaucrats (and indeed Ministers) will find eventually (no doubt at our rather than their cost) that independent, expert evaluation and reporting of bureaucratic performance (especially failings) is essential. In its absence, existing pressures in and on the public sector are unlikely in themselves to result in continuous improvement in (or even maintenance of) present levels of efficiency, effectiveness or economy. But it will be hard for even the victims to prove this in the absence of effective, independent, apolitical, external review. Is this an unstated 'corporate goal'?

Questioner — In the traditional Western democracy we have the legislature, the executive and the judiciary. Do you think we should have another form of government — that is, the auditor or the equivalent — which is recognised in some sort of constitutional way?

Mr Taylor — I am not sure I am capable of answering that question. I think observation would suggest that Australia does not have the same Westminster system as do other countries. I believe that, with the cutting out of some of the institutional dissent that I spoke about before, including the abolition of the Public Service Board, and with the concentration of power more and more in the executive's hands — much more than it ever was in the past — there will inevitably have to be a rebalancing of power. It will occur somehow; I do not know how. The longer you hold it back, the more powerful it will be when it comes through.

I forecast in 1989 that we would move to a more American system of congressional committees and what have you. I fought very hard while I was Auditor-General to encourage every parliamentary committee with which I had dealings to act in a bipartisan way. By and large, including sports grants, they did. I am very proud of them, if I can be paternalistic. When you get them away in quiet rooms; when it is on the basis of a factual report — I used to have a little lecture, which I do not think they ever listened to, which was that it is very important to approach this on a bipartisan basis — they really do come through.

It is quite clear from what I am saying that I do not believe the Auditor-General or anybody else should be created. I do not know that I would back any government support for it. Rather, I believe we have to face reality. I think the whips have to be taken off on some of the things that involve Parliament and I believe backbenchers ought to insist upon it. They really ought to do a Missen. But doing a Missen makes you very unpopular, just as being an outspoken Auditor-General makes you very unpopular. But you have got to do it sometimes if you want to get results.

I think we have to increase the power of the Senate and, I would hope, have the House of Representatives do more committee work. You cannot stop a government from governing. That is what we elect them for. I am not suggesting in any way that I should be sitting on their shoulder. Our involvement in the vast array of what was going on in government was minuscule. We were a fleabite on a giant herd of elephants. The fact that we were there improved things. There is no doubt about that. Even if we had done nothing, even if we had never reported, for a long while it still would have had an effect. It is only when an informed

Parliament can hold an executive to account for its actions that you have got a system that is going well.

I would be very wary of tinkering too much. I believe in a very strong judiciary. I hope that the conventions of appointing the very best continue to be followed, but I worry because we do not want a situation as exists in America where you stack the Supreme Court with your own political kind. That would be a debauching of the system. Thank God we have got a Senate. Government should be supporting it. It should also be supporting an Auditor-General, because we really do keep them out of trouble rather than put them in it. I have been rather bemused about it all.

Questioner — In 1993-94 you reported that security of commercially sensitive data at the Australian Bureau of Statistics was held under insecure conditions. I had reported that to them about a year before. I would just like to thank you for your report confirming what I found. I reported it to the Prime Minister, the Treasurer and people like that who should have been concerned. I got intensified efforts to have me declared insane, so your report was absolutely terrific.

Mr Taylor — Thank you very much. I do remember your particular case. What worries the hell out of me is that individuals can find themselves in situations of such powerlessness. It used to get me down and I was, when I was a statutory official, a very powerful official with a very good office behind me. Now I have to hunt to find a pin to put in a folder of papers.

Almost the second day that I had in office I was rung by a young lady who said, ‘I have just read in the paper that you apparently have integrity. I have tried this and this and this and I have a real problem and I want to talk to you about it.’ We did what we could for the lady, and I hope the particular investigation is being progressed as I speak. I do not know now.

It is sad. The number of individuals who have come to us as an office over the years has not been large, but the carelessness about the official reaction to genuine complaints was quite appalling. It really disappointed me to actually have somebody — after six years of me thumping around the country, kicking doors down — say that she did not really understand that all Auditors-General have integrity. If they do not, their officers soon give it to them.

Questioner — What do you consider are the reasons for the enormous difference in power that is given to the tax commissioner for the raising of revenue (he has punitive powers under the Income Tax Assessment Act), for the way in which governments use so much force and power behind the collection of revenue and for the fact that the Auditor-General does not have similar powers for the monitoring and control of the expenditure of that revenue? I have two other pertinent questions. What needs to be done in order to persuade the Parliament that legislation needs to be passed to give the Auditor-General the most powers? What is impeding the Auditor-General’s office from reporting directly to the Parliament?

Mr Taylor — I can answer the last question more easily than the other two. There is nothing to stop the Auditor-General from reporting to Parliament. Indeed, I exercised that with a great deal of happiness. Before I took up office, we reported every six months, except for very few efficiency audits. I got the office to agree to bring in individual reports. One time we upset the Treasury so much over something in a draft — it did not get anywhere near publication

— that it got a legal opinion which said we did not even have the power to produce those individual reports. This may answer your second question.

I then said ‘Thank goodness. I’ve got another opportunity to put the pressure on to change the legislation’. I continued to put in those reports and hoped that the presiding officers would knock me back. That would bring it to the boil. It is a bit like Western Australia Incorporated and Tricontinental. You need to have a powerful patron — this is what happens overseas — a minister for finance or the head of a committee who says, ‘I believe’.

To a certain extent, leadership sets the environment. If those at the very top are not giving you support, it allows the smaller players to kick the hell out of you every time they pass you by. Parliamentarians have a lot of other things to do and quite reasonably expect me to be running the office. Until we are found to have totally mucked up the audit of Qantas, Telecom, the Commonwealth Bank or what have you, they are not going to take any notice.

I am not prepared — neither was my successor — to go to that extent, but I have tried everything else I can. I have gradually been upping the public pressure all the time to get an informed debate actually out into the open, but they do not answer. They do not have to. They do nothing; nothing happens. I cannot force it. I have just gone around the country whenever I have had an opportunity and tried to put a reasoned case. It is your money; they are your resources; it is your power. You have a right to know. What is the problem? I cannot understand it. I am just confused. It all seems so clear to me.

In answer to the first question, let me tell you a story. When I came back from New York, the first thing I did was to see my friend, as I believed he was, the Treasurer. His first words to me were not, ‘Welcome back, John. How are you? What a great thing I’ve got for you,’ and I am sure he was very influential in Mr Hawke making me the Auditor-General. He said, ‘Get your fellas off Trevor’s back.’ Does that help answer your question?

What did I do? I must admit, I do not remember another word that occurred in that whole interview — and it was quite a friendly interview. I went back to the office and said, ‘What in the hell are you doing with the tax commissioner?’ I was satisfied that what they were doing was quite proper and I never had the opportunity to go back and explain in detail what we did, and I do not think it mattered.

He was really showing his great loyalty, which he has always had, to people in his portfolio. That is a trait that I would not want to take away from anybody. He tried to muscle me in a pretty up-front way — he certainly got my attention — but I had been appointed as a statutory officer under the act. I had certain duties which were put into the fourth act of the first Parliament, precisely to make it possible for politicians to say what they like to me — that is fair enough; I am not complaining about that — and for me to actually take no notice of what they say. That is what it is all about. I would never disregard such notice without checking first because they might be right.

Where does that leave us? I am not giving them money. I am giving them problems. It does not matter that there is money saved down the track. Forget about that. Nobody was ever sacked in the bureaucracy for having too many staff. Nobody was ever sacked for having a program that gave too much money away. But, if you do not get that money in to pay the bills, you are in diabolical trouble. I think that is the answer, is it not? By the way, it is

Parliament that has to accept the responsibility for the Audit Office — not the executive. That is what the joint committee said. That is what a majority of Labor people said. Do not ask me how to get it to happen; if I could do it, I would have done it.

Questioner — I originally came here in 1951 to work on the horror budget under your predecessor, Duncan Craik. At that time — the Menzies government had just got in — there were quite substantial interferences with the top level of the Public Service. I do not have to talk about Burton, Trevor Swan, Fin Crisp and others who were removed from office. I can assure you that, although I was a junior officer, I participated in quite high-level discussions about transferring to the American system so that when a new government gets in, you get a new lot of leading advisers who will be compatible with them — do what they want — and they can have their way.

My answer to that was that I saw too much corruption, inefficiency and stupidity from political friends in the war, when our lives were consistently at risk. So I came out against it. But with these new developments about the contractualisation of the public servants and the senior advisers no longer being independent because they have tenure of office, it is becoming the new way to go. It is a prescription for disaster, as happened with the auditors in private industry during the mid-1980s. They had always had their problems, but they were on the surface then and massive amounts of money were lost.

Our whole economy could go that way if we have a docile group of friends supporting the executive government. Cannot some start be made to change that point? You have been stating your point of view. Other individual voices are joining you. Maybe the time has come to form some sort of organisation aimed at this. Otherwise, I can prescribe only disaster.

Mr Taylor — We have elected parliamentarians to represent us. It would be a terrible criticism of them if this sort of thing were allowed to go on. Of course, one suspects that the opposition would be delirious with joy at the opportunity of freeing up the senior bureaucracy. I have lived through a number of changes of government and I have usually been on the hit list because I regarded myself as a mercenary. I worked for whoever paid me and I worked as hard and as loyally as I possibly could. I could go on for another twenty minutes about what happened when Whitlam came in; what happened when Fraser came in; and what happened when Hawke came in.

I have never had a problem with ministerial officers personally. Indeed, I have found them to be a great help over the years. If you could get a relationship of trust with a ministerial officer, a lot could be done on both sides. But it is appalling, as we have said in our report, that Parliament has no access to ministerial officers. It cannot grill ministerial officers. These are very important people working in very influential ways.

I had very close connections with the then Treasurer's office when I was in New York. It was marvellous. I never dealt with the Treasurer. I preferred dealing with his office. They both have to exist somehow, but there has to be a change in the way we approach the public service. The public service should not be the property of the government of the day, but it is today — lock, stock and barrel. That means it is going to be subject to enormous stress and strain when there is a change of government.

I have given up on trying to change this government. Maybe we should be trying to change any successive government and get commitments from it that it will set up an independent, apolitical, genuine public service. You have to have a public service board of some stature. It is a community treasure. I sound as though I am criticising its bureaucracy. The majority of public servants are wonderful people. They are great people who should be protected more than they are, but some ought to be sacked. You know what happened in the audit office. I wanted to hire and fire. So I am not against sacking public servants, but it must be for due cause — not for political reasons.

It is just crazy. When Gough Whitlam came to office, he did not realise that a lot of the illustrious knights had voted for him. He did not use all those talented people for a long while, which is very sad. They were disagreeing with him, of course — so what? I would rather have them disagree with me to my face. You go back to the Fin Crisps. That was another disaster where we lost talent. I am getting old. I am starting to see cycles coming back for the third time.

Questioner — As well as about ten very senior, absolutely essential people who were removed from office when Menzies started, I understand that the appointment of the next Auditor-General was on Chifley's desk when he departed. When Menzies saw the file, he saw the name Brophy and he said, 'Oh, he'll make a good copper.' I think that is what you have been doing.

Mr Taylor — There is a constant subterranean murmuring of complaints that I was getting involved in policy. One of my predecessors used to complain about social security benefits being paid to people. He complained publicly and in his reports about midweek race meetings because it took people away from the office. He complained about too many motor cars being allowed to be built. I thought I was pretty restrained. What people do not understand is that Australia has always been a very robust democracy. I hope we never lose it.

Some people would realise that I have been somewhat critical of the Department of Finance. Certainly, one of the recommendations of the JCPA was that an auditor-general should not be a client of the Department of Finance. I am certainly on the record as saying that I thought the appointment of an Auditor-General from the Department of Finance was not a good signal, but it is a pretty clear signal of what the government says. It is rejecting the whole idea of Parliament being involved. I do not think it even discussed the appointment, as I think it should have, with the JCPA.

That being said, the particular person who has been appointed is somebody whom I have known for decades and who is of great integrity and great character. I think he will make a marvellous Auditor-General. When I came in, I did not understand what was going on, but I am sure he will understand a lot more. It took me two years before I really decided that I had to get in and kick heads. I just hope he does not have to wait that long.

One thing that I am not going to do from now on is talk about the audit office. I have a great many friends there. Whenever we meet we do not talk about the audit office, and that is way it is going to be.

Westminster Democracy and the Separation of Powers: Can they Co-exist?

Dr Suri Ratnapala

I am speaking today just one week after the launch of a campaign to make Australia a republic. I believe that the debate that the Prime Minister ignited on 7 June has added significance to the issues which I propose to discuss today. Anyone who has followed the republican debate cannot have failed to notice two intriguing facts. The first fact is that the main protagonists, the minimalist republicans and the monarchists, have great faith in the Westminster system of government and wish to preserve it in this country. The minimalists, such as the Prime Minister, propose to replace the monarch with a head of state chosen locally. According to the minimalist proposal, the only change from the monarchy will be that, instead of a foreign sovereign, we will have as our titular head 'one of us'.

Monarchists argue that such a change will damage the system, no matter how we select the Queen's replacement. That is the first fact. The second fact is that almost every opinion poll indicates that an overwhelming majority of Australians wish to elect directly their head of state if a republic is established. This is in stark contrast to the almost universal conviction among politicians, academics and media commentators that a republican president should not be popularly elected. The figures revealed by the latest opinion poll taken in Queensland indicates that a staggering eighty-one percent of those questioned wish to elect directly the president and only nineteen per cent favoured the Prime Minister's proposal to elect the president by two-thirds majority of the two Houses of Parliament. This, in spite of the fact that fifty-seven per cent actually favour the transition to a republic.¹

¹ Quadrant Poll reported in *Sunday Mail*, 11 June 1995.

There are two main objections to a popularly elected president. One is that such an election would politicise the office of the president. The Westminster system requires certain reserve

powers mainly concerned with the appointment and dismissal of the Prime Minister and the dissolution of Parliament to be exercised in a non-partisan way in accordance with constitutional conventions. It is thought that the person who wins office through an electoral contest may lack the necessary distance from party politics to be a credible repository of these powers. The second objection is that a popularly elected president may receive a kind of legitimacy which may rival the authority of the Prime Minister and the cabinet.

These two objections presuppose that the people wish to preserve the Westminster system in its current form. Perhaps they do. Then, again, they may be saying that they wish to elect directly a president even if it means changing the present system. One thing, though, is certain: we will never find out what the people think on this issue unless there is a wider public debate in which the case for retaining the present system is weighed against alternative models including those based on direct popular election of governments.

I am pessimistic about the prospects for such a debate as our political leaders seem to have no stomach for it. But there is no better time to discuss this issue than the present. I want to take this opportunity to provoke this debate. I do so because I believe that on this issue the people are right and the politicians wrong. I happen to believe that we can achieve the republican ideal only by replacing Westminster democracy with a system of representative government firmly grounded in the doctrine of the separation of powers, guaranteed fundamental freedoms and genuine federalism. This would involve the direct popular election of the executive government for a fixed term.

In the first part of this paper, I will explain my reasons for holding the view that the Westminster system should be abandoned. The kind of constitutional change that I am advocating places me perhaps within the republican camp. It seems to me that the institutional separation of the legislative and the executive branches and the direct election of the executive cannot be achieved within the framework of the hereditary monarchy. However, I also think that if we are not willing to change substantially our system of government, there is not much point in constitutional theory to sever our links with the monarchy. I say in 'constitutional theory' because I appreciate that many Australians have strong cultural and nationalistic reasons perhaps for breaking with the monarchy. For my part, there is little I can contribute on that side of the debate. Nationalism is not something that stirs me these days, having seen its darker side in the country of my birth, Sri Lanka. As much as I would like to see the Westminster system jettisoned, I do not rate the prospect for such a radical change very highly. Hence, I will proceed to argue in the final part of this paper that if we are to persist with this form of government we should seek urgently to impose upon it the discipline of the separation of powers.

Why should we abandon the Westminster model?

Westminster democracy is that system of government also known as responsible government and parliamentary government in which people do not directly elect their

government but leave it to the elected legislature to install, supervise, and remove the government. In this system, the government continues in office as long as it has the confidence of the lower house. Usually, that confidence is lost upon defeat at a general election. This system may be contrasted with the presidential system where the executive president is directly elected by the people and holds office for a fixed term regardless of the confidence of the legislature.

In a recent speech at this very forum, Professor Geoffrey Brennan, the Director of the Research School of Social Sciences at the Australian National University, made a spirited defence of Westminster democracy.² Being the true intellectual he is, Professor Brennan does not focus on the weakest arguments of his opponents but aims to criticise them in terms of their best arguments. Thus he concedes that Parliament today is neither a deliberative forum nor a representative body. Yet, he claims that the present system is defensible and, indeed, superior to alternative models such as the American system. I am of the view that Professor Brennan's arguments constitute the best case for the status quo, not the least because he deals with the strongest arguments against it. Hence, I intend to take a leaf out of his book and criticise the status quo in terms of its best justification, namely, Professor Brennan's own arguments. By focusing on his arguments, I am not picking on the good professor, but I am paying him my highest compliment.

Before I address Professor Brennan's defence of the status quo I must specify my own objections to it. In my view, Westminster democracy has two tragic flaws. The first is that the system often installs in power political parties which have been rejected by a majority of voters at the ballot box. I believe that this situation is completely unacceptable in any country which aspires to be a republic. The second flaw is that, owing to a profound and incurable contradiction within itself, responsible government reduces the legislature, or at least the more critical branch thereof, to the status of an instrument of the executive except in the unusual circumstances where the ministry constitutes the minority government. This situation too, I believe, is unacceptable in a republic.

How responsible government defeats the people's choice of ruler

In postwar Australia on no less than four occasions, the Westminster system handed the federal government to the party rejected by the majority of voters at the ballot box. In 1954, the ALP won 50.7 per cent of the votes on a two party preferred basis, but Mr Menzies formed the government with a working majority of five members.³ In 1961, the ALP won 50.5 per cent of the vote but Mr Menzies won an equal number of seats and formed the government. In 1969, the ALP won 50.2 per cent of the vote but Mr Macmahon received the luxury of a seven seat majority. In 1990, the Liberal-National Coalition and an independent received 50.1 per cent of the vote but Mr Hawke won government with a handsome eight seat majority. This phenomenon occurs frequently at State level as well.

The distortion of the popular wish concerning who should rule us is aggravated by the requirement of compulsory voting and the requirement of indicating preferences at federal elections. The compulsion to indicate preferences is particularly insidious. It

² *ibid.*

³ The source of the election result statistics used in this lecture is from: G. Newman, *Federal Election Results 1949-1993*, Department of the Parliamentary Library, Canberra, 1993.

forces many voters to grant preferences to parties they have no wish to support simply in order to validate their primary vote.

The parliamentary electoral college

The reason the Westminster system cannot guarantee the government which is desired by a majority of the people is that the system does not allow us to choose our government directly.

Instead, we have to entrust the task to the House of Representatives which acts as an electoral college.

The idea of an electoral college is that it is not the people but their representatives who choose the ruler. The Holy Roman Empire provided an early example of an electoral college, with the Emperor being elected by the rulers of the kingdoms and principalities which constituted the Empire. The Founders of the American Constitution intended to separate the executive and legislative branches with respect to both powers and personnel. They provided for the separate election of the two branches. However, when it came to choosing the President, the Founders mistrusted the passions of the individual voters and installed what they thought was the precaution of an electoral college. Each state elects a number of delegates proportionate to its population on the 'winner takes all basis'. That is, the candidate who wins a state, however narrowly, wins all the delegates. The delegates (with rare exceptions) vote for their candidate. It is always possible that a candidate may be elected on the basis of a minority of the popular votes, although surprisingly, this has happened only thrice in American history. There is also the possibility that a third candidate may deprive the winner of a popular majority as happened when Bill Clinton won the presidency with much less than half the national vote in a three cornered contest with George Bush and Ross Perot. Despite these occasional aberrations, it could be said, that the American people usually get the President preferred by a majority among them.

In France, the President is directly elected without the intercession of an electoral college. However, the President must exercise the executive power through a Premier and a Council of Ministers who must resign when it loses the confidence of the National Assembly.⁴ Hence, one could say that the electoral college concept is partially implemented in the French Constitution.

In the beginning, the Parliament at Westminster was by no means an electoral college. Even after the Glorious Revolution established parliament's legislative supremacy, the monarch remained the executive in name, in law and in fact. Parliament had little control over the composition of the ministry. To be a minister, one had to have the confidence of the monarch, not of the parliament. The monarch chose whomever he pleased. It was not until the whig administration of Sir Robert Walpole that ministers were even drawn from a single party. Lovell writes:

Control of patronage lay with the crown. The number of government posts, including many sinecures and government contracts was sufficiently large for their distribution to give the crown real power. The extent to which the ruler was willing to allow a politician to allocate jobs and

⁴ Articles 49 and 50 of the French Constitution.

contracts made all the difference in the world to the loyalty he could command from his supporters, to his power as a Parliamentary manager and hence as a minister. Without royal confidence, therefore, a politician had little hope of building a following in Parliament to support his claims to office.⁵

The criterion for political office was not the confidence of parliament but the control of parliament achieved through royal patronage.

The electorate had no control over parliament and was itself manipulated by politicians. Elections were by no means fair; there were many members who were in the House of Commons by virtue of office or nomination. They were called 'placemen'. The franchise was limited to men with property qualifications. There were many 'pocket boroughs' and 'rotten boroughs' with so few voters that the outcome was easily influenced by bribery. It was estimated that in 1780, out of 658 members of the House of Commons, 487 were virtually nominated and that the majority were elected by about 6,000 voters.⁶

The nineteenth century was the age of democratic reform. By the reform acts of 1832, 1867 and 1884, franchise was extended, electoral reforms were carried out and mass democracy was established with the important qualification, however, that women did not get their vote until well into this century.

The extent of the franchise meant that it was much more difficult to manipulate the electorate. There were just too many voters to bribe. The reforms brought about a tremendous change in the nature of parliamentary democracy. The vestiges of ministerial responsibility to the king disappeared; parliament became accountable to the people. Politicians needed mass support to get elected to government and hence, needed to promise people what they desired. This revolution led to the ministry replacing the monarch as the true executive. It meant that parliament became the electoral college which chose the executive.

The parliamentary electoral college often failed to produce a government that was preferred by a majority of the people at the ballot box. Yet, from the republican standpoint, it was a vast improvement on the hereditary principle. In fact, in one crucial respect, the parliamentary electoral college was superior to the direct election of the government by the people.

Unlike the American electoral college which disbands itself after electing the President, the House of Commons continues to preside over the destiny of the government, acting as an overseer of the government's responsibility to the electorate and as a sentinel of people's rights against official invasion. As Sir Walter Bagehot put it, the House of Commons remained 'in a state of perpetual choice; at any moment it could choose a ruler and dismiss a ruler'. It made a great deal of sense for the people to entrust their elected representatives with the task of installing and keeping under supervision their government. It made sense as long as Parliament was independent of the government.

⁵ C.R.Lovell, *English Constitutional History*, Oxford University Press, New York, 1962, p.419.

⁶ G.B.Adams, *Constitutional History of England*, Jonathan Cape, London, 1938, p.397.

The fatal contradiction

The nineteenth century has been described as the classical period of the British Constitution. Following the great reforms, it seems as though the electorate was supreme. The voters could count on their representatives to keep the government honest and to remove it when it misbehaved. This situation could not last. While the monarch was the real executive, parliament could chastise the ministry with impunity. Parliament could call ministers to account, impeach them or otherwise force them out of office without disruption to the administration of the realm. There was a real separation of power between the executive monarch and the legislature and each balanced the other. However, once real executive power was transferred to the ministry and the convention was established that the ministry which lost the confidence of the Commons had to resign, parliament, for the most part, could not express its lack of confidence in the ministry without actually ending the government's life and forcing a new general election.⁷

What occurred then was a classic case of Darwinian natural selection. The new reality meant that only political parties which could secure unquestioning obedience of their parliamentary group could form an effective government. The party whip was born and the independent member of parliament became vestigial. Henceforth, intramural debate would be tolerated in the backrooms but not on the floor of the house where it mattered. It is one of the tremendous ironies of political history that the growth of parliament's legal power to remove a government from office actually reduced its political power to hold a government to account. The institutional separation of the executive and legislative branches was obliterated and the executive regained its ascendancy over parliament, except in the unusual circumstances where no party secured a majority and the Prime Minister led a minority government.

Why did the electorate tolerate the subservience of its representatives to the will of government? Why did the people not insist on proper oversight of government? The reason is that it had no real choice. The system simply did not allow an undisciplined party to remain in power for any length of time. Hence no party allowed its members any freedom in parliament. The only alternatives to monolithic political parties were the independent candidates and they had no prospects of forming a government at all.

The Brennan case for the status quo: democracy as a marketplace

There was another reason for the electorate's impotence in enforcing parliamentary discipline on government. After the great reforms, the electorate was clearly in a position to make demands which politicians could not ignore. Then something funny happened. Politicians discovered that they could turn the tables on the electorate by making offers which segments of the electorate would not ignore. They found a fertile marketplace where benefits and privileges could be traded for votes. Elections could be won through distributional coalition building, that is by putting together offers to a sufficiently large number of special interests. As Professor Brennan notes, parliament

⁷ If an alternative government having the confidence of the Commons was available, the general election could be avoided.

became ‘a prize awarded to the winner of the electoral competition’.⁸ Brennan describes this view of parliamentary democracy as follows:

On this view, voters are rather like consumers in a marketplace; they desire policies from the government and they vote for those policy packages they prefer. Candidates or political parties are analogous to firms; they bid for custom by offering policies in competition with one another. In this way, electoral competition is analogous with market competition; politicians can be construed as offering alternative bids for office (like competitive tenders for a construction job) and the bid that is most preferred by the electorate is successful.⁹

I find myself in substantial agreement with Professor Brennan’s description of the current state of Westminster democracy. He finds that parliament today is ‘just a piece of theatre’ and the vote is ‘pointless ritual’¹⁰ but he later makes the concession that this theatre plays an important part in the bidding process of the political marketplace which constitutes the main game.¹¹ Whether or not we put it as high as that, it seems reasonably clear that in the routine circumstances, the lower house is very much the servant of the executive. Unfortunately, my agreement with Professor Brennan ends there. Professor Brennan sees two main advantages in practising the Westminster system and I will consider them in turn.

i) Political Parties as a brake on ‘Majoritarian cycling’. Brennan sees the competition between disciplined political parties as a means of suppressing the phenomenon of ‘majoritarian cycling’. The term ‘majoritarian cycling’ is a micro-economist’s way of saying that among a group of equally selfish individuals seeking to obtain shares of an economic pie, there can be an endless process of shifting majorities. To use Brennan’s own example, in seeking to divide \$100 among three entirely selfish persons, there is clearly no outcome such that we cannot find another which is preferred by a majority.¹² Thus, an equal division between the three will be defeated by a 50:50 split between any two; which in turn is defeated by an appropriate 60:40 split in which one of the earlier coalition members gets 60 and the other nothing, and so on. Brennan says that ‘electoral competition between two rival parties under reasonable conditions will generate a stable equilibrium at the median of the preferred points of individual voters’.¹³

It is difficult to see how a bidding war between political parties can produce a stable equilibrium at the median. But it is clear enough that where people cannot engage in deal making directly but only through group representatives, the scope for

⁸ G. Brennan, ‘Australian Parliamentary Democracy: One Cheer for the Status Quo’, 11 (1), 1995, *Policy*. Professor Brennan’s paper was earlier published in *Views of Parliament Democracy, Papers on Parliament, No.22*, Department of the Senate, Parliament House, Canberra, February 1994.

⁹ *ibid.*

¹⁰ *ibid.*, p.17

¹¹ *ibid.*, pp.20, 21–22.

¹² *ibid.*, p.20.

¹³ *ibid.*

majoritarian cycling is reduced as representatives are compelled to seek the most favourable synthesis of the individual members' desires.

This is essentially the point made in a non-economic way by James Madison when he wrote in *The Federalist*, No. 10, that the representative form of government has the tendency to 'refine and enlarge public views, by passing them through the medium of a chosen body of citizens'.¹⁴ This kind of synthesising occurs in both the Westminster and American models. In the Westminster model, the deal making occurs in relation to a whole package or program to be pursued by the political party over the term of the parliament. In the United States, owing to the lack of party discipline, renegotiations and deal making can occur throughout the legislative term with respect to each proposed measure.

In real life, neither model works exactly like this. However, it is clear that under the US system, the people have much greater capacity to influence their delegates in relation to each measure proposed in the legislature. Hence, in my view, the American model is more democratic and hence, more republican than the system which we have. It must be mentioned that a democracy which functions mainly through deal making is seriously flawed and is a grave threat to the rule of law. However, the solution to this problem lies elsewhere and not in monolithic political parties.

ii) Political parties as accountable agents. Professor Brennan's second justification of Westminster democracy is that it permits governments to be judged by the electorate according to the extent that they have fulfilled their policy commitments. For this form of accountability to be effective, 'the winner of the election must be identified as the government with effective control over the legislative and policy making processes'.¹⁵ Brennan explains:

The test is clearly met if the elected candidate is an all-powerful president; but it is also met if the elected candidate is a dominant party. However, the test is not met if the candidates are individual members of Parliament who are not held together by party ties. In that case, all that each winning candidate can credibly promise to do is to vote in a certain way in the Parliament, without any commitment to bring any policy into practice.¹⁶

Brennan prefers a dominant party to an absolute president because presidents come and go while parties endure. A president may have no incentive to heed the political market signals after he or she decides to quit or is defeated, whereas a party will continue to be a player.

I have three main problems with this argument. Firstly, I think it overestimates the capacity of the electorate to monitor and pass judgment on a government's term of office in the context of a bargaining democracy. In implementing its program over a term of office, most governments would disappoint the expectations of some groups and fulfil those of others. Although the record in office is an important factor, a government may still win with the aid of a new or modified coalition of interests. Except when major errors or abuses are committed, elections are decided by the

¹⁴ J. Cook (ed), *The Federalist*, Wesleyan University Press, Middletown, 1961, p.62.

¹⁵ *ibid.*, p.21

¹⁶ *ibid.*

ongoing bidding process which allows parties to recoup lost support by new promises to disaffected groups or to alternative groups. The accounting process is also undermined by the fact that a great deal of the governmental activity cannot be monitored as it happens outside parliament within bureaucratic structures which elude political and judicial scrutiny.

Secondly, the criticism of the Westminster system is not that it promotes the formation of political parties, but that it requires a degree of party discipline which destroys the principle of responsibility to parliament. Political parties are a naturally selected phenomenon in any large democracy. Candidates who band together can offer voters more things than those who remain independent. So, there will always be political parties. In the United States model, the degree of cohesion within political parties is dictated by voter sentiment. Obviously voters see advantages in their delegates being part of a powerful group. At the same time, they would like their delegates to break ranks when they think that the group is making a wrong decision. Therefore, the American system tends towards optimality in party discipline as representatives constantly fine tune their performances between solidarity and independence. In contrast, Westminster democracy leaves no room for the evolution of an optimal party system.

My third problem with Professor Brennan's argument concerns the price we pay for Westminster accountability. The 'Parliament as prize' model requires that we choose from among competing bids at election time. These bids constitute whole packages or programs to be pursued over several years. They contain things that we like and things that we do not like. We can only get the programs that we want by agreeing to the programs that we do not like. For example, I cannot say to a political party that I agree with its non-discriminatory immigration policy but vehemently disagree with its policy on racial vilification which I think is a destruction of the freedom of speech. Even if I say so, at the ballot box I cannot split my vote. If I take the one, I must take the other.

It is not an unreasonable assumption that the decisive issue at the last general election was the coalition's proposed Goods and Services Tax (GST). But, after the election there were many fringe groups who claimed that Labor had mandates on a range of issues which, by themselves, would never have received majority support. We cannot blame those groups for making the claims or the Labor party for implementing them regardless of majority wishes. Our political system invites such claims and legitimates them.

An alternative form of government

The clear alternative to Westminster democracy is a system where the executive and legislative branches are directly and separately elected for fixed terms. Under such a system, the executive cannot dismiss the legislature, nor the legislature dismiss the executive. The law-making power resides in the legislature, with the executive having the right to propose but not dispose of legislation. An independent judicature may enforce the separation of legislative and executive powers and safeguard the citizen's constitutional rights against invasion by either branch. Ideally, such constitutional rights would include the basic personal and political freedoms without which constitutional democracy will not operate.

What are the objections to such a system? The following may be considered.

i) *The first objection is that an independent executive will be too powerful.* As US presidents quickly find out, this is not true even when their own party controls Congress. The fact that the legislature does not have to prop up the executive means that the legislature can subject the executive to law far more effectively and act as a check on its power. In the Westminster system, the legislature is precluded from balancing and controlling the executive power owing to the fatal contradiction within that system.

ii) *The problem of the gridlock.* It has been pointed out that, under the American system, the executive's dependence for money and legal authorisation on a legislature that it does not control can produce ineffective government. It is said with some justification that the separation of executive and legislative branches can lead to excessive conflict between these branches and also between the two houses of parliament but I think it is easy to overstate these arguments.

By what yardstick do we pronounce a system of separated powers as ineffective? After all, it is the system under which the United States became the most technologically advanced and economically and militarily powerful nation the world has seen. Of course, it is also a system under which the great social ills of poverty and crime persist. I do not think that the system can take all the credit for America's successes. By the same token it cannot be tainted with all of America's failures.

The so-called gridlock actually has two faces. We can view it as conflict and deadlock but we can also see it as a situation which demands negotiation and compromise as opposed to dictatorial resolution. I think our fear of deadlock has something to do with the culture of soft authoritarianism which the system of cabinet government promotes. Negotiations and compromise do occur under the Westminster system but tend to happen in the backrooms at party conferences and during the electoral bidding process which precedes elections. Westminster democracy, public backdowns and compromises are viewed as weaknesses and may prove fatal to political careers, as we have seen from time to time. Under the system of separated government, public negotiation and compromise become the stuff of politics. It produces greater transparency and hence better accountability.

Can separation of powers co-exist with Westminster democracy?

My plea in this lecture is that the people of Australia be given an opportunity to consider whether they should retain the Westminster system or adopt a different republican form which would allow the people to choose directly their government. However, if we decide to keep the Westminster system, whether by choice or by default, we should think of ways to improve its operation. One of the ways is to reimpose the discipline of the separation of powers.

As we have seen, the Westminster system today fits Professor Brennan's model of 'Parliament as prize'. A key justification for maintaining the system is that it provides a system of accountability which enables the electorate to assess the extent to which a government has fulfilled its commitments to the electorate. How does the electorate monitor a government's performance? It is easy enough in economic matters. A political party may promise to increase employment, contain inflation, intensify productivity and decrease interest rates—they promise the moon. We can find out

whether these things have happened. But good government is not only about good economic figures. It is also about fairness in administration, the predictability of official actions, the morality of decisions affecting individuals and equality before the law. It is also about the liberty and security of the citizen. Westminster democracy not only fails in this regard but actually encourages arbitrariness in government.

Under the 'Parliament as prize' model, government gets what amounts to a blank cheque. Provided that it works within the liberally construed powers of the Commonwealth Parliament, it can do pretty much as it pleases. The government can enact legislation which empowers officials to pursue policy objectives free of the restraints of law. This is the consequence of the High Court's insistence that there is no real separation of powers between the executive and the legislative branches of government in Australia.

In Australia, the doctrine of the separation of powers has been implemented selectively. The High Court has sought to keep judicial and nonjudicial powers separate, while condoning the unification of legislative and executive powers in the hands of the executive branch of government. The Court regards the separation and independence of the judicature as essential to the maintenance of the federal distribution of powers and for the protection of the liberty of the citizen. However, the Court considers that the system of responsible government established by the Constitution dispenses with the need to limit the law-making power of the executive.¹⁷

The neglect of the legislative and executive division has harmed the integrity of the separation of powers doctrine in a manner which has seriously weakened the doctrine's capacity to serve its political ends. The grant of unfettered law-making powers to the executive enables that branch to make law at the point of its execution and deprives the courts of legal standards by which to judge the legality of official actions.

This impotence was dramatically highlighted by Barwick CJ's admission in the case of *Giris v Federal Commissioner of Taxation* that a legislative discretion conferred upon an official cannot be challenged on the grounds of 'width ... and the lack of discernible criteria by reference to which the propriety of its exercise could be tested'.¹⁸ I think it is a very sad reflection on a constitution when the chief justice of the country says that the court is powerless to strike down an executive act done under power which is so totally absolute that there are no criteria by which to judge whether that act is legal or not.

This judicial impotence is self inflicted. This is the unfortunate part. It is true that in Westminster democracy members of government are also legislators. Hence, a complete institutional separation is impossible. But, it was possible to interpret the Australian Constitution to require that the primary law-making function, that is the function of determining the principles as opposed to the detail of legislation, should

¹⁷ *Victorian Stevedoring & General Contracting Co. And Meakes v Dignan* (1931) 46 CLR 73 73, 86-87, 114, 120.

¹⁸ (1969) 119 CLR 365. See also *Murphyores Inc Pty Ltd v Commonwealth* (1976) CLR I, 19 per Mason J.

be confined to Parliament. It was possible to insist that the government be bound by laws declared beforehand, even if the government itself was the author of such laws. It was possible to insist that if the government wished to change the law, it should do so in Parliament and not in tribunals and government departments which actually administer the law.

The High Court has taken the view that without executive law-making of this sort, 'effective government would be impossible'.¹⁹ There is no doubt that the executive has to be left with discretion to work out much of the detail of the law. However, this is a power which can be subjected to justiciable standards and principles. American and German courts, when confronted with an identical issue, reached this conclusion. The German precedent is particularly instructive as that country has a system of parliamentary government very similar to the Westminster model. The German Federal Constitutional Court has declared that 'a vague blanket provision which should permit the executive [branch] to determine in detail the limits of [the individual's] freedom, conflicts with the principle that an administrative agency must function according to law'.²⁰

One may, of course, ask whether there is any point in consulting Parliament when Parliament is simply the mouthpiece of the executive. There are three good reasons why Parliament should be consulted. Firstly, parliamentary enactment of law reduces the capacity of officials to make the law to suit individual cases and therefore it lessens arbitrariness of government. Secondly, where Parliament lays down the legislative principles, the courts have substantial legal standards by which they could determine the lawfulness of official actions. Thirdly, parliamentary legislation attracts public attention and so assists the process of electoral assessment of the government's record in office.

If we continue to practise Westminster democracy, it is vital that we not only maintain an independent and separated judiciary, but that we also achieve a substantial separation of legislative and executive powers by upholding the rule against the unguided delegation of law-making power. No constitutional alteration is required to effect this change; no referendum is required. It is within the High Court's power to recognise this constitutional principle, which has been recognised elsewhere. If the High Court fails to do so, there is much that the Australian Senate could do to ensure that the law-making power of officials is properly circumscribed by justiciable standards. In opposing the conferment of arbitrary power on the officials and by ensuring that Parliament alone determines matters of legislative principle, the Senate will not be undermining Westminster democracy but will be strengthening it.

Questioner — I agree substantially with the comments you make about our representative institutions at the moment. Where I would have some disagreement is in the remedy that you prescribe for those defects. I look at the Australian Senate; I look at the Tasmanian House of Assembly; I look at the ACT Legislative Assembly

¹⁹ Dignan's Case (1931) 46 CLR 73, 117 per Evatt.

²⁰ Emergency Price Control Case (1958) 8 BVerfGE 274, quoted from D.P. Kommers, *The Constitutional Jurisprudence of the Republic of Germany*, Duke University Press, Durham, London, 1989, p.148.

and, as I understand it, the parliaments of Ireland, Malta and Israel, and I ask whether a more achievable or better remedy would be reform of the electoral system?

Dr Ratnapala — I understand that you are talking about the reform of the electoral system in so far as it concerns the House of Representatives.

Questioner — I am suggesting that multi-member electorates with proportional representation, particularly when they include Robson rotation as they do in the ACT and in Tasmania, could in fact remedy a lot of the defects that you have identified.

Dr Ratnapala — Certainly there is no constitutional objection to adopting proportional representation for elections to the House of Representatives. It would not get rid of the problem of the House being an electoral college which produces governments which do not have popular support at the general elections. On that score, it could actually promote more minority supported governments than the present system. I do admit, though, that on the other score it would improve parliament's capability or willingness to act as a supervisor or overseer of executive government. I certainly do concede that.

Questioner — What we see in the ACT with the Legislative Assembly, where we may well never see a majority government, is the building up of a set of conventions which do lead to very real supervision of the executive by the legislature. I think that is a very healthy thing.

Dr Ratnapala — Yes. Under the present conventions, the government will have to resign from office every time it is defeated on a money bill, on a vote of confidence or perhaps even on a major central plank of its legislative policy. We have to change that convention to accommodate the kind of situation that will improve oversight. Whether that would involve radically changing the Westminster system is the question. Perhaps we have to do that.

Questioner — You unfavourably compared the Westminster system with the American system of democracy. But it strikes me that there are two issues; one you did not address and the other you introduced almost by way of footnote at the end. The first thing is that in the American system you do not elect the executive. You elect the president. Once the president is elected, the individual has little, if no, control over what the executive does, except through their representatives in the legislature.

The second thing is that you seem to be opting for an executive presidency of the American form but admitted right at the end of your talk that the German system of government, which is similar to our own, appears to be very effective, at least in terms of the example that you gave. Yet it has a titular presidency, not an executive one. It does not seem as though a titular republic is necessarily inferior to an executive one.

Dr Ratnapala — The first point: the American President is also elected by electoral college. But most of the time the American people get the president they want, although at the last election the American people did not get the president they wanted because of a third candidate obtaining something like eighteen per cent of the vote. Clinton drew only about forty per cent of the vote. The American system consists of a

system of checks and balances. You elect your president who appoints the cabinet and they are separate from the Congress. The American president's freedom to act, is circumscribed by what Congress does in terms of passing laws and that is balanced in turn by the president's power to veto in which case a veto can be overridden by a two-thirds majority and so forth.

The German system is an improvement on our system because of the recognition of the separation of law-making power as between the executive and the legislature. Of course, in terms of economic performance, cultural performance and social performance it is difficult to say which is the better system. My own view is that the American system is better, because it allows people to bring their views to bear on each important question as it arises in the legislature—it is a more republican form of government. In the German system, you still have the party discipline in the Bundestag and people do not have the capacity to bring to bear their opinions on each individual measure as it comes up. I certainly do agree, however, that it is an improvement on the Australian system.

Questioner — Would you care to comment on the merits of the respective systems in protecting the interests of minorities?

Dr Ratnapala — In themselves, minorities can be equally vulnerable under both systems. It is possible under the Westminster system to put together a coalition of interests, appealing to different interest groups, which may have the effect of undermining or neglecting certain minority interests. The essential difference between the Westminster system and the American system is that the decisions are made in a package in the Westminster system. In the American system, the decisions tend to be made in relation to particular important measures.

Under each system, it is possible for a majority coalition to ignore a minority viewpoint and, in fact, minority fundamental freedoms. That is what is happening with the racial vilification law. I think there is a coalition of interests which is impinging on a certain fundamental right. I think the answer to that is to recognise basic freedoms in a constitutional system. To the extent that the American system promotes freer debate and freer discussion, perhaps the minorities may feel, more comfortable in that system than under this.

Questioner — What are these basic constitutional rights? Do they include economic rights or are they only political civil rights?

Dr Ratnapala — Basically, I believe that we could agree on some basic civil and political rights in a negative form such as the abstract equality before the law and the freedom from arbitrary arrest and punishment without trial. The right to vote, for example, is not recognised under the Australian Constitution. The High Court judges, in one case, have said that the Australian Parliament could limit the right to vote to white Anglo-Saxon Protestant males if it wanted. Those kinds of freedoms, certainly, I think we could agree on. But, when it comes to economic rights, you will be talking about positive rights such as the right to employment, the right to a minimum wage or the right to a certain standard of living. I have problems with that.

As a nonjusticiable set of policy objectives, it will do no harm in a constitution, but if you are going to put them down as obligatory provisions of a constitution, then how do you ensure that they are implemented? You can only ensure that everyone gets a job by controlling everyone's economic activity. You can only ensure that everyone has a certain standard of living by socialising the means of production — that would in turn impinge on certain other rights. So I have problems with positive economic rights. I think it is possible to have negative economic rights such as the right to engage in free association in trading and the right to hold property. I do see problems when people are given positive rights in the sense that the government has to deliver certain minimum standards of living. It is a very good ideal but I do not know whether it can possibly be implemented.

Questioner — I am a bit perplexed about your characterisation of the High Court in terms of one decision that I am not familiar with by Sir Garfield Barwick. I would have thought that the character of the High Court in the last several decades had changed markedly since that time, particularly in terms of some of the issues you are concerned about. Do you have a view about what has happened in the last twenty years, particularly with the growing strength of administrative law and the more recent judgments in the High Court?

Dr Ratnapala — I would say that the character of the High Court is changing, not so much in the last twenty years but perhaps in the last ten years or even in the last five years. Certainly there is a discernible change in attitude towards the Constitution. It is very clear from the recent judgments in the broadcasting cases and in the war crimes case where they recognised the ban on ex post facto law, due process decisions of one sort or another, and so forth.

I think the High Court's attitude has changed from one of deference to the legislature to one of vigilance against the legislature. Of course, many people are disturbed by that development thinking that the High Court has acquired more power than it actually should. I think the High Court's recent decisions have represented real constitutional gains in this country. I believe that that is a positive tendency but perhaps some decisions have gone overboard.

Unless the High Court looks at the Constitution as a living document which imposes limits on the political authorities of this country, there is no chance to develop a jurisprudence concerning what these limits are. The High Court has moved towards developing such a jurisprudence now. Perhaps we may disagree with some of the decisions but certainly the High Court has paved the way for a new debate on the limits of government.

Questioner — Would you comment on the proposition that in the American presidential system the power through finance of the group which can produce the most support for a presidential candidate fundamentally affects the nature of the executive, whereas, the parties under the present system in Australia have broadly equal power to determine the executive.

Dr Ratnapala — I think there is a problem at presidential elections in that not many people can actually aspire to the nomination of the political party or run as an independent. Therefore, the choices that the people have as regards the president are

limited. However, I think the merit of the American system is that it is a system of checks and balances. There are many congressmen and women and senators who do get elected without having to be millionaires. Those people have a closer nexus to their constituencies and are controlled by their constituencies to a much greater extent than our members of parliament and senators. So, in that sense, the elected president's powers are circumscribed and I think that is the way it has to be overcome. Of course, there may be reforms possible to allow more candidates and fairer elections at the presidential level.

Prima Facie Native Title

Peter C. Grundy

The Mabo Decisions

Native title, only recently recognised in Australia, has emerged from a trying process. The High Court delivered its first Mabo judgement on 8 December 1988, some six and a half years after the action was commenced by Eddie Mabo and James Rice representing family groups of the Murray Islands. They sought a declaration that, among other things, native title was held to the island land that they occupied.

In Mabo 1 the High Court considered the validity of the *Queensland Coast Islands Declaratory Act 1985* which, declaring that the islands were Crown land subject to the applicable legislation, could have extinguished the basis of the claim by the Murray Islanders. The High Court concluded that the Queensland Act was incompatible with the Federal Racial Discrimination Act. By virtue of section 109 of the Constitution, Commonwealth law prevails; in 1988 Queensland therefore failed in its attempt to quash this native title claim and it continued before the High Court.

On 3 June 1992, a decade after the issuing of the Murray Islanders' writ, the High Court delivered the judgement now known as Mabo 2. In Mabo 2 the High Court held that Australian common law recognises a form of native title which, in the cases where it has not been extinguished, reflects the entitlements of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands.

The Commonwealth's Legislative Response

The Native Title Bill was developed as part of the Commonwealth response to Mabo 2; it emerged from an extensive round of consultations. With the passing of the bill, the Australian Parliament concluded a strenuous task. During Senate consideration, a total of 149 amendments was moved, of which 119 were agreed to. The Senate took 51 hours and 49 minutes to deal with the bill, the longest such consideration in Australian history.

The *Native Title Act 1993* responded to a range of issues about native title in Australia. It answered questions concerning the appropriate legislative response to Mabo 2, the ways in which native title could be acknowledged and the significant matter of reconciliation. However, there were certain things that the Act did not do and many that it could not. Crucially, because it provided a somewhat incomplete definition of native title at s.223(1) and (2), the Act did not articulate for Aboriginal people what their native title rights are. It did, however, prescribe a mechanism (including mediation through the National Native Title Tribunal) for determining where native title persists.

Under the Act the National Native Title Tribunal (NNTT) began operating in January 1994. Five months later the Parliamentary Joint Committee on Native Title, appointed under the Act¹, commenced its task of monitoring the Act's implementation.

The Parliamentary Committee has since tabled two reports. The first, in October 1994, discussed issues that arose during its initial round of public consultations. The second report, tabled in March 1995, examined the NNTT President's first annual report;² the Committee concentrated on the process by which native title applications are accepted by the Tribunal, an issue that was also raised in its first report.

Applications for Native Title

The acceptance process for native title applications has been the subject of considerable comment, not only in the Committee's reports. For instance, in the January 1995 issue of *The Australian Law Journal* Peter Butt dealt in part with answering a central question about applications: 'What must an applicant do to make out a "prima facie" claim to native title?' He noted that the NNTT Registrar makes decisions concerning the acceptance of native title applications:

Under s.62 of the Act, an application for a determination as to the existence of native title is lodged with the registrar of the National Native Title Tribunal. Where the applicant is claiming native title, the application must be accompanied by specified information, including a sworn affidavit that the applicant believes that native title has not been extinguished: s.62(1). If the requirements of s.62 are met, the registrar must accept the application, unless the registrar considers (a) that the application is frivolous or vexatious; or (b) that

¹ s.204.

² Tabled in the Parliament, 15 November 1994.

"prima facie the claim cannot be made out". If the registrar considers that the application ought not to be accepted on these grounds (a) or (b), then the registrar must refer the application to a presidential member of the Tribunal: s.63(2). If the presidential member is of the same opinion, then he or she must give the applicant "reasonable opportunity to satisfy the presidential member that the application is not frivolous or vexatious, or that a prima facie claim can be made out": s.63(3).³

If the presidential member disagrees with the Registrar, the Registrar is directed to accept the application.⁴ In essence, then, the Registrar either accepts an application or, under the direction of a presidential member, does not accept an application. The Act does not refer to the Tribunal *rejecting* applications although, of course, that is what ultimate refusal to accept amounts to; and the term 'reject' has been employed widely.

The Parliamentary Committee's second report noted⁵ that the provision of the Native Title Act for *prima facie* assessment was not part of the original bill; it was adopted in one of the 119 amendments agreed to by the Parliament. It remains an open question whether the drafters of the amendment intended the new section to entail a difference in the threshold test as applied by the Registrar and presidential members. Nevertheless, Justice Robert French, President of the Tribunal, has outlined the difference in approach between the Registrar's *prima facie* test and that of the presidential member as required by s.63(3)(a) of the Act:

There is a semantic difference between the requirement imposed on the applicant at this point and the criterion under s.63(1)(b) upon which the Registrar must refer the application. Whereas before the Registrar the applicant merely had to survive the possibility that prima facie the claim could not be made out, now a positive case must be shown that a prima facie claim can be made out.⁶

In the *Australian Property Law Journal* of November 1994, John Hockley⁷ described as 'unsatisfactory' the current arrangement for a negative *prima facie* test applied by the Registrar, and a positive *prima facie* test applied by the presidential member. Dr Hockley considered that tension could result from the different tests and suggested a more rigorous screening test or provisions requiring the Tribunal to conduct an inquiry in all cases.

³ 'The Conveyancer', *The Australian Law Journal*, Vol 69, No 1, January 1995, p.10.

⁴ s.63(4).

⁵ Parliamentary Joint Committee on Native Title, *The National Native Title Tribunal Annual Report 1993-1994*, paragraph 3.4, p.6; also noted in J. Hockley, 'Native Title Act 1993 (Cth): "Fine Tuning" Needed', *Australian Property Law Journal*, Vol 2, No 3, November 1994.

⁶ French J, 'Reasons for Ruling in Relation to Criteria for Acceptance of a Native Title Determination Application', unpublished, 15 September 1994, p.25.

⁷ Hockley, op. cit., p.247.

The Prima Facie Test

The Parliamentary Committee has followed this issue closely. It has been advised of concerns about the operation of s.63 of the Act; in particular, the fact that applications have been subjected to *prima facie* examination.

Although at s.63 the Act prescribes *prima facie* tests, the Tribunal President has promulgated a procedure (6.3) which states that an applicant is not required to establish a *prima facie* case in order to have an application accepted. In a submission to the Committee, the Hon. Peter Dowding, solicitor for the Ngarluma and Injibarndi people in regard to their native title application, referred to the Tribunal's procedure 6.3. Mr Dowding has claimed that, although the Tribunal is not required to make a decision on *prima facie* grounds, in the claim with which he is associated the Tribunal took that approach. That is, according to Mr Dowding the onus was put on the applicants to show why their application should be accepted. He concluded that this situation involved issues that should have been resolved after the application had been accepted.⁸ The Ngarluma and Injibarndi application (WN94/6) was subsequently accepted by the Tribunal Registrar on 20 December 1994.

In the overview to his first annual report, Tribunal President Justice Robert French notes the Registrar's role in assessing applications and advises:

There is, at this point, a role for the Registrar and the Tribunal in screening out hopeless applications.⁹

It is certainly the case that the Act¹⁰ provides for an assessment of the application on *prima facie* grounds at the acceptance phase. And as Mr Dowding has pointed out, according to the Tribunal's procedure 6.3, an applicant is not required to establish a *prima facie* case in order to have an application accepted. Presumably the Tribunal intends procedure 6.3, to relate to the 'negative' *prima facie* test applied by the Registrar. As was indicated in the Parliamentary Committee's first report,¹¹ there is no inherent contradiction in the Tribunal:

- having the power or responsibility to make a *prima facie* assessment pursuant to the Act, and
- having the option to accept an application even if a *prima facie* case has not been established.

⁸ Submission No.6, DCH Legal Group to Parliamentary Joint Committee on Native Title, 5 December 1994, Parliament House, Canberra, p.4.

⁹ *National Native Title Tribunal Annual Report 1993/94*, AGPS, p.1.

¹⁰ s.63(1)(b).

¹¹ Parliamentary Joint Committee on Native Title, *Consultations During August 1994*, paragraph 3.20, p.11.

Indeed, the Act¹² even allows for the fact that an application could reach the ‘inquiry’ stage before it was dismissed on *prima facie* grounds, although this strains the logic of *prima facie*.

The Parliamentary Committee’s second report concluded that the Tribunal has been acting consistently with its powers pursuant to the Act in subjecting applications to *prima facie* assessment. Importantly, the fact that the Tribunal can accept an application where a *prima facie* case has not been made out does not entail that it should forego the *prima facie* assessment. Nevertheless, three questions are relevant:

- Should the Tribunal exercise as a matter of course its option (pursuant to procedure 6.3) concerning the acceptance of applications that have not established a *prima facie* case?
- Indeed, should the Act be amended to preclude *prima facie* assessment prior to acceptance?
- Or should the Act be amended to allow for the resolution of *prima facie* matters at an early inquiry stage?

The third question relates to an amendment proposal put by Justice French and canvassed by Dr John Hockley; it concerns the post-acceptance phase of the process and is considered later in this article.

In regard to the first two questions, Aboriginal and Torres Strait Islander Social Justice Commissioner, Mr Michael Dodson, has endorsed a low threshold test for acceptance of claims.¹³ Mr Dodson referred to the contention of the applicants in the Waanyi claim that no investigation is required on the part of the Registrar and no material, other than that accompanying the application, should be taken into account.¹⁴

Should this approach be adopted and comprehensive *prima facie* assessment discarded, the Tribunal would be unable to screen out what the President describes as ‘hopeless applications’.¹⁵ And there would be two consequent disadvantages in such an approach. First, it could add to the mediation workload of the Tribunal without prospect of advantage to native title applicants: the validity of ‘hopeless’ applications would not be expected to improve during mediation. Second, it would deny applicants some potentially useful pre-acceptance advice. These are major considerations against the notion that the Act should be amended to preclude *prima facie* assessment prior to acceptance.

¹² s.148.

¹³ Submission No.8, M.Dodson to Parliamentary Joint Committee on Native Title, 20 December 1994, Parliament House, Canberra, p.2.

¹⁴ French J, op. Cit., 15 September 1994, p.12.

¹⁵ *NNTT Annual Report*, op. cit., p.1.

In reference to the pre-acceptance process, Mr Dodson has drawn attention to the Tribunal's guidelines concerning leaseholds. The Committee's first report noted¹⁶ that if a pastoral lease does not contain a 'reservation' in favour of Aboriginal people, then the Registrar will not usually accept the application but refer it to a presidential member. The wording of the guidelines is that such applications 'will *not ordinarily* be accepted by the Registrar' (emphasis added). Mr Dodson has advised that:

The legal uncertainty as to the extent that pastoral leases extinguish native title even beyond the reservations leads me to query why the Registrar of the Tribunal is rejecting applications on this ground while this uncertainty persists.¹⁷

Although it is not the Registrar who 'rejects' applications, Commissioner Dodson's remarks are important. Given the significance of the pastoral lease issue and the fact that the matter may receive some clarification in the near future from the Wik claim before the Federal Court, it is useful for the Tribunal (where possible) to employ the option provided in the guidelines. This is the case because, depending on the terms of the claim, *elements* of native title may be able to be mediated despite the issuing of a valid leasehold. Although the Act provides that presidential members may decline to accept applications where native title can be demonstrated to have been extinguished, the Tribunal can maintain a flexible approach in other cases. Unless there is irrefutable evidence of extinguishment, applications should be accepted even if in many cases the mediation process would be significantly constrained until at least such time as the Federal Court has dealt with the Wik case. Pursuant to s.148 any such applications that reached the 'inquiry' stage would be subject to the *prima facie* test following the Federal Court's judgement in the Wik case.

While Justice French confirmed¹⁸ that to 24 November 1994 no application had been rejected by the Tribunal on the grounds of extinguishment by virtue of any past or present pastoral lease, on 14 February 1995 he issued his *Reasons for Ruling on Acceptance of a Native Title Determination Application* for the Waanyi claim. He found¹⁹ that under common law principles native title was extinguished by pastoral leases granted in 1883 and 1905; Justice French accordingly directed the Registrar not to accept the Waanyi application.

Points of Law

Concern about *prima facie* examination of applications has tended to concentrate on the fact that points of law are assessed. Mr Greg McIntyre, a barrister practising law in the field of

¹⁶ Parliamentary Joint Committee on Native Title, *Consultations During August 1994*, paragraph 3.40, p.16.

¹⁷ Submission No.8, *op. cit.*, p.4.

¹⁸ Submission No.9, Justice French to Parliamentary Joint Committee on Native Title, 11 January 1995, p.6.

¹⁹ French J, 'Reasons for Ruling on Acceptance of a Native Title Determination Application', unpublished, 14 February 1995, p.70.

native title, advised the Committee of his concern that the Tribunal Registrar formed views on points of law in the screening process, in effect making quite substantial decisions on questions of law.²⁰ It has already been noted that Peter Dowding referred to the same issue in his submission. And Commissioner Dodson stated:

I am anxious that the Registrar has in some instances made quite substantial decisions on questions of law in what is supposed to be a preliminary screening process.²¹

Perhaps such expressions of concern should not single out the Tribunal Registrar. While the Registrar forms opinions on points of law and acts upon them in referring applications to presidential members, it is the Tribunal through its presidential members that confirms such acts or negates them pursuant to s.63 of the Act; in so doing the presidential members also form opinions on points of law. To the extent that such complaints are relevant to the Registrar, Justice French has stated:

There is no doubt that in the process of referral of certain applications to a Presidential Member, the Registrar is making judgements about whether, *prima facie*, the claim can be made out. That is what the Act requires the Registrar to do. If, in the course of making that judgement, the Registrar forms an opinion as to the law relating to the extinguishment of native title, she is only acting in accordance with her duty.²²

Although the Registrar's function is to apply a 'negative' *prima facie* test, under the Act *prima facie* assessment allows for the forming of opinion on points of law by both the Registrar and presidential members. Those who are concerned by the fact that the Tribunal considers points of law in the acceptance process, then, should address their criticisms to the Act. One way in which to rule out assessment of points of law during the acceptance process (by amending the Act) would be to lower the present threshold level for acceptance of applications by removing the Tribunal's power of *prima facie* assessment. As already indicated, however, there are reasons to conclude that that would be undesirable. (Another proposal, put by Justice French on 14 March 1995, would address this problem without lowering the acceptance threshold. That proposal, beyond the scope of this discussion, provides that native title applications would be lodged not with the Tribunal, but in the Federal Court.)

In the period under review by the President's first annual report (January to June 1994) there were two applications referred by the Registrar to the President.²³ To date, however, the most significant referral has been the Waanyi application (QN94/9). The application was referred to

²⁰ Parliamentary Joint Committee on Native Title, *Hansard*, 24 November 1994, p.704.

²¹ Submission No.8, *op. cit.*, p.4.

²² Submission No.9, *op. cit.*, p.7.

²³ *NNTT Annual Report*, *op. cit.*, p.9.

the President on 16 August 1994 and on 15 September 1994 Justice French issued his *Reasons for Ruling in Relation to Criteria for Acceptance of a Native Title Determination Application*. There Justice French made two significant points:

- It is not necessary that applicants identify comprehensive evidence of non-extinguishment as a condition of acceptance of their claim.
- On the other hand, evidence of an extinguishing event may be relied upon by the Registrar in deciding that *prima facie* the claim cannot be made out.²⁴

The initial point is significant in two ways. First, it avoids the (in principle) difficulty of being required to prove the *non-occurrence* of an event (extinguishment). Second, and as a consequence, it relieves claimants of one element of onus of proof in the application acceptance phase.

Now, applications to determine whether native title exists can be made other than by persons claiming to hold native title; they are known as non-claimant applications. For example, the Parliamentary Committee was told by the Mount Isa City Council²⁵ of its need to extend the cemetery. As the Council did not know whether native title was considered to prevail over that land, it could submit a non-claimant application to the Tribunal for a determination.

In one non-claimant application (QN94/4 at Edmonton south of Cairns) evidence of an extinguishing event was apparent to the Registrar in referring it to the President. Mr McIntyre, in noting the Aboriginal claimant response to this application, stated²⁶ that the Tribunal determined as a matter of law that there was no claim which could be made over any of that area. Mr McIntyre advised that, as a consequence of the claimant response being rejected, the non-claimant application proceeds as an unopposed non-claimant application with no Aboriginal claimant as a party to the proceedings. Mr McIntyre added²⁷ that taking this decision meant that the claimant response had no standing. He suggested²⁸ that there ought to be some provision for the claimants to be able to continue to put their case as the non-claimant application was being considered.

Commissioner Dodson has also taken an interest in the Edmonton claim. Notably, and like Mr McIntyre, Mr Dodson has expressed the view that the Registrar's decision on this point of law was 'legally questionable'. Both Mr McIntyre and Mr Dodson would have preferred such points of law to have been considered during the mediation process. Mr McIntyre advised the Committee that there is only one remedy to situations where responses to non-claimant applications are not accepted allowing the non-claimant application to proceed unopposed:

²⁴ French J, *op. cit.*, p.30.

²⁵ Parliamentary Joint Committee on Native Title, *Hansard*, 4 August 1994, pp.343, 345.

²⁶ *ibid.*, 24 November 1994, p.702.

²⁷ *ibid.*, p.703.

²⁸ *ibid.*, p.704.

I think the only way to deal with it is to make an application under the Administrative Decisions (Judicial Review) Act to overturn the decision of the Registrar rejecting your application, which is a ludicrous process.²⁹

Justice French has commented on the details of the referral of the Edmonton non-claimant application. He advised³⁰ that the claimant (respondent) application was referred by the Registrar in part on the basis that some of the area under claim had been the subject of freehold grant and that *prima facie* the claim to native title could not succeed over the whole of the area covered by the application. At page 3 of his submission Justice French explains why, pursuant to the Act³¹, an application cannot be accepted in such circumstances. Justice French accordingly wrote to the applicant on 1 September 1994 inviting submissions on the acceptance question within fourteen days. By 27 September no response had been received and the Registrar was directed not to accept the application.

There is, then, clear justification for the Native Title Act³² provision for the Registrar to conduct the pre-acceptance *prima facie* test. Without it, the Tribunal's operations could become burdened by 'hopeless' applications. Where it is clear that a claimant response to a non-claimant application cannot be accepted on *prima facie* examination, the Tribunal President³³ has confirmed that it is open to the Tribunal to hear evidence from unsuccessful claimants if the Tribunal can be assisted in arriving at its decision at the inquiry. That is, while 'standing' may not be granted, in order to be heard during the inquiry process it is not necessary to pursue the course outlined by Mr McIntyre — an application under the *Administrative Decisions (Judicial Review) Act 1977*.

Importantly, while it would be undesirable to lower the present threshold for the acceptance of applications, there remains considerable flexibility in the Tribunal's acceptance process by virtue of:

- the President's procedure 6.3 whereby an applicant is not required to establish a *prima facie* case in order to have an application accepted;
- the President's *Reasons for Ruling in Relation to Criteria...* (p.30) whereby, to have an application accepted, it is not necessary that applicants identify comprehensive evidence of non-extinguishment; and

²⁹ ibid.

³⁰ Submission No.9, op. cit., p.6.

³¹ s.62.

³² s.63.

³³ Submission No.9, op. cit., p.9.

- the President’s submission (No.9, p.9) whereby, for non-claimant applications, it is open to the Tribunal to hear evidence from those whose claimant response has not been accepted on *prima facie* grounds.

Justice French’s Proposed Amendment

Section 139(a) of the *Native Title Act 1993* requires an ‘inquiry’ to be held in relation to applications that achieve agreement pursuant to s.73. This is to establish whether the agreement is within power and appropriate. Although the Tribunal has the power to conduct *prima facie* assessment of applications before they are accepted, and the Act³⁴ allows for *prima facie* assessment at the inquiry stage of an application, would it be desirable to facilitate such assessment *following* acceptance of an application in certain circumstances? The President has proposed an amendment to the *Native Title Act 1993* that would:

enable an inquiry to be held, on a discretionary basis, at any point after acceptance of the application to determine whether there is a *prima facie* case and in that context to allow for important points of law which may affect the negotiation process to be referred to the Federal Court.³⁵

The resolving of points of law early in the native title consideration process has been a continuing issue. As already discussed, the Tribunal’s acceptance process has included the development of opinion on significant points of law, in turn determining whether an application is accepted or referred to a presidential member. Clearly the Registrar acts on the basis of such opinions in processing all applications. In the case of applications that have been referred to a presidential member (such as the Waanyi claim) they were referred on the basis of an opinion about a point of law; in the Waanyi case it concerned the status of the pastoral lease at Lawn Hill. The President’s proposed amendment, then, is not one designed to permit points of law to be taken into account early in the acceptance process — that is already being done.

Rather, the President’s suggested amendment addresses his perceived need for *an inquiry* to proceed following acceptance in certain cases where agreement has not been reached between the parties. As the Act stands, an inquiry can only be held if the application is unopposed or the subject of agreement either with or without mediation.³⁶ In theory the benefit of the proposed amendment would be that the Tribunal, by conducting the inquiry early, could identify issues affecting the application and, where necessary, refer them to the Federal Court for determination pursuant to s.145 of the Act. This process could expedite difficult cases.

³⁴ s.148.

³⁵ *NNTT Annual Report*, op. cit., Appendix 9, p.67; see Appendix 5 of second report of the Parliamentary Joint Committee on Native Title, *The National Native Title Tribunal Annual Report 1993-1994*.

³⁶ s.139(a).

Perhaps one virtue in this proposal is that it potentially addresses the various concerns that have been expressed about the fact that the Tribunal Registrar has been acting on opinions about points of law during the process of accepting applications. Were an early inquiry process available, in appropriate cases the Tribunal could exercise the (existing) option of accepting applications although a *prima facie* case was not established confident that an early inquiry could address issues relevant to the *prima facie* test. (In fact, the President's proposal is premised on the postponement of the *prima facie* test until the application has been accepted.) The present concern (albeit questionable) about the Registrar having regard to points of law in the acceptance phase could be alleviated, the parties having such issues clarified through an early inquiry, and the Federal Court would be able to determine matters that might otherwise remain unresolved for a considerable period. Justice French notes in his annual report³⁷ that, for example, a test case on the impact of a pastoral lease with a statutory reservation in the area the subject of the claim, could be considered in this way. Commissioner Dodson has recognised the value of the proposal, confirming in his submission³⁸ that the resolution of questions of law at an early stage would enhance the negotiation process and give greater certainty and credibility to the native title determination procedures.

While there are benefits in the President's proposed amendment to the Act, it is not without difficulty. Perhaps the most significant issue concerns the concept of mediation. Despite being termed a Tribunal, the NNTT is more accurately described by Justice French as a native title dispute resolution service. The Tribunal assists parties to native title claims to resolve those claims by agreement. However, because Justice French's proposed amendment could open the inquiry process at an early stage following acceptance of an application, one of the major benefits of the process envisaged under the Act could be put at risk. That is, the parties would have at least some elements of the claim dealt with in the *public* inquiry process at an early stage rather than in *private* mediation. The Parliamentary Committee's second report advised³⁹ that this could hazard the chances of an agreed outcome. In his submission Commissioner Dodson endorses the private mediation process:

The adoption of interests-based negotiation by the Tribunal which recognises the possible need for confidentiality and is flexible in the consultation options available to parties is, I believe, a balanced method for dealing with claims.⁴⁰

Nevertheless, it is important to record that the President's proposal would not compel the Tribunal to conduct an early inquiry. Rather, the Act could be amended to provide an additional option for processing particular applications. It also should be noted that the proposal would enable inquiries to be held *on a discretionary basis* to determine *prima facie* matters and refer points of law to the Federal Court. Provided that this was the approach taken, and that every attempt was otherwise made to pursue mediation, the President's proposal could be useful

³⁷ *NNTT Annual Report*, op. cit., p.67.

³⁸ Submission No.8, op. cit., p.13.

³⁹ *The National Native Title Tribunal Annual Report 1993-1994*, paragraph 4.5, p.14.

⁴⁰ Submission No.8, op. cit., p.12.

because it would increase the flexibility of the Tribunal's procedures. In some instances applicants may prefer an early inquiry rather than have the application subjected to pre-acceptance examination on points of law.

Summary

This article has explored some wider reasons for supporting the following judgements of the Parliamentary Committee's second report:

- that the Tribunal's acceptance process, including *prima facie* assessment of applications, is consistent with section 63 of the *Native Title Act 1993*; and
- that there are grounds for the Tribunal President's proposed amendment to the Act which would allow for increased flexibility through an early inquiry process for applications.