

Papers on Parliament No. 39

December 2002

Senate Envy

**and Other Lectures in the
Senate Occasional Lecture Series, 2001–2002**

Published and printed by the Department of the Senate,
Parliament House, Canberra
ISSN 1031-976X

Published by the Department of the Senate, 2002

Papers on Parliament is edited and managed by the Research Section,
Department of the Senate.

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ISSN 1031-976X

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Two Cultures: Parliament and the Media*

Julianne Schultz

The brief I was given when I was invited to present this speech concluded with a fairly bleak assessment of the relative roles of the Parliament and the Media. The questions posed were these:

We can lament the fact that politicians now see the media as a more important forum than Parliament, but should we blame them for accepting the raw realities and regarding appearances on talkback radio or the *7.30 Report* as more effective means of communication than a speech in the Senate or the House? What share has Parliament had in its own decline as a forum for debate and to what extent is it simply the victim of the proliferation of communications media during the past two centuries?

Now to be fair to those who very kindly invited me to address you today, this rather jaundiced assessment of the relative importance of the Parliament and the Media as forums of debate was prepared at the end of the last session, not long after a gruelling election campaign.

This week of course marks the beginning of a new session, a new Parliament, a renewed government, opposition parties in review mode, and other minor parties and independents contemplating the best way of representing their constituents and exercising their influence. And in the gallery, at the entrances and in the corridors of this building an excited and/or world weary groups of journalists are ready—according to the current routines of political reporting—to catch the grabs as they are

* This paper was presented as a lecture in the Department of the Senate Occasional Lecture Series at Parliament House on 15 February 2002.

uttered in the Parliament, on the door steps, or drawn from the voluminous transcripts of other interviews and doorstops, or the whispered backgrounders in corridors and over mobile phones, and craft them into stories that make sense of complex policy or issues or power plays for their various audiences.

And because the relationship between the parliament and the media is not just between politicians and their staffs and the journalists, I should also mention the battalions of media executives who have been discretely knocking on doors since November 11, seeking modifications to a range of media policies that could shape their companies' futures.

Issues of representation and communication are common to all the players on this particular field although there are fundamental differences of outcome and culture, some of which I will come to later.

Those questions in the briefing note I received just before Christmas made me think about whether it was true that members of Parliament would really prefer a possibly caustic five minutes with Kerry O'Brien or Alan Jones than the opportunity to expound on an important matter of policy or public importance in the House or the Senate. No doubt they would reach a bigger audience, but a brief interview couldn't replace the subtlety and complexity of the deliberative process in the Parliament, surely. Then again maybe these questions pointed to the beginning of a new form of direct politics played out in TV and radio studios, rather than on the floor of the House or the Senate, with a worm or internet buzzer ready to pass judgement at every twist and nuance, and talkback hosts prepared to act as intermediaries with clout, for citizens dissatisfied with the traditional processes.

As I considered these questions I knew that they were not new—indeed not long after the press had won its quasi institutional status as the fourth estate, its relative strength *vis a vis* the parliament was being questioned:

from slight beginnings the press has overshadowed and surpassed the other estates ... It has obtained paramount influence and authority partly by assuming them, but still more by deserving them ... it is unquestionably the most grave, noticeable and formidable phenomenon of our times.

Now George Reeves, who wrote this in 1855, was given to a particular style of nineteenth century hyperbole, but there is an interesting echo—indeed it is possibly truer today than it was then. Not everyone shared Reeves' views, just as today the media has both its boosters and its critics, who see its methods corroding other institutions and possibly even the fabric of our society.

So I thought it might be useful to construct a couple of questions about the role of the media in relation to the parliamentary process in the same spirit as those I read a minute ago. They might go something like this:

We can lament the fact that politicians now seek to use the media in a way that avoids serious consideration of complex issues and substitutes it with

well rehearsed one-liners and emotive phrases, but hasn't the media brought it on itself in its desire for controversy, conflict and simplicity? What part has the media played in its own marginalisation, is it simply a victim of its own success?

There are probably a dozen other questions that could be thrown into this particularly overheated pot—but they all tend to point to a sense of what I want to describe as *institutional disappointment*. I believe that there is a gnawing sense of disappointment that some of our important public institutions do not serve us as well as they might, that maybe they do not adequately meet the changing expectations of the times.

I am not one of those who subscribes to the idea that our public institutions are in crisis, or in need of fundamental reform—at least not in most cases. They are resilient and have served us well. But I do think that there is a need for some refreshment to ensure that they are firmly grounded in the rituals and expectations of the twenty-first century rather than the nineteenth.

So that is what I will do today: look at the principles that led to the establishment of the media as a quasi institution of the parliamentary process, a bastard fourth estate, assess some of the current strengths and weaknesses of the relationship and suggest some alternatives that draw on the past and seek to anticipate the future.

One of the most important insights that comes from the study of institutional creation and policy formation over time is that things which we now take for granted were in many cases just someone's bright idea, which they pursued doggedly, tested in debate, grabbing opportunities as they arose to refine, develop and implement. The Parliament is itself to some extent such a creation, certainly the role of the media as an adjunct to the parliamentary process is.

There is a seeming immutability about the idea of the Fourth Estate: that the media should report and provide scrutiny of the debates in Parliament and the policy outcomes. It has however long been a matter of contest. The notion of the Fourth Estate has changed and developed over the past two centuries. It was briefly just a description of the place where reporters sat, but within a couple of decades had become 'the feedback mechanism of democratic system management'. Nonetheless the words *The Fourth Estate* conjure an image every bit as solid as the Gothic stone of Westminster, the elegant dome of the US Congress or the submerged walls of this beautiful building.

But it was not always thus. I would like therefore to trace briefly the process by which the fourth estate moved from being a place, where reporters sat, to an idea which was integral to the democratic political process.

This idea has never been never cast in stone, or even scribbled in the margins of the Australian Constitution. It was only a decade ago that the High Court affirmed the constitutional importance of freedom of political speech. Justice Brennan wrote at the time, 'It would be a parody of democracy to confer on the people a power to choose their parliament, but deny them the freedom of public discussion from which they

derive their political judgement.’ That of course depends on access to all the necessary information to make such judgements.

Despite these High Court rulings, no tablets of stone defining an institutional role for the press have been handed down in this country. Indeed while many would welcome a constitutional recognition of freedom of expression, any legislative attempt to define the role and nature of the press would make most nervous. While the role of the media has more often been defined in the negative, by limits, exclusions, caveats and so on, the tension that comes from quasi-institutional status of a commercial agency is fundamentally healthy in a democracy.

There is a little game that is sometimes played by pedants and trivia freaks about the origin of the term fourth estate: who used it first, was it Macaulay, was it Burke, was it Hazlitt? This can be interesting, but like many games of trivial pursuit misses what, to me at least, is the more interesting question. And that is the process by which the idea of the fourth estate came to be accepted in eighteenth century Britain, its colonies and around the world.

As I said before, there was no great handing down of the tablets, although some may point to the decision to include a gallery for reporters in the new Parliament at Westminster as such recognition. That was the moment after years of debate when the fourth estate eventually became a place, more than just a bench where reporters had been allowed to sit and take notes squeezed in between others. It had taken two decades to become an idea, as John Stuart Mill wrote in 1859: ‘No argument can now be needed against permitting a legislature or executive ... to prescribe opinions or determine what doctrines or arguments the people shall be allowed to hear.’ The opinion journals of the eighteenth century had been alive with argument—erudite, articulate, sophisticated debate that fostered the creation of many of the Enlightenment institutions and ways of seeing and thinking that are now more commonplace than the food we eat.

The role of public opinion, the importance of reporting, the need to give people access to information to allow debate to occur and informed opinions to be created, was one of the big debates—an issue for the elites that became in today’s jargon ‘a hot button issue’ for the masses with the publication and suppression of Thomas Paine’s *Rights of Man* in 1792.

Those in positions of power, like their successors and predecessors, were profoundly uneasy with this trend. They preferred printers who were more interested in making money than some higher purpose. They used blunt instruments of exclusion and censorship and then more subtle tools of regulation and tax to try to put the press and the public discussion of ideas in its place. But the resilience of the idea, which had been tested and argued, prevailed. In the colony of New South Wales the administrators gave up the unequal battle and allowed tax-free newspapers to be distributed well before similar decisions were made in Westminster.

The landmarks in the debate that led to the creation of the press as a quasi-institution are probably worth recapping, not least because it gives a sense of how long it can take before an idea really takes root in a society, and becomes a self evident truth.

- 1644: Milton published his famous anti-censorship tract *Areopagitica*
- 1660: House of Commons resolved no one could report its debates
- 1765: American newspaper refused to pay the British license fees
- 1770: British papers won freedom from prior restraint, after printers were jailed for reporting debates, released by the Mayor of London who was then jailed himself—it was clearly becoming time-consuming and silly
- 1791: American Constitution declared freedom of expression
- 1792: Fox’s libel laws reduced penalties and introduced juries
- 1802: William Cobbett began the weekly *Political Register*
- 1803: A bench set aside for reporters in the House of Commons at direction of the Speaker
- 1824: First Australian newspaper established without prior official approval
- 1826: Censorship abolished in Australian colonies, stamp duty removed
- 1834: Lord Macaulay referred to the reporters as being the fourth estate, more important than the other estates
- 1852: Delane editorialised in *The Times* about the different yet complementary nature of journalism and statecraft
- 1853–61: Stamp duty abolished
- 1855: Reeve declared the press created the wont which it supplied and was more important than the other estates
- 1859: John Stuart Mill declared the need for a free press was self evident.

It was a long slow process. The thing which most interests me about this is that the idea of the press as the fourth estate was not handed down in molten lead letterpress, but was the result of robust argument. More importantly, and this has a couple of key parallels with the situation we face today, the press was able to create the wont which it supplied.

The press was its own best advocate—using every means available to advance the case of its institutional role. Of course it was not an institution, it was not elected, nor appointed by virtue of birth or good works. It derived its success from the marketplace. So it was an institution of the political process, but was not directly a

part of that process, and measured its success in pounds, shillings and pence. The bastard estate had its feet in commerce and its head in public affairs.

Rather than decrying the commercial nature of the media, its very commercial nature gave it—and continues to give it—its authority, its independence and ultimately its power. The ability of the nineteenth century press to create the wont which it then supplied could be restated in the somewhat less elegant language of the twenty-first century, as an idea whose time had come.

So what are the characteristics of this time more than two centuries later? What are the expectations, values, possibilities? Do we need to rethink the relationship between the media and the Parliament, or at least recast or reinvent it in some way?

The world as we know it is profoundly different to that in which the idea of the fourth estate took root. Let me just run through a few salient differences: suffrage is now universal and mandatory, the population is overwhelmingly literate, almost everyone has had at least ten years of schooling, the society as a whole is much richer, there are fewer unknowns, human rights are widely understood and accepted, people expect to have access to information and for their opinion to count. These days the media reaches into every minute of our lives—eight hours work, eight hours play, eight hours rest, and depending on how much the media influences your dreams, maybe 20 hours of media in print, on TV, in the air, on the computer, in the public places. It is not surprising that the media and communications business chews up 25 billion dollars a year in this country alone.

The prevailing established viewpoint is established, developed and maintained through a complex machinery of information and communication. The capacity of the media to turn the level of civilisation up or down a notch is still important, but the elements involved are more diverse and sophisticated than they were even a few decades ago.

As I said at the beginning, I think that it is necessary to understand the antecedents of our current institutions, and quasi-institutions, if we are to imagine how they may change in the future.

I would now like to propose a solution which may go some small way towards addressing the institutional disappointment I mentioned earlier. In the nineteenth century George Reeves celebrated the process by which the press had developed a voice of its own, and was no longer merely an echo chamber of the other 'estates'. The attempts to ensure that the echo is in place are more sophisticated than ever, as you would expect for the billions spent on public communication.

It seems to me that much of the political reporting that we have today is stripped of complexity. There simply isn't the space or the time to do otherwise. We get at best a layering of different perspectives and assertions, claim and counter claim built over the course of a few days or longer. Who can remember who said what, and what was really right or true. As the ideological underpinnings of political debate have become more blurred, the distinctions are harder to hang on to. So not surprisingly much political reporting focuses on the theatre, the spectacle, the gaffes and nuances. Single

words and phrases bounce around the airwaves framing the public discussion. Emotion has supplanted logic as the principle tool of debate. A simple, clear exposition of facts and rationale rarely cuts through the one-liners, the rhetoric, the spin, the code words and the masked ideology. It is no wonder that we retreat into our preconceptions.

Cynicism has become the new bedrock of this country over the past decade or so. It has become been pretty impenetrable, and to some extent demoralised our political institutions. Suspicion and fear of manipulation has undermined the confidence of many Australians in their ability to think through complex issues. The cynicism that fuelled the One Nation phenomenon has now been supplemented with the most skilful media management ever seen in this country. This all contributes to the sense of *institutional disappointment* I mentioned earlier.

As someone who has worked as journalist and editor, who has taught journalism, and has been involved in the hand to hand combat of media policy formation, I feel that there is a gap between what I consume in the media and what I know is going on in areas of policy formation and development. I don't blame anyone for this—I understand the pressures journalists and editors work under, I know some of the tricks that media managers use to ensure that their take on stories and issues reaches a mass audience and I have a sense of the pressure that policy makers are under, as one state departmental head said recently, 'forget the detail, give me the one liner.'

As I said before the media management at play today is of an order of magnitude more sophisticated than we have ever seen before in this country. It is not the simple control of the old elites; it is slippery, skilful, sometimes abusive and well grounded in the real and imagined fears and expectations of us all. It doesn't leave much space for new ideas.

So I and many others feel a sense of institutional disappointment. At a time when there is more media, why does it seem that there is less detail, less of the fabric of the underpinning rationale, process and outcomes? The media searchlight shines brightly for a few minutes before moving to the next event, that is its job. Sometimes we feel satisfied, sometimes not, sometimes feeling like a child with ADD hoping the next Ritalin will help us make sense of the big picture.

This at a time when technology makes it possible for us to access more detail than ever before—to read the court judgements, to consider the full reports, to examine the data on a thousand and one web sites—making the quick retreat to one liners and snappy phrases is somewhat paradoxical. The ease of access to voluminous information is a challenge to the reductionist inverted pyramid of journalism and its demand for brevity, clarity and simplicity.

So we are reduced to policy one liners, which are deliberately uttered, rarely meaningfully challenged, and endlessly circulated, as highlighted transcripts of previous interviews form the basis of the next.

I understand that the language of politics has now been reduced to the five second grab; the snappy one-liner that pushes the buttons and draws a response is what the

pollsters—and ultimately the ballot box—can measure. But at a time when the people of this country are better educated than ever before, when they are dealing with increasing complexity in every other aspect of their lives, why is our political discussion reduced to such a thin broth? Emotion and snappy one-liners are no substitute for logic or complexity in policy making and public debate.

It is not my place to advise either the media or the Parliament about how to go about changing this situation—I can simply note what I observe from a somewhat privileged vantage point. I suspect that the pressures on the media will see some swings in the pendulum and innovations which manage to break through the stranglehold of media management, and I note with interest the discussion about the reform of parliamentary practices.

I would however like to add a suggestion, which may be of value to both. It is not a new idea, but it seems to me that it may be one whose time has come. An innovation that may go some way towards providing a framework for public policy discussion would be the televising of Parliament, and related public affairs events—committees, media conferences, speeches, and so on. I know that this is something which has been considered by joint committees in the past, and has never really got beyond a discussion of the technicalities, legal issues and in debate cheap political point scoring. Indeed just as I listed the process of deliberation about the development of the fourth estate, a similar, although not quite so lengthy list can be cited documenting the debate about the televising of Parliament in Australia. The first report was prepared in 1978, there is no record of any response to that, the second was an unfinished report in 1984, then there was another in 1985 also with no response and then a further four, the last in 1995, which also failed to draw a response from the government of the day.

So while the debate about the televising of Parliament has been around for a long time, and has had some advocates, it has never really been taken seriously. I think that it should now be reconsidered. The technology has changed, the spectrum is available, the methods of televising the proceedings are now well established, the need for citizens and audiences to get access to more than the five second grab is greater as the space available for reports has shrunk, the expectation that cameras can relay events any where any time is well established in all other sectors of society; we live in a visual virtual reality. Television can supplement what *Hansard* already does. This could have interesting consequences, as interest in direct democracy via the media is an idea that is likely to recur over the next decade.

It seems to me that that televising of Parliament is no longer just an issue for the elected members and senators, it is essential for the health of the country as a whole. As the eminent American journalism critic Walter Lippmann wrote: ‘The press is no substitute for institutions, at best it shines a search light and clarifies some events.’ Lippmann had learnt the limits of journalism as a public relations officer, managing public opinion and political communication during the First World War. The management of public opinion is now incomparably more sophisticated.

The media in this country does a good job—but it necessarily operates within limits. A television echo chamber may be an institutional response that complements the practical limitations of the media searchlight.

I don't want to be too overblown in this, but as the pressure on the media increases the space for detail is lost. The heirs and successors to Walter Lippmann, today's media managers know this in their bones. Increasingly what they seek to do is manage the frame through which issues are seen, as well as the particulars of the event itself. This is now done with much greater skill than would have once been possible. Public debate in Australia is robust, at times even bullying; genuine alternatives, complexity and subtlety rarely get an airing. The opportunities to watch extended verbatim coverage would demonstrate the limits of this style and provide an easy point of access to the insights from the parliamentary debate and other significant public speeches.

I can hear the sceptics already: Why bother? Who'd watch? How boring! What a waste of money! Isn't that what the public broadcasters should do? Who would fund it?

It is interesting to look to other countries in this regard. The televising of Parliament is done in many. As the technology of digital broadcasting, cable and satellite television and broadband internet removes scarcity of spectrum as a bottleneck, the technological impediments will disappear. Those of you who work in this building already have this access both to the coverage of the House and Senate, and the committees. Why not make it available to those beyond Capital Hill?

The C-span—cable and satellite public affairs network in the USA—is the best documented, and provides a particularly useful model. It was set up by Barry Lamb in 1979, a year after this, Parliament first considered televising its sittings. Lamb was a former journalist and Republican congressional aide, an assistant director in the office of telecommunications policy in the Nixon White House, who had become increasingly annoyed with the way that partial coverage distorted events. He recognised that the technology of cable and satellite television, the hunger for channels, and the desire by the cable industry to be seen to be exercising its quasi-institutional role in covering public affairs, presented an opportunity. His vision was of a television network that had the time to show the debate, the speech, and the news conference in full—gavel to gavel. It was not flashy, but by making the full debate, the full news conference, and the full speech, available, it provided a base line for access to information about public affairs.

I'm sure that many of you have had the experience of seeing remarks and comments you have made broadcast, but feeling that without their context the meaning was lost or distorted. I am not critical of journalists in this, their difficult task is to reduce and distil, to draw out the most salient points and hopefully arrive at a snapshot that captures the essence of the debate, within tolerable bounds of accuracy. But sometimes the context is lost, and you need the underpinning arguments to make sense of the conclusions. Most often the distortion that occurs is not of the type described by Anthony Trollope in *The Warden* in 1855 'that makes you odious to your dearest friends to be pointed at by finger', but sometimes it is. Televising

Parliament wouldn't prevent this, but members, senators and speech writers would at least be able to take some comfort from the knowledge that some people saw the whole speech and had at least a chance of understanding what you were really saying.

C-span now operates two television networks covering the Congress and the Senate, committees, media conferences, speeches, and conferences and three radio networks. It is reached by 77 million of the 98 million American TV households, up from 3.5 million in 1979. While 60 percent never or rarely watch the network, 30 percent watch occasionally and ten percent watch regularly several times a week—a committed audience of more than 23 million. This is in a country where only about 45 percent of people still watch the network news shows. These figures, if translated to Australian cable television could mean that eight percent of Australian TV households could be expected to watch the network at least occasionally—more if it was available by free to air television. I haven't seen the ratings for the pay TV channels for a while, but I suspect that this would be in the middle ranking channels. This is not expensive television—the costs of production would be low, programming costs would be negligible, staff numbers small.

For reasons I do not quite understand at the moment, in Australia the debate and discussion of ideas rarely makes it onto the mainstream agenda. The ideologically driven think tanks pump out their analysis with admirable frequency, the talk shows analyse the event, people get a chance to put in their two bob's worth on numerous radio programs, the op ed pages are filled with 800 word perspectives, large numbers of people are going to public lectures—yet the gap between this and the surface layer of political discussion is substantial.

Televising Parliament and significant public events will not be a one-stop solution to closing this gap, but it may be a part of it. If the public had the opportunity to watch a full debate, not just the grabs that appear on the nightly news, some of the complexity of issues—the trade offs and necessary compromises—may become clearer to more people.

I don't think that this is just a minority concern, but even if it were the opinion-leading and informed minority of any society is enormously important, just as the ideas that withstand robust debate are the ones that will form the basis of the institutions of the future. Again, looking briefly at the C-span audience gives some clues to the depth of interest in public affairs. As you would expect, the C-Span audience tends to be made up of people who vote and read newspapers. But interestingly a third of them are under 35, a third also only went to high school and about a third earn less than \$30 000 a year. So it is not just something watched by the wealthy political elites—it may be that televising the Monica hearings helped this along a bit.

Having easy access to important public affairs debates would however put an information floor under the debate. It can give people ready access to more information than they would otherwise have—without the overlay of interpretation by commentators or the selection of editors. There are plenty of opportunities for such interpretation, selection and analysis elsewhere.

While there are proposals being developed about ways to improve the public standing of the Parliament and better bring it into the twenty-first century the televising of Parliament might also be a useful additional innovation. Concerns have been expressed in the past that the robustness of the debate may be diminished by televising the debate. Some have pointed to changes in the tone and nature of the debates after radio broadcasts began in 1946, and that the deliberative nature of the Australian Parliament could be impeded by such openness. Similar arguments were used to restrict press coverage in the eighteenth and nineteenth centuries.

It may be that the knowledge that an audience of electors is watching might change the tone and nature of the debates for the better.

Live coverage could also provide an interesting platform for feedback. Again drawing on the C-span figures shows how this might develop: 86 percent of politicians report significant increases in correspondence after they appear on the network, 91 percent consider this to be a good thing, 63 percent believe it has enhanced the reputation of Congress and only 6 percent feel it has been harmed. C-span has also developed sophisticated feedback mechanisms, to provide direct responses. While this sort of talkback television has become well established in America, it has not really taken off in this country. Certainly with the introduction of digital broadcasting the capacity for the audience to respond, answer back, vote or whatever will be alluring and technologically easy. Tying audience response to a direct parliamentary channel is obviously quite a different proposition to the current style of radio talk-back or internet polling based on an often selective or partial description of the issues.

Walter Lippmann anticipated the tyranny of opinion when he wrote that democracy could only work if we 'could escape the intolerable and unworkable fiction that everyone must acquire a competent opinion about every issue' because no society could be effectively 'governed by the episodes, incidents and eruptions elevated by journalism'. If any of you saw the Alain de Botton program on the mismatch between the Socratic Method and the current tyranny of opinion polling and media management, you may have some sympathy for Lippmann's observation, which sounds dangerously elitist to our ears.

Of course today everyone is expected, and feels entitled, to have an opinion, even if they sometimes have precious little information on which to base it. The media tries to address this, but there is a danger of the 'garbage in, garbage out' variety. So when NSW Chief Justice Jim Spigelman indirectly criticised the tyranny of talkback and the pressure ill-informed commentary was placing on the judiciary, leading talk-back hosts were quick to respond. They were providing the feedback, and the judges were there to do the public's bidding and respond to community pressure.

So the tension between 'the mob' and established institutional practice is sharp. There is an expectation that people can have an input, provide feedback. I welcome this development. But for it to be meaningful there is a need for space to be created to allow for greater complexity, for the detail to be fleshed out, for the arguments to be tested. I am not saying that the media can't do this. Of course it can and does. But its ability to do so will always be limited by the space and time available, by the tolerable limits of mass audience interest, by the very episodic nature of journalism. This is

why I suggest that the televising of Parliament is an idea whose time may at last have arrived.

This could be done in a number of ways. It could use one of the digital broadcasting's data casting content licenses—when this regime is finally resolved in a way that makes sense for the industry and audiences. Pay TV would be another possibility—although this currently only reaches 20 percent of households. The straightened financial times in that industry may make it unlikely immediately, but not impossible, especially given the recent rulings on access, and the lobbying that the industry is engaging in to ensure that the conditions regulating the switch to digital reception are most favourable. Similarly, the current internet streaming could be upgraded and expanded, but this reaches an ever smaller proportion of the community, and the jerkiness of the picture does not make it a particularly compelling experience. I do not think that it would be appropriate to require the Australian Broadcasting Corporation to broadcast Parliament—the ABC is much more than the echo-chamber of the Parliament, it is an independent public broadcaster. It already has well-developed plans for its digital channels, and has a lot on its plate with the new international service. I would also be fearful that if the ABC were required to broadcast Parliament this could be used as a stick to turn the ABC into the government broadcasting corporation.

The proposal to broadcast Parliament and related public affairs events is about extending the Parliament, not just creating another TV channel.

More than forty years ago, the Cambridge academic and writer C.P. Snow delivered a speech which left a legacy at least of a catchy phrase—two cultures. Sir Charles was exploring the gap between the literary and scientific establishments in post-war Britain, when the scientists were on the ascendancy and the writers were somewhat left out. These days the tables have probably turned. He bemoaned the literary ignorance and political radicalism of the scientists, the scientific ignorance of the writers, and system of education which meant that neither group could talk to each other—even at a Cambridge High Tea.

The speech caused uproar in the way that it addressed a very particular British situation. In giving this speech a title I borrowed the phrase today because I think that there are elements of a two cultures in the gap in understanding of politicians and the media in Australia today. The two cultures are flip sides of the same coin—light and shade, relief and impression—but with important differences of role, method and accountability which need to be recognised and a distance maintained—which is why the media regulation debates are so problematic.

There are at least two different cultures at play—politicians are motivated to varying degrees by ideology and a desire to change or maintain institutions; journalists are generally not ideological and are not in most cases seeking to influence change; media companies enjoy the power that their quasi-institutional status gives them, but are resolutely commercial and driven by self-interest. My suggestion of a public affairs television network should not step on any of these toes. Indeed it should add value to each point of the public policy information chain, and provide an institutional

supplement to what is already done by the Parliament, executive, judiciary and the bastard estate.

The openness and access to information that the media craves and expects is, notwithstanding the consequences of September 11, the trajectory on which we are placed. The internet, for all the negative hype last year, allows a degree of openness and exchange which was inconceivable even ten years ago. The breaking down of information barriers, the synthesising of material and the capacity for direct feedback are on a collision course with those who are seeking to manage, massage and strangle debate. September 11 may have slowed this trend somewhat, but openness and access to information is absolutely the single brilliant idea of the networked information society. It is the twenty-first century manifestation of the Enlightenment's ideals. We need to find means of saving our institutions from themselves, by using the technology and tools we now have at our disposal to build on the legacy of past debates and insights.



Question — I work for the Department that supports the House of Representatives. I very much welcome your call for the proceedings of committees to go out to the people unassisted by the interpretive elements. Sometimes I wonder whether the events I'm reading about or see in the electronic media are the same ones I observed with my own eyes. I believe that the Canadian House of Commons last year resolved that it was a contempt of the House for a minister to brief the press outside the Chamber if the members were advised of something inside the Chamber.

I want to mention something that I think was attributed to William Randolph Hearst during the Spanish American War. In response to a reporter who said, 'There's nothing much happening here, boss', I think Hearst said something like: 'Your job is not only to report the news—if there's nothing to report, then get out there and make the news.' That even extends down to the recent twelve months, when we had a demonstration in the House of Representatives Gallery where the demonstrators said to the Serjeant-At-Arms: 'We have to do this because the press has said we would.' Building on your comment that the press is now creating the need that it was meant to supply, is it just paranoia to see the press in fact setting the agenda, and then reporting it?

Julianne Schultz — I think the whole process of agenda-setting is really complex. In the old days—talking of Randolph Hearst—it was pretty straightforward. There was a pretty comfortable club between the senior elected politicians, the owners of the media and other members of the elite. It was a cosy sort of environment. I think that has broken down to a large degree. So in the process of setting the agenda, I'm really torn about how it happens. I think that, to a much greater extent than is visible, it happens as a result of advocates of particular positions influencing people to ensure that things get on the agenda.

When I was doing research for my book a few years ago, *Reviving the Fourth Estate*, I asked journalists whether they felt that they were involved in setting the agenda, or if they felt it was being set by others. And there was a really divided sense of where that lay. So much of the debate is managed and massaged by a whole range of organisations and interest groups, that the notion of a story falling, perfectly formed, is very problematic.

Question — I feel as though the media is very unpopular amongst a lot of people at present, and I'm not sure it's always in touch with how society's thinking. A lot of views are being imposed on us. I also feel that it's wielding a big stick, and people don't like it.

Julianne Schultz — I think there is a real gap in public feeling toward the media. I think they will be quite critical of it, and yet they will rely on it and use it very extensively. So there's a dichotomy in the way people feel about it to a very great degree. One of my concerns is that there is a lot of stuff happening which is at a degree of complexity and analysis—and tapping into what people are saying and thinking and talking about—which just doesn't reduce down well into the very episodic nature of a lot of reporting. We need to find a number of means that can tap into that so that there is easier access to a wider range of views and discussions than we've got at the moment.

Question — In your flyer, the first sentence is: 'Has talkback trashed question time, or, to put it more politely, has the media become more important than the Parliament as a public forum?' When we talk about talkback, we are really talking about the Alan Joneses and the John Lawses of this world who are somewhat directing public opinion and debate in this country. I find this quite extraordinary and damaging. So you'd surely have to say that there is an element of that being trashed. I would suggest that we need to draw a very clear line between journalists and these talkback hosts—who are *not* journalists, are not qualified and who don't have to follow a code of ethics. They have their own code of ethics which can change to suit them at any time. Therefore, their public debate is very damaging and that is something that is not being addressed. We assume and would like to think that the media and most journalists follow a code of ethics, but the Alan Joneses and the John Lawses of this world do not.

Julianne Schultz — I was talking on a talkback program this morning about this whole idea. I actually don't have a problem with talkback hosts being explicitly partisan. Part of the problem we have at the moment is that, in reducing everything down to appear to be as neutral as possible, you lose the energy that comes from that partisan debate. So I actually don't mind that Alan Jones is openly a partisan advocate.

The problem which a lot of the talkback hosts themselves are trying to deal with is how they, in their format, get beyond the 'grab' or the key phrase which they know will bounce around, to something which is a bit more rigorously tested. I think you can do that testing irrespective of what your particular ideological position might be. But I don't think there has been any will to do that, and that's where the problem of the 'mob' thing develops.

I agree that those big stars of talkback aren't constrained in the same ways as journalists may be in terms of their professional practice and so on. But there is a sense that, if they are taken for a ride—if the weakness of their method is exposed—they will have to come back to some sort of middle ground. Which is why I think that in areas where really quite sophisticated media management taps into various different ways of getting messages out, you'll start to see over the next little while some quite interesting innovations in the way that media goes about testing the veracity of statements as they are made, rather than just taking them and letting them run.

Question — You mentioned that some of us are disappointed in our institutions, and I am one of them. Your discussion, very rightly, concentrated on the media. With respect to the Clerk of the Senate, and not defending the media, I would have liked to have heard you speak more about the institutions of parliament and government in this conflict that we live amongst. Governments, particularly, have a very important and powerful role in what we finish up getting on the receiving end of the media. Taxpayer-paid spin-doctors are rampant in both those institutions, but more particularly the government. I welcome your ideas for more public television, but I think something has to be done about those doctors of spin.

Julianne Schultz — I'm more an expert on media than I am on parliamentary process, so that's why my focus was on the media end of the relationship, rather than on the parliamentary process. I think you are right about the process of managing the debate and the discussion. In my suggestion for televising, what I'm trying to suggest is that you can at least begin to see some of the complexity of the debate and the argument and so on, because they are easily available. And that means, while it won't cut across what's done in reducing things down to one-liners, at least at the highest level of public debate, which is what should be happening in the House of Representatives and the Senate, we should be able to get access to that in its unadulterated fashion. It won't solve the problem, but it is one of a number of means that might help to address it.

Question — I am a journalist with the press gallery. Televising of Parliament would end up arriving at somewhat of a paradox, and there would be big challenges for the audience. For example, there is evidence to suggest that a lot of the bureaux now film quite large amounts of activity around Parliament every day. And yet, inevitably, through the editorial process, it only ends up at about a minute or so on air. That can be quite disappointing for some professional cameramen who in fact try to editorialise on the run, and try and get the best slant on what is, ostensibly, a news-making event at a press conference or a doorstep. So that creates challenges along the way as well.

The seven thousand hours of free-to-air sport that's televised in this country gives you an idea of the demographics and what people are actually watching, and that would create challenges of trying to replicate a sea-span model in Australia.

Another interesting point is that we're one of the few western democracies with the media inside the parliamentary space. That creates pluses rather than minuses, but that hasn't been picked up much in terms of the way the executive interacts with the press gallery, and how they in fact can work together.

How do we empower the media to increase their respect for the current institutions—whether they be the judiciary or the Parliament—given the way they operate and, as you pointed out extensively in your speech, the way that everything is shrunk down? In our modern lives, people’s attention spans are reduced. As I said earlier, the paradox is that people want more but their capacity to handle more has in fact been diminished.

Julianne Schultz — It is a paradox. Part of the reason that I’m suggesting the televising of Parliament is precisely to go to the heart of the issue that you’ve identified, which is that there are a lot of reporters here trying to get more material up than they are able to. Televising Parliament doesn’t actually solve that, because what you get is gavel-to-gavel coverage of issues, some of which will be interesting, and some not.

What I’m most interested in at the moment, as an ordinary citizen, is looking for more complexity in the media that I consume and in the debate that I get access to. I know the pressures that anyone working for a newspaper, radio or television station face, which are that you’re not always going to win. So I think this is one of a number of different mechanisms which may help to add that complexity and give people the opportunity to expand. I talk to journalists who say:

I’ve got to do this story, because every other paper is doing it. I actually don’t think it’s much of a story, but my paper can’t be without it because then we’d look bad. What I really want is to go off and do ‘x’, but because nobody else is doing that I’m not going to get a run on it.

What I’m exercised by is trying to find ways of creating the space for some of that other stuff to get out. I don’t think televising Parliament solves it, but it might be one of a number of different tools that could go some way towards it.

Question — The biggest problem with the media these days seems to be the conflicts of interest. Our main media barons are fighting for telecommunications power, and we have a situation with the law firms involved with the likes of Telstra—some 45 law firms on retainers—which creates conflicts of interest right through to the judiciary. The problem we have is that, with the size of the annual advertising budgets of these corporations, the media will not publish the facts that the people need to have exposed for the politicians to deal with. Is that something that you’ve been investigating in your research?

Julianne Schultz — Not recently. I actually tend to shy away from those sorts of issues. There are certainly subjects which don’t get published or broadcast or discussed in as much detail as people who are advocates or are concerned about them would like to see. I don’t, however, tend to subscribe to simple analyses which say that because so much money is spent in advertising that therefore those subjects don’t get published and broadcast. I don’t think that’s true. It’s an area I’ve looked at, and I’ve looked at the way which journalists feel pressured or not, in terms of self-censorship, on those issues when I was doing research a few years ago. Journalists are

quite resilient in their ability to separate the commercial interests of their organisation from what they regard as the public interest and the areas they report.

Question — Have you looked at the multiple directorships? The former chairman of Telstra, at the time of the T1 and T2 share dumping, was also the chairman of Mallesons Stephen Jacques, the legal advisory firm. The in-house counsel of Telstra was also a partner in Mallesons Stephen Jacques, which concealed potential liabilities of Telstra and therefore the shares were sold at a much inflated price to what they would have been had all the systemic faults been exposed. That's the type of conflict of interest that is being withheld from the media, and therefore the public are being ripped off.

Julianne Schultz — I don't really feel qualified to comment on that in detail.

Question — Do you perceive that public opinion—and not the rule of law—is the new authority in Australia? And do you feel that the media has aided this position?

Julianne Schultz — No, I think we're still ruled by law, rather than public opinion. And that is a desirable way to be. Public opinion is very powerful, and it presents real challenges for politicians, and it's at that level of the political challenge that public opinion may seem to nibble at the edges of the law. I suppose that was the point that Jim Spigelman was making in his address to the NSW Law Society a few weeks ago at the opening of the legal year. There is much greater access, and people expect to have opinions and to have those opinions taken seriously. And I think that we will see over the next decade many moves towards greater direct democracy and ways of people's opinion being translated in the public space. But we are still ruled by law.

I think that what you've seen over the last few days (regarding the 'children overboard' affair) is the failure of public opinion. Yes, public opinion was massaged by the release of unsubstantiated information during the election campaign, but what you have now seen is the inquiry process of the departmental review and the inquiry process in Parliament.

What you see today about that issue in the papers is formal apologies, with papers saying they were misinformed. That tyranny of public opinion does create travesties. There's no question about it. All I'm saying is that we are not ruled by public opinion. A few months on from that incident, we now have the processes of our institutions kicking in, in such a way that the failure of that public opinion process is being blatantly revealed. Which is why I think you will see in the media a number of different methods and techniques being developed which will challenge assertions much more rigorously than you've seen in the past.

The best example that immediately springs to mind—and I don't say this in any pejorative, political sense, it's just interesting historically—was what happened when the McCarthy period began to be seen to be an abuse of power. You started to find that newspapers and television stations, when reporting McCarthy statements, would say: 'McCarthy said Joe Blow was a Communist', and the next paragraph would say 'There is no evidence to substantiate this. If they reported that 'McCarthy then said blah blah.' they would then say, 'We have been unable to verify this claim.' Because

within the limits of the techniques of journalism there were very few ways of getting around that.

If someone in authority makes a statement, we have every right to expect that statement to be truthful. And if they're found to be less than truthful in that context, it throws a challenge back to the media process of how to address that disquiet in the processes and norms of reporting.

Senate Envy: Why Western Canada Wants What Australia Has*

Ted Morton

Introduction

I came to Australia to do what political scientists do: to study and to report. I came to study how you Australians have successfully wedded an American-style Senate to a Westminster-style Parliament. To help pay the freight, I am also lecturing at various universities on how the Charter of Rights has impacted and changed the way Canada is governed. My old friend and ANU Professor John Uhr has informed me that this is a much too rational and superficial view of my mission. According to John, what I am really doing in Australia is better described as a form of political psycho-therapy: I have come to cure Australians of your rights-envy, and in turn be cured by you of my Senate-envy—thus the topic of today’s lecture.

Comparative constitutionalism can be tricky business, and sometimes even nasty. During Australia’s founding debates in the 1890s, Sir Edmund Barton disparaged the Canadian constitution as a ‘mongrel’ brand of federalism.

Sir Edmund was not simply being contentious. He had a point. He was referring to the highly unbalanced nature of Canadian federalism, resulting from the central government’s powers of disallowance and reservation, which allowed Ottawa to unilaterally set aside any provincial statutes that it found objectionable. This

* This paper was presented as a lecture in the Department of the Senate Occasional Lecture Series at Parliament House on 22 March 2002.

arrangement violated the first principle of true federalism: that neither level of government can unilaterally invade or change the jurisdiction of the other. Sir Edmund was right: based on the original constitutional design, Canada's was a 'mongrel' brand of federalism.

What concerns us today is that this theoretical imbalance was quickly remedied by practice. Within a generation, the legitimacy of these federal powers had been successfully challenged and undermined by a coalition of provincial premiers with strong public support. A convention of non-use developed, effectively neutralising these powers and restoring balance to Canadian federalism.

The original constitutional design neither fit nor reflected the deeply decentralised nature of Canadian society. The constitutional blueprint did not accord with the building-blocks of Canadian society. There was an absence of symmetry between theory and practice, and, as usual, practice won. According to legal theory, constitutions shape society. In practice, society also shapes the constitution.

The contemporary Senate reform movement in Canada can best be understood as a response to an analogous gap between state and society; between an aging political superstructure and its evolving economic and social foundation. The analytical framework that I am proposing can be summarised in the following three propositions:

1. That in all democracies, there must be a modicum of symmetry between *de jure* power and *de facto* power; a proximate balance between the formal distribution of power in the state and the real world distribution of power in the society that state seeks to govern.
2. That in Canada, this balance has been lost, because of an institutional status quo that historically has privileged Central Canada (Ontario and Quebec) and that has failed to adapt to a rapidly evolving political-economy in which significant new *de facto* power has flowed to the two western-most provinces, British Columbia and Alberta.
3. That the Senate reform movement is one symptom of the political friction between the *de jure* constitution and the *de facto* constitution, between the old state and the new society.

If this sounds too abstract, let me illustrate it with a more familiar example from the United States. Since World War II, there has been a significant flow of both people and capital out of the 'rust-belt' states of the north-east into the 'sunbelt' states of the south and south-west. The political reflection of economic shift is found in the fact that the last five presidents have come from Texas, California or a southern state.

To apply this theory to Canada, I begin with an overview of the oligarchic origins and design of the Canadian Senate and its subsequent democratic demise. I then briefly sketch the economic and demographic decline of Quebec and the corresponding ascendancy of British Columbia and Alberta; and then compare this to the continuing political dominance of Quebec in national politics.

The Rise and Fall of the Canadian Senate: an Overview

Like the Australian Constitution, the British North America Act sought to wed a British-style Westminster government with an American-style federal system. The BNA Act spells out a division of powers between the central government in Ottawa and the provincial governments. At the federal level, the Canadian founders created a bicameral legislature with both a House of Commons and a Senate, with ‘responsible government’ grounded in the popularly elected lower chamber. Notwithstanding the latter, the Senate was given the identical powers of the lower house, save the power to introduce tax and spending bills.

Here, the similarities with the Australian Constitution end. Spurning the republican model of the Americans in favour of imitating the British House of Lords, the Canadian Senate was to be appointed, not elected. Canadian senators were given tenure of office for life. The principle of provincial equality was also rejected, in favour of what is now called regional equality. Ontario and Quebec, the two most populous provinces, were allotted 24 senators each, while the three original Maritime provinces—New Brunswick (10), Nova Scotia (10) and tiny Prince Edward Island (4) were given 24 to divide amongst themselves. This model was later extended to the Western territories as they gained the status of province. Today the four Western provinces also have 24 senators—six per province. Newfoundland, the latecomer, was allotted four senators when it joined Confederation in 1949.

Basing the selection of senators on executive appointment rather than popular election proved to be the fatal flaw in the design of the Senate. The rising tide of democracy quickly discredited the idea of a non-elected and thus unaccountable upper-house exercising a veto power over the House of Commons. A constitutional convention developed that the Senate should not use its powers to obstruct government legislation, a convention that was effectively reinforced by the partisan use of the appointment power. Notwithstanding some eminent individual members, the Senate became discredited as little more than a patronage pit for the government of the day. Today the Senate may be candidly described as at best an irrelevancy, at worst a national embarrassment.¹ Significantly, there is almost as much sentiment for abolishing the Senate as for reforming it. Senate abolition is an official policy of the centre-left New Democratic Party (NDP).

¹ Contemporary Senate appointments are the sole prerogative of the Prime Minister and he uses them to promote his and his party’s political interests. The primary function of contemporary Senate appointments is to reward party fundraisers. To this end, Mr. Chretien has adopted the dual strategies of leaving Senate vacancies open for months at a time to ‘encourage’ competition amongst Liberal bag-men and to appoint persons already approaching the mandatory retirement age of 75, thus increasing the opportunities for additional appointments—and still more fundraising. Senate appointments are also used for short-term partisan strategy—to reward loyal MPs and to create timely by-elections. Since January 2002, Mr. Chretien has ‘promoted’ three MPs from safe Liberal ridings—Ron Duhamel, George Baker, and Raymond Lavigne—to the Senate. He has done this in order to buffer the effects of a likely Canadian Alliance (CA) victory in the Calgary Southwest by-election, triggered by the February 1 retirement of Preston Manning, founder of the CA and Reform parties. Any negative publicity created by a CA victory in Calgary could be counterspun by the guaranteed Liberal wins in the other three ridings. (See ‘PM surprises veteran MPs with Senate appointments,’ *Ottawa Citizen*, March 27, 2002, A5.)

Senate reform, however, has enjoyed much more political support. ‘Triple E’ Senate reform—elected, equal, and effective—was a founding principle of the upstart Reform Party, which has dominated federal elections in the four Western provinces since 1993, and has formed the Official Opposition in the last two parliaments.² At various times, some variant of Senate reform has enjoyed the active support of the premiers of all four Western provinces. In 1992 it was briefly endorsed by all ten premiers and the Prime Minister as part of a package of constitutional amendments known as the Charlottetown Accord.

Senate reform is one of the oldest and most enduring issues—or perhaps, non-issues—of Canadian political history. My focus today will be the contemporary Senate reform movement, which dates from the mid-1970s and has been driven almost exclusively by Western Canadians and their political leaders. This Western basis reflects a conviction of regional grievance; a strong sense that the institutional status quo is permanently stacked against Western Canadian interests and that Senate reform along the lines of ‘Triple E’ is the best way to remedy this imbalance.

Economic and Demographic Change versus Political Status Quo

The contemporary Senate reform movement in Canada can be understood as a response to a widening gap between the institutions of the state and society they seek to govern; between an aging political superstructure and its evolving economic and social foundation.

Since the end of World War II, Quebec’s proportion of Canada’s population has declined by 20 percent (from 30% to 24%), while British Columbia’s share has increased 57 percent (from 8.3% to 13%) and Alberta’s by 50 percent (from 6.6% to 10%). More revealing, at the end of the War, Quebec’s population was double the combined populations of British Columbia and Alberta. In 2001, they were virtually equal. (about 7.4 versus 7.1 million, or 24% versus 23% of Canada's population).

Over a shorter time period, Quebec’s economic decline has been even steeper. From 1961 to 2001—just forty years—Quebec’s percent of Canada’s GDP has dropped by 20 percent (from 26.1% to 21%), while British Columbia’s has grown by 22 percent (from 10% to 12.2%) and Alberta’s an astonishing 51 percent (from 7.9% to 11.9%). In 1961, Quebec’s share of Canada’s GDP (26.1%) was 44 percent *more* than the *combined* share of British Columbia and Alberta (17.9%). By 2000, Quebec’s share of the GDP (21%) had shrunk to 13 percent *less* than the combined share of British Columbia and Alberta (24.1%).

This dramatic transfer of economic and demographic power from Central Canada to the two western-most provinces has not been matched with a corresponding transfer of political power. In fact, almost the opposite has happened.

Since Pierre Trudeau burst onto the federal political scene in 1968, nine of the ten elections have been won by a party led by a Quebecker. The only non-Quebec Prime Minister elected during this period, the hapless Joe Clark from Alberta, lasted less

² The Canadian Alliance Party, founded in 2000 as the successor party to Reform, maintained Senate reform as one of its premier policies but is less explicit about the ‘equal’ part of Triple E.

than six months. With the exception of the two Mulroney governments during the 1980s, our Quebec prime ministers have governed with little to no electoral support in the West. In the six elections following Trudeau's respectable showing of 40 percent in 1968, the Liberals won an average of less than 8 percent of the seats west of the Ontario-Manitoba border. During this 21-year stretch in six elections, Alberta did not elect a single Liberal MP, while Saskatchewan elected only four.

While Western Canada has been an electoral wasteland for the Liberals during this 34 year run, voter-rich Central Canada has been a political bonanza.³ In the ten elections won by the Liberals since 1963, the Liberals have elected an average of 114 MPs just from Ontario and Quebec, more than two-thirds of the 152 seats needed to form a majority government. From the 1968 through to the 1980 elections, this Central Canadian electoral juggernaut was centred in Quebec, where the Liberals elected an average of 62 (83%) of Quebec's 75 MPs. The Liberals lost their electoral stranglehold on Quebec to the Mulroney Tories in the 1980s and then to the separatists Bloq Quebecois during the 1990s, but it did not matter. Ontario replaced Quebec as the electoral cornerstone of Liberal majority governments. In the three federal elections since 1993, the Liberals have taken all but one or two of Ontario's 103 seats.⁴

The results have been predictable. On a personal level, many Western Canadians have come to feel deeply alienated from a political system in which the results of the election are already decided by Eastern and Central Canada before they even cast their votes. On a policy level, the West's lack of representation in government caucuses and cabinets has resulted in public policies that are indifferent, if not hostile, to Western interests and values.

The most egregious of these policies was Pierre Trudeau's 'National Energy Policy' (NEP) introduced during the energy crises of the mid-seventies and early eighties. The NEP imposed a variety of measures to reduce the cost of energy to Canadian consumers—concentrated principally in Ontario and Quebec—at great expense to the oil and gas industry—then concentrated mainly in Western Canada. Estimates of the cost of the NEP to Alberta's GDP alone range from 140 to 195 billion dollars over a ten year (1974–1984) period. Other federal policies that have negatively impacted the West include:

- The Canadian Wheat Board, through which Ottawa compels grain growers from Manitoba west to market all their wheat and barley through the federal Wheat Board. No such restrictions apply to farmers from Ontario eastwards.
- Equalisation Grants, through which federal tax revenues are transferred from the three 'have' provinces (Ontario, British

³ A contributing factor is the over-representation of Quebec. Despite near population parity with Quebec (7.1 vs 7.4 million), British Columbia and Alberta have only 60 MPs compared to Quebec's constitutionally guaranteed number of 75. Indeed, until the 1980 election, Quebec was allotted more MPs than the four Western provinces combined.

⁴ In the 1993 federal election, the Liberals won 98 of Ontario's 99 seats; in 1997, 101 of 103; in 2000, 100 of 103.

Columbia, Alberta) to the seven ‘have not’ provinces (and two territories) in order to provide parity in health, education and welfare services. In 1999, the last year for which data is available, the net outflow of equalisation payments cost every man, woman and child in Alberta an average of \$2 800.

- Official bilingualism, a policy initiated by the Trudeau Liberals but accelerated during the Conservative Mulroney governments of the Eighties, requiring proficiency in both French and English as a prerequisite for employment in the Ottawa civil service, especially at the higher levels. This policy has made the federal bureaucracy in Ottawa off-limits to the ninety-five percent of Westerners who do not speak French.

Implicit in these policies was a ‘divide and conquer’ electoral strategy. The West is resource rich but voter-poor, while Central Canada is voter-rich but resource poor. As long as they could confiscate new resource revenues from Western Canada to buy votes in Central and Eastern Canada, the Liberals virtually owned the House of Commons.⁵ Growing numbers of Westerners despaired of this situation, especially after their high hopes for less Quebec-centric policies under the Tory government of Prime Minister Brian Mulroney (1984–1992) were shattered. To many in the West, it appeared that the weaker Quebec became economically, the stronger it became politically. Under the institutional status quo—a Parliament dominated by the House of Commons; a Commons dominated by the Prime Minister; and a Prime Ministership dominated by Quebecers—there was no electoral incentive to accommodate or respect Western interests and opinions. Indeed, the electoral incentives were precisely the opposite. It was out of this gloomy scenario that renewed interest in Senate reform was born.

Of course, if these economic policies had benefited Canada as a whole even as they harmed British Columbia and Alberta, then Western anger could be mostly discounted as sour grapes. In fact, there is considerable evidence to the contrary. During this same 30 year time period, Canada became one of the most heavily taxed and heavily indebted countries among the industrial democracies, with corresponding declines in productivity gains and the value of its currency. This has triggered a damaging out-migration of medical doctors (averaging one thousand a year during the 1990s) and

⁵ This strategy was most explicit in the NEP, but still re-surfaces. In the 2000 federal election, our Liberal PM, Mr. Chretien, campaigning in Eastern Canada, remarked, ‘I like to do politics with people from the East. Joe Clark and Stockwell Day are from Alberta. They are a different type.’ When his audience chuckled, he added: ‘I’m joking.’ When they laughed more, he added: ‘I’m serious,’ drawing an even bigger laugh.

other mobile ‘human capital,’ mainly to the United States.⁶ The case can and has been made that Ottawa’s fiscal and economic policies have harmed the rest of Canada even more than Alberta and British Columbia.

The Contemporary Senate Reform Movement

The contemporary Senate reform movement in Canada dates from the mid-1970s, and was initially led by British Columbia. Throughout the this decade, Prime Minister Trudeau was relentlessly advancing constitutional changes of his own—mainly a charter of rights. British Columbia Premier Bill Bennett seized this opportunity to introduce Senate reform into the mix of constitutional projects under consideration. British Columbia’s preferred model of Senate reform was the German Bundesrat—some form of a ‘House of the Provinces’—in which the senators would be chosen by provincial governments and thus act as delegates to the central government in Ottawa. The Bennett initiative was widely discussed but never got off the ground, since it did not fit into Trudeau’s priorities. However, it did succeed in putting Senate reform on Canada’s constitutional agenda, a necessary first step.

In the 1980s, the initiative for Senate reform passed to Alberta. Premier Peter Lougheed, fresh from battling Pierre Trudeau over the NEP, created a provincial task force to study the idea of Senate reform. In its final report, the Alberta Task Force rejected the German model in favour of the Australian and US models—senators directly elected by the people and an equal number of senators for each province. The Alberta Task Force had virtually no profile outside of Alberta, but within the province its influence was immense. For many Albertans, Senate reform became the Holy Grail of political salvation—a belief that would soon play a crucial role in national politics as a new generation of Albertans charged onto the national political stage.

In 1987, there were two seminal events in the evolution of the Senate reform movement. The first was the Meech Lake Accord. The second was the founding of the new Reform Party. At the time, the former completely overshadowed the latter. In the end, it was the Reform Party that proved more enduring.

Meech was a package of constitutional amendments introduced by the Mulroney Government. Its purpose was to reconcile Quebec to the constitutional changes pushed through by Trudeau in 1982 but never accepted by Quebec. One amendment

⁶ Since 1968, the year Pierre Trudeau was first elected Prime Minister, the value of the Canadian dollar has shrunk from over US\$1 to US\$0.62. This decline is linked to Canada’s failure to keep pace in terms of economic productivity and capital investment. These in turn are explained by Canada’s relatively higher tax rates and government debt. Canada’s tax burden in 2000 was 44.3% of GDP, which is 40% higher than the US, our principal trading partner, and ranks Canada the third highest taxed country in the G7. Canada’s public expenditures in 2000 were 40.9% of GDP, or 39% higher than the US. Canada’s net debt in 2000 was 66% of GDP, the second highest in the G7 and 54% higher than the US (43%) and 36% higher than the G7 average (48.5%). The US is the most relevant comparison, as it receives 85% of Canada’s exports and accounts for 40% of our GDP. Successive federal governments have achieved these dubious distinctions while spending almost nothing on defence compared to our trading partners. As a percentage of GDP, Canada spends (1.03%) one-third of what the US spends (3%) and is the second lowest in the G7—only Japan spends less. Within NATO, Canada spends less on defence than the other 18 members except Iceland and Luxembourg, the former having no army and Luxembourg having only 800 soldiers. If Canada had been making ‘normal’ expenditures on defence, our debt and tax conditions would be even worse.

gave all provinces—and thus Quebec—a veto over any future constitutional change. This prospect elicited strong opposition in Alberta because of the belief that Quebec would use this veto to block any future Senate reform.

At the same time that Brian Mulroney was trying to sell the Meech Lake Accord to the ten provinces, Preston Manning was forming the Reform Party. Manning was the son of one Alberta's longest serving premiers, and benefited immediately from the widespread respect for his father. Manning launched the Reform Party as an explicitly regional party with the slogan: 'The West wants in.' Triple E Senate Reform was one of its premier policies. Nationally Manning and his upstart party were not taken seriously, but an immediate groundswell of support in Alberta resulted in growing pressure on the new Premier of Alberta, Don Getty, to withdraw his government's support for the Meech Lake Accord.

By 1989, opposition to Meech became so widespread in Alberta that Mulroney was forced to do a deal with Getty. Getty agreed not to withdraw Alberta's consent to Meech in return for Mulroney agreeing to appoint the winner of an Alberta Senate election to the Senate. In October 1989, Alberta thus held Canada's first ever Senate election. The Reform Party nominated retired General Stan Waters, who then trounced prominent Liberal and Tory candidates in a hotly contested province-wide election.

In 1990, Mulroney upheld his end of the deal, and appointed Waters to the Senate, giving Canada its first ever elected senator and the Reform Party its second elected member of Parliament.⁷ Waters immediately achieved icon status within the Reform Party, a status that only increased when he died suddenly of brain cancer the following year. Triple E Senate, already an article of faith for the growing number of Reformers, was now consecrated by Waters' untimely death.

The Waters Senate appointment was not enough to save the Meech Lake Accord, which failed to receive the unanimous consent of all ten provinces as required by the Constitution. The failure of Meech created a crisis for the Mulroney government and the country. Intended to reconcile Quebec to the new constitutional order, English Canada's apparent rejection of Meech now inflamed separatist sentiment within Quebec. In an attempt to save his reputation, his party and even his country, Prime Minister Mulroney desperately undertook yet another round of 'mega-constitutional politics.'⁸ After almost a year of intensive consultations with both governments and non-governmental interests, the Mulroney government produced an even more extensive package of constitutional amendments, this one known as the Charlottetown Accord.

This time Senate reform figured prominently from the start. It was clear that the price of Western support for Quebec's constitutional demands was significant Senate reform. In a cruel twist of fate, Mulroney appointed the still hapless Joe Clark, the

⁷ Earlier that year in a federal by-election, Reform had elected its first MP, Deborah Gray, from Beaver River, Alberta.

⁸ This term was coined by Peter Russell to capture the multi-level and regime-changing aspects of Canada's ill-fated attempts at constitutional renewal in the 1980s and 1990s. See Peter H. Russell, *Constitutional Odyssey*, revised ed., University of Toronto Press, 1994.

man whom he had dethroned as Tory leader in 1983, to head up government's constitutional negotiations team. And Clark almost pulled it off. In July 1992, Clark emerged from a meeting with the premiers from the nine English-speaking provinces with an agreement to a Senate reform package—known as the 'Pearson Accord'—that satisfied Western premiers and other Triple E supporters.⁹ The Holy Grail seemed within reach. But it was not to be.

Mulroney was in Germany at a G7 economic summit when Clark struck his deal, and Quebec had not been present. Quebec opinion leaders quickly denounced the Pearson Accord as a betrayal of Quebec's interests, and Quebec Premier Robert Bourassa signalled his dissatisfaction to the Prime Minister upon his return. Mulroney wasted no time in informing Clark that the Pearson Accord would have to be revised to satisfy Quebec. In an about face that earned him the lasting enmity of many of his fellow Albertans, poor Joe followed Mulroney's orders by eliminating an effective veto power from the proposed Senate.¹⁰ In the end, Western supporters of Senate reform, led by an emboldened Reform Party, voted overwhelmingly against the Charlottetown Accord, and contributed to its crushing rejection in a national referendum in October 1992.

Canadians' rejection of the Charlottetown Accord spelled the end of not only Brian Mulroney but also his party. In an election the following year, the Liberals swept to power in an election badly divided along regional lines. The once proud Tories were demolished, reduced from 166 to only two MPs. The Manning-led Reformers, who won 51 of the 86 seats in the four Western provinces, destroyed their Western wing. Their Quebec wing was crushed by the separatist Bloq Quebecois, which, led by a former Mulroney cabinet minister (Lucien Bouchard) captured 54 of Quebec's 75 MPs and formed the new official Opposition.

The new Liberal Prime Minister, Jean Chretien, surveyed the wreckage of the Tory party and announced a moratorium on constitutional politics. There would be no more Meech Lakes or Charlottetowns on his watch. Nine years and two more majority

⁹ The Pearson Accord met the 'Triple E' criteria but with a 'lower case e' with respect to effective. It stipulated an equal number of senators from each province (8), popularly elected using a system of single transferable vote. However, it would take the votes of 75 percent of the senators to veto legislation passed by the House of Commons, except for natural resource tax bills (50% plus 1) and bills affecting fields of shared federal-provincial jurisdiction such as agriculture (60%). Supply bills were only subject to a suspensive veto by the Senate, and a double majority of French and English senators would be required for bills affecting the French language. For agreeing to equality of representation in the Senate, Ontario would be compensated by a stricter application of the principle of 'rep by pop' in the House—adding as many as 10 MPs to Ontario's cohort. The choice of STV clearly followed the Australian model, but unlike Australia, senators would not be permitted to serve in the cabinet.

¹⁰ 'Clark re-emerges in Senate row,' by Robert Mason Lee, *The Toronto Star*, August 22, 1992. The revised final version of Senate reform in the Charlottetown Accord would have reduced the number of senators to 62 from 82 (six per province plus one each for the two territories), and allowed the Quebec senators to be selected by the Quebec government rather than directly elected. The most significant departure from the Pearson Accord was that any deadlock between the Senate and the Commons would be resolved by a joint sitting, in which presumably the 337 MPs in the Commons could swamp the 62 senators. Triple E activists and the Reform Party both claimed that this arrangement destroyed the possibility of an 'effective' Senate.

governments later, Chretien has kept his word. This constitutional moratorium has proven to be a death-knell for Senate reform, at least for the time being.

In 1998, Preston Manning, now leader of the official opposition, and Ralph Klein, the Premier of Alberta, tried to pry open the constitutional door by organising a second Senate election in Alberta. The strategy was to elect two 'senators-in-waiting' and then prevail upon Prime Minister Chretien to show his respect for democracy by appointing them as Senate vacancies occurred amongst Alberta's six Senate seats. The precedent was the Waters appointment from 1990, and it was hoped that Alberta's anticipated success in electing its senators would lead other provinces hold their own Senate elections and then demand equal treatment from Ottawa. According to this scenario, once a sufficient number of elected-senators had been appointed to the Senate and proved their superiority over the patronage-senators, public support would build for a constitutional amendment to formalise and to complete the Senate reform process. The theory was to begin with incremental, non-constitutional reform and to defer any formal constitutional amendments until the practice had become familiar and popular.

Whatever the virtues of this theory, in practice it has not worked. While seven candidates—of which I was one—contested the two Reform Party nominations, the Liberals and the Tories despaired of winning either seat and refused to put forward candidates. In the province-wide election in October, the two Reform candidates, Bert Brown (333 000 votes) and myself (274 000 votes) easily outdistanced the two independent candidates (149 000 and 136 000 votes), who in fact were the third and fourth place finishers in the Reform Party's nomination elections. Faced with such a limited choice of candidates, somewhere between 16 and 30 percent of the voters (who voted in the civic elections held concurrently) protested by boycotting the Senate election.

The Chretien government have done all they could to undermine the Alberta Senate election. At the outset they declared that the Senate election was unauthorised and even unconstitutional. When an Alberta Senate vacancy unexpectedly occurred in the midst of the election, Mr. Chretien tried to snuff out renewed public interest by quickly filling it with an appointment. After the election, the Liberals seized upon the lower voter turn out to further stigmatise the process and to justify ignoring the results.

More recently, the Liberal line of attack has been that 'piece-meal' reform on the Alberta model is counterproductive, because it would risk entrenching the current unequal distribution of senators. Senate reform, say the Liberals, must be an all or nothing undertaking. Given their moratorium on constitutional issues, this means nothing. Even this line of argument is disingenuous, as Mr. Chretien was quick to make some unilateral constitutional concessions to Quebec following the Separatists'

near victory—less than one percent—in the 1995 Quebec Referendum.¹¹ The real reason behind Prime Minister Chretien's distaste for Senate reform is the same as Mulroney's a decade earlier: the fear of antagonising Quebec and rekindling separatist sentiment. As it has so often in the past, the national unity/Quebec separatist card has trumped other issues of national importance.

Since the election, there has been one Senate opening from Alberta, and Prime Minister Chretien ignored a public plea from the Premier of Alberta and appointed a popular jazz musician to the open seat. There is a second retirement due at the end of this year. There is no reason to think the Prime Minister's appointment will be any different—other than that a shortage of famous jazz musicians may force him to resort to a former ice hockey star—something he has done before.

Prospects for reform

What then is the prospect for Senate reform in Canada? I see three possibilities.

The first hinges on the fortunes of the Canadian Alliance, the successor party to the Reform Party. The Alliance was formed in 2000 in an effort to re-unite the Tories and the Reform and thus end the vote-splitting on the right that was guaranteeing Liberals re-election. Senate Reform remains a central plank in the Alliance policy book, although the equality principle was softened to make the Senate project more palatable to Ontario and Quebec, the two most populous provinces. The election of an Alliance majority government would kick-start the Senate reform process.

An Alliance breakthrough, however, does not seem imminent. In the 2000 election, only about half the Tory voters switched to the Alliance, thus continuing the vote-splitting that gave the Liberals over 40 plurality victories in Ontario alone. The Alliance has since been plagued by party infighting and defections over the issue of leadership. In March 2002 the Alliance chose a new leader, but it remains to be seen whether the Alliance (with or without the Tories) can recover to seriously challenge the Liberals in the next election.

An Alliance majority government could only be formed by carrying at least half of Ontario's 103 parliamentary seats. This means that the Alliance would have to successfully market Senate reform to the provincial electorate with the most to lose from a re-invigorated upper chamber. To sell Senate reform in Ontario, the CA will have to advertise the 'good government' dimension of an elected and effective Senate, rather than the 'House of the provinces' dimension. Here is the point at which the achievements of the Australian Senate, with its scrutiny of government bills and powers of investigation, would become especially relevant to the Canadian debate.

¹¹ The Liberal Government passed a statute that purports to 'loan' the federal government's constitutional veto power to each of five designated 'regions'—Atlantic Canada, Quebec, Ontario, the Prairies and British Columbia. Under this 'law,' Ottawa will refuse its consent to any constitutional amendment that does not have the support of each province and region (majority of governments comprising the region). This was the Liberals' indirect way of 'restoring' Quebec's constitutional veto power, an eleventh hour promise made by Chretien to avoid defeat in the 1995 Quebec Referendum.

A second parallel with Australia comes into play here. In Australia, the ascendancy of your Senate has been greatly aided by the support of left-of-centre, non-economic interests such as the Greens and the Democrats. In Canada, the analogous coalition of interests is much less supportive of Senate reform, because they are achieving so many of their policy goals through litigation under the Charter of Rights. Just as the success of your Senate (to articulate minority concerns) is often used to make the case against the need for a bill of rights for Australia, so in Canada the Left's success under the Charter of Rights has dampened their interest in Senate reform.

A second possibility depends on the outcome of the next provincial election in Quebec. If the separatist Parti Quebecois is re-elected, then the prospects remain nil. The Separatists have zero interest in Senate reform or any other constitutional reforms. They want to leave Canada, not reform it. If the Quebec Liberal Party defeats the Separatists—and the polls indicate they should—the Liberal Party leader has already signalled that he intends to re-open the constitutional file with Ottawa. It was a previous Quebec Liberal Premier, Robert Bourassa, who negotiated the failed Meech and Charlottetown Accords, and the Quebec Liberal Party still regards those demands as unmet.

While the Prime Minister is able to ignore demands for constitutional reform from the West with relative impunity, the same is not true for Quebec. But Quebec's constitutional agenda cannot be dealt with bilaterally. The kinds of changes sought would require the consent of at least six other provinces. This of course opens the door for Western Premiers to re-introduce the Senate reform issue on a *quid pro quo* basis—just as Alberta did in 1989 in the midst of the Meech Lake process.

Whether a new generation of political leaders would be more successful than their predecessors at combining these diverse interests remains to be seen. Quebec and Alberta, otherwise the two most dissimilar provinces in Canada, share a dislike of Ottawa. Quebec's solution is to reduce the influence of Ottawa in Quebec. Alberta's solution is to increase the influence of Alberta in Ottawa—through a Triple E Senate. Squaring this circle is no easy task, although the leader of the Alliance Party, Stephen Harper, has in the past indicated his preference for Quebec-style 'policy fire-walls' to protect Alberta from predatory central government policies.

The third and final possibility rests with a more assertive approach by one or more Western premiers. As noted above, Ottawa cannot afford to ignore Quebec's constitutional initiatives because the perceived costs are too high—the threat of secession. No Western Canadian political leader has yet had the stomach—or the public support—for this kind of high stakes political poker. This could change, especially if the Canadian Alliance fails to make an electoral breakthrough in Ontario and becomes a dispirited regional rump party.

Conclusion

Let me conclude with an anecdote. On Tuesday, my wife and I took the public tour of Parliament House. When we were in the House of Representatives, our guide was giving a brief explanation of how laws are made. She explained that most bills are prepared and introduced by the Government. She then noted that the Government does not have much trouble getting its bills through the House of Representatives,

because it always has a guaranteed majority. Then she added, ‘Fortunately, there is still the Senate ...’ and went on to explain how the Government does not have an automatic majority and its bills are subject to much sharper scrutiny.

‘Fortunately’ indeed! I have benefited greatly from observing your Senate at work over the past month. The recent Senate committee investigations into the ‘children overboard’ affair and the Treasury’s ‘debt swapping’ losses have re-confirmed my belief in the virtues of vigorous bicameralism. My enthusiasm comes not because I necessarily believe the Opposition’s allegations against the Government—I realise there is plenty of partisan self-interest on both sides of these issues—but precisely because your Senate creates an effective forum for partisan challenge and reply.

The founders of the United States, Australia and yes, even Canada, saw the merit of bicameralism as a means of institutionalising good government by ‘making ambition check ambition.’¹² They had no illusions about the effects of ambition amongst the political class, and nor should we. Again, in the words of James Madison:

It may be a reflection of human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.

Now as then, governments will misuse or abuse their powers, and then do all they can to hide their misdeeds from the voters. Unfortunately we in Canada have forgotten this insight and lost the advantages that flow from a vigorous bicameral parliament.

So what does Australia have that Western Canadians want? This month—after two weeks of minus-20 degree temperatures—most would be happy to have your sunshine. But weather aside, my stay in Canberra has only confirmed that what Western Canada—indeed all of Canada—needs is an Australian-style Senate. My Senate envy, rather than being cured, has only been inflamed.



Question — Do you mind me suggesting that what you’re really admiring is not the Australian Senate, but multi-party politics? What you really dislike is majority government, and for that reason, the title of your talk—interesting though it was and interesting though your talk was—is basically wrong. That is, it is not our American-style Senate that you admire, it is our multi-party politics that you admire.

Ted Morton — I agree that the method of election—the single transferable vote in the Senate—is the key to creating the Senate as an effective check on the House of Representatives. I am quite familiar with Campbell Sharman’s diagram that shows

¹² *Federalist* No. 51: ‘by giving to those who administer each department the necessary constitutional means and personal motives to resist the encroachment of the others. The interests of the man must be connected with constitutional rights of the place.’

seats in the Senate and that, until 1949, the majority and minority graphs are far away from the middle. There are huge majorities for the winning side and almost nothing for the losing side. And then the minute you changed your electoral system, they converged in the middle and you end up with something other than majority government. So, I do agree with you. When I used the term ‘wedding an American-style Senate to a parliamentary system’, I did not mean that you had done exactly what the Americans did. But there is no question that the Canadian founders were extremely literate and well-informed about the US Constitution and the workings of the US system through Bryce’s book, and that they were much more inspired by the role of the Senate than by anything in the House of Lords, which was unfortunately a sort of working model for the Canadian founders.

Question — You stated that your members are appointed for life. Are there incidences where they have been dismissed?

Ted Morton — Mandatory retirement at age 75 was introduced in 1960, so it is sort of like judges—appointment for life until mandatory retirement. I do not think there has actually ever been a senator removed. There have been several instances where senators resigned prior to what *would* have been their removal. In fact—this will sound familiar—just within the last 18 months there have been two senators who were convicted of abuse of office. In both cases the abuse was ‘influence peddling’, or selling their votes for money. They went through the whole appeals process and then ran out of appeals. They’ve done the crime and they’re paying time, but they resigned rather than got thrown out.

There was one other incident that came to light in the 1990s, where a senator—while collecting his salary of \$100 000 per year when you include benefits—was basically living full-time in Mexico at the beach. He had only shown up in the Senate chamber I think 11 times in the previous four years, which met the minimum requirement for picking up his cheque. So that is why I said that at times our Senate is a national embarrassment.

Question — I grew up in British Columbia, and I remember a time in the 1960s and early 1970s when the question was: ‘What is the point of the Senate? It is a waste of time.’ I know you have given the justification for reform of the Senate, but what is the argument for abolition of the Senate, because it just seems to be irrelevant? It is entirely different from the Australian Senate and there are a variety of reasons why it should be gone. It is just a House of Lords in disguise. British Columbia and Alberta—as with most Canadian provinces—have unicameral parliaments. If Alberta is so keen on a Senate, why didn’t they re-introduce bicameral parliament? You talked about British Columbia and Alberta, which have two entirely different political cultures. I wondered if there is the same sort of support for Senate reform in British Columbia?

Ted Morton — British Columbia and Alberta are very different politically. British Columbia has just come off a decade-long run of governments formed by the New Democratic Party (NDP), which is the social democratic left-of-centre party. The NDP in Alberta typically gets one or two seats and less than 10 percent of the popular vote. So that alone shows the difference in political culture between the two. At the

federal level however, British Columbia went even more strongly for the Canadian Alliance Party in the last election than Alberta did. For the first time in four decades, a single political party—the Canadian Alliance Party, the successor party to reform—took over 50 percent of the popular votes out of British Columbia. So in terms of national politics and their reference towards Senate reform—which is a key issue there—I would say that in terms of public opinion British Columbia and Alberta share that objective.

I think there are two answers to your question about the reasons why Albertans and westerners don't have bicameralism, if they are so enthusiastic about it. One is that we're naturally cheap, and we don't want to pay for another house. I think most people in British Columbia and Alberta really don't like the politicians they have already, and the idea of having yet another house full of them—that they would have to pay and support—doesn't have any sort of immediate appeal. On a more serious level (but perhaps also facetious) is that all politicians are hypocrites, almost by definition. And while the leaders of the provincial parties, at least in Alberta, always talk about the virtues and merits of bicameralism and an elected Senate, they are not quite so enthusiastic about it at home in Alberta, because that, of course, would mean that they (particularly the Premier) would become less powerful. So they tend to think bicameralism and an elected Senate is a great idea for Ottawa, but they don't want to spend the money and they would just as soon let the Premier continue to be King of Alberta. Provincial premiers are not really like kings; they are more like princes. They really are the cock of the walk and king of the roost and all of that, so the appeal of Senate reform at home at the provincial level is not quite as strong.

Regarding abolition of the Senate, the NDP has Senate abolition as their policy at the national level. And if you ask the man or woman on the street: 'Do you want Senate reform?' you will get 60 to 80 percent support. If you ask: 'Do you want to abolish the Senate?' you will get about 50 to 60 percent support. Public opinion is sort of fluid. Everyone knows they don't like what they have, and if you prompt them with a question about abolition there will be support for that, and if you prompt them with a question about reform, a slightly higher percentage will buy into that.

The reason I prefer Senate reform over Senate abolition is in part because of what I have observed both in the workings of the US Congress and in the Australian Parliament—that effective bicameralism provides better government. And, again, I go back particularly to the powers of committees. The two small examples that I have witnessed in the past month here are the ability of the Senate to force the government ministers to testify, and to table documents. Governments don't like to do that, and it doesn't matter if they are governments to the left or to the right. Governments are going to have scandals and screw-ups and abuses, and they want to do everything they can to prevent the public, the voters, from learning of that. A vigorous bicameral system such as you have and such as the Americans have is a way of forcing the door open and letting the light of in on what government wants to keep private and secret for very self-interested reasons. I don't mean to criticise the Liberal Government here, I think this is inherent in all governments.

Question — As a fellow Canadian, it was nice to see our country explained so clearly. Lest you all leave here thinking that Alberta—as a result of its exclusion from

the centre of power—is in dire straits, it is probably the most successful province in Canada, notwithstanding the constraints on its representation. Its economy is far and away the strongest in the country and people generally live fairly good lives there. That is not an argument against Senate reform, but it has not been a total dead end for the people there.

Effective bicameralism might be a means to prevent the necessity for the use of the Charter of Rights. And I think you are right in saying that governments, while not necessarily victimising the people, are able to go forward with their agenda without any checks. Do you see the push for Senate reform militating against the Charter movement?

Ted Morton — The Charter of Rights really just means the court, because the High Court—or our Supreme Court—ends up being the institution that exercises the power created by a charter or a bill of rights.

One of the arguments against a bill of rights for Australia is that it is not needed because the Senate is already doing a great job of checking the Government. This is true particularly amongst the parties or the non-economic interests on the left—the environmentalists, feminists, gay rights movements, peace movements. These types of interests have done alright in the Senate. So maybe even the enthusiasm of the social left in Australia has been dampened by the fact that they are enjoying some success in having their interests articulated and even defended successfully in the Senate.

Unfortunately, in my view, the opposite has happened in Canada. Most of the enthusiasm for Senate reform comes from Senate right and further right interests. And what I call centre left and left interest (some of you may know the term ‘post-materialist’)—feminists, gay rights, environmental movement—have done so well under the Charter of Rights by bringing interest group litigation and winning cases under the Charter through the Supreme Court that they have basically lost interest in the Senate reform project. Understandably so. Why would they want a Senate when they are doing pretty well in terms of policy change through litigation under the Charter in the Supreme Court? So the reverse dynamics seem to have occurred in Canada and the US.

Question — I’ve watched with a degree of amazement the Canadian political system vote out a party from 167 seats to two. That was unprecedented in my reading of political literature in modern times. Was the factor that caused the demise of that party constitutional reform, or was it the fact that they implemented a GST and that it was done very poorly? My understanding of the facts was that the government introduced GST, and broke the nexus between offering income tax cuts and bringing in the GST at the same time. They brought in the income taxes in advance, and people got used to them and quite resented it. They didn’t abolish provincial taxes. People really resented that and it was considered a botched policy.

In Australia there was a degree of interest and alarm when that happened because we had a government trying to bring in tax reform. It seemed to me that that was the overwhelming factor that destroyed the government, not constitutional reform.

Ted Morton — You are absolutely right, the GST was brought in by the Mulroney government in its second mandate in the late 1980s. In that first Senate election in Alberta in 1989, the mantra of Stan Waters' (the general who won and was appointed) campaign was 'Axe the Tax'. The Atlanta Braves' fans are quite obnoxious and at Braves games they have a tomahawk in their hands—and at the 'Axe the Tax' rallies in the 1989 Alberta Senate election everybody was imitating the Braves fans with their tomahawks. So the GST was a political landmine for the Tories and no doubt contributed significantly to their destruction in the 1993 election.

But I would venture to say that it is at best equal to, not greater than, the extreme dismay and even disgust at these two huge exercises, first Meech Lake then Charlottetown, which just preoccupied everything that happened in national politics for almost twelve months. Huge amounts of money were spent. However, of even more concern than the money was the amount of time taken and the preoccupation with the agenda, with absolutely nothing coming out of it. Most importantly—and again, this is a Canadian idiosyncrasy—the Mulroney coalition was anchored in two provinces, Quebec and Alberta. And after the failure of Meech and Charlottetown Quebec split off into the separatist camp, and in fact the leader of the Separatist party when it went national was a former cabinet minister of Mulroney's, Mr Bouchard. So it was actually a Tory cabinet minister that led the breakaway in Quebec and took 56 of the 75 seats there, and then in the west, Manning and the reformers swept out. In Alberta, for example, all 26 seats in both Mulroney elections went to the Tories and in 1993, the Reform, I think, took 22 of those 26 seats.

Question — The then-Opposition promised that if they were elected they would abolish the GST—which, of course, they didn't. But when you came to vote in that election you had one party saying they'd abolish it and one saying they would keep it. But in terms of constitutional reform I didn't think that it was necessarily such a clear division on what to vote on.

Ted Morton — I think there would be regional differences again. Perhaps in Ontario the constitutional issues were less important. In Quebec, however, they were very important. In electoral politics and in the media, everything gets simplified and becomes kind of like a comic strip. Symbolically, the defeat of Charlottetown was seen and portrayed in the Quebec media as English Canada basically spitting on them—in fact, there was an incident where some English rights group burnt a Quebec flag, and the video footage of them burning the Quebec *fleur-de-lis* was shown again and again on Quebec television during this period.

Again, in the west, there was a lot of disgust and anger about the GST, but there was an equal amount of concern about the constitutional issue. Not only had it failed, but, if you look at all these policies that are either targeted at the west or have a disparate impact on the west, there was a growing despair that it just couldn't be changed by winning government because, in fact, the west had been part of the Mulroney coalition. The Mulroney coalition that governed from 1984 to 1993 had lots of western MPs and in the end, westerners thought that it didn't make any difference whether government was the liberals or the conservatives—they were always going to play second fiddle to Quebec. I'm not saying that was right or wrong, just that that was the sentiment that fuelled this huge and continuing abandonment of the federal

Tories—they had already abandoned federal liberals in support for this reform and now the Canadian Alliance Party in the west.

Question — In describing the method of electing this new Senate that you are postulating, you referred from time to time to the ‘single transferable vote’. Is that correct, or are you advocating a proportional representation system comparable to what Australia has had since 1949? And does that include electing the Senate in two different batches so that it is a continuing house? Would you have a provision for a double dissolution similar to Australia? Have you studied whether, given the pattern of voting across Canada, if you were to adopt our system of constituting the Senate, you would in fact end up with a Senate like Australia? And, on your way home, are you going to New Zealand to tell them about your views on the Australian Parliament and suggest that they perhaps took the wrong course when they reformed their House of Representatives?

Ted Morton — I’ll beg off completely on the New Zealand question.

On the electoral system itself, my understanding is that the Australian Senate is elected on a single transferable vote basis, which is a form of proportional representation—although there are, of course, many forms.

I don’t have any strong views on double dissolution. I suppose you need a tiebreaker if there is a deadlock, but I haven’t given that serious thought.

The model that was proposed initially in July 1982 was for eight senators from each province, and it was to be on a rotating basis of four and four, similar to here, and using the system of single transferable vote. If that system were applied, would Canadian society then produce some splinter or minor parties of the left and the right? I have no doubt that they would. Certainly the Green movement in Canada, particularly in British Columbia, is very strong. Heck, the Marijuana Party in BC is pretty strong. They got three percent of the vote in the last provincial election. Like I said, British Columbia is very different from Alberta.

Again, on the right, from the Rocky Mountains right to the Canadian shield (which is basically the Ontario border) is all grain farming, just hundreds and hundreds of miles of grain. The farmers there can’t stand the Liberals, and they became disillusioned with the Tories. But I know the Reform caucus, and there’s discontent there that we’re not strong enough on farm issues either. So I could very easily see something like your National Party having seats in a reformed Senate. I think there is the diversity of interest in Canada that would give rise to some minor parties that could successfully compete in an Australian-style Senate.

Question — You might get an elected Senate, but at the same time you might not get a Senate that you would like. You might have a situation similar to the one we have in Australia where Tasmania has the same representation as New South Wales, or as in the United States, where Rhode Island has the same representation as California. What are you going to do to ensure that you don’t have anomalies like that? And what are you going to do to ensure you won’t get gridlock between the Senate and the House of Representatives, which gives rise to situations such as we have at present in

Australia, where the Senate can frustrate the elected power in the House of Representatives?

Ted Morton — I think I've made it clear that I think it's great that there's a second chamber that does frustrate and put pressure on the government that controls the other house. I know that during the last series of Labor governments, there was a great deal of unhappiness with and attacks on the Senate, but based on what I've observed in the four weeks I've been here, Labor is pretty happy in the Senate right now. I think enthusiasm for the Senate seems to ebb and flow, depending upon the situation in the other house.

Democratic Equivocations: Who Wants What, When and How?*

Patrick Bishop

Representative democracy, as it developed in Europe and the United States and in Australia, has defensible merits. Unless we realise its merits, we risk undermining it in the very attempt to improve it. Here I am evaluating not democracy as an ideal, or even an idea, but as it is practiced in Australia, and elsewhere, as representative democracy. This form of democracy is often disparaged as not ‘true’ democracy. In fact, representative democracy and its political practices come in for some pretty bad press, as irrelevant, self-serving and aloof from the people’s wishes. Even those you’d expect to be its most staunch defenders equivocate. Most famously, Winston Churchill said of democracy: ‘It is the worst form of government, aside from all the others that have been tried from time to time.’ Hence my title *Democratic equivocations*.

Of course, it maybe that these ‘equivocations’ are its most enduring and endearing features—not for representative democracy the certainty that leads revolutionaries to their death at the barricades, or for that matter, the certainty that the trains run on time. The problem is if we don’t understand what it is we value and why we value it we may lose it in our attempts at reform. My contention is that many new initiatives aimed at addressing perceived ‘problems’ of representative democracy rest on the unquestioned assumption of the desirability of more direct participation and a desire on the part of the people for more participation. Here I ask the question, when it

* This paper is based on a lecture presented in the Department of the Senate Occasional Lecture Series at Parliament House on 19 April 2002.

comes to involvement in democratic politics, who *really* wants what when and how? My argument will be that while representative government has certain participatory functions there are other functions that must remain the responsibility of the representatives. And that there is considerable evidence that the urge for increased participation in politics, in any general sense, is simply not there.

One way to answer the question of what the people want is to ask them. When we ask the people what they think of representative democracy, what do they say? Global surveys show that commitment to the institution of representative democratic government, internationally, is very high.

The mean value for all 38 countries (in the *World Values Survey*) is 84 percent. Eleven countries, most of them Western European states, have over 90 percent support for democracy as a form of government, suggesting that experience with functioning democratic regimes, with all their blemishes, far from leading to cynicism and rejection, reinforces citizens' commitments to that ever more widely accepted form of government.¹

To localise this claim, I can report that a recent survey in Queensland produced a similar result. When asked in a random phone poll if they were happy with democracy as a system of government, 78 percent of respondents said 'Yes'.

But there is a paradox when we look a little further. Even people who are critical of their regimes also value democracy as the best system of government. Hans-Dieter Klingemann identifies this group as 'dissatisfied democrats'—Pippa Norris calls them 'critical citizens'—those in surveys who 'put a high rating on the attractiveness of democracy as a form of government but at the same time place a low rating on the performance of their particular democratic regime.'² Understanding these 'dissatisfied democrats', I believe, will turn out to be an important exercise.

Eminent American political scientist Robert Dahl also draws attention to the fact that surveys repeatedly show that 'despite their disdain for some key democratic political institutions, citizens ... continue to express high levels of support for democracy as a system.'³ He suggests a follow up question be asked: 'What is it precisely people are supporting when they say they support 'democracy as a system'?'

In my survey in Queensland, I attempted to answer this by asking the question: 'How do you think the system of democracy could be improved?' Twenty-eight percent wanted more participation and 27 percent wanted more leadership from politicians!

¹ Hans-Dieter Klingemann, 'Mapping Political Support in the 1990s: a Global Analysis', in Pippa Norris, *Critical Citizens: Global Support for Democratic Governance*, Oxford, Oxford University Press, 1999, p. 4. Note here the equivocal mode—despite their experience of the system they accept it as a good form of government!

² Pippa Norris, *ibid*, p. 54.

³ Robert Dahl, 'A Democratic Paradox?' *Political Science Quarterly*, vol. 115, Spring 2000, p. 35.

Rather than following that tangled empirical path, I'm going to explore the nature of representative government, and its challenges, to see if we can map out a normative path for a better representative system in response to the current raft of concerns.

Problems for representative democracy

Representative democracy is prey to conflicting emotions: apathy and antipathy. Internationally, voter apathy as measured by voter turnout figures, and high informal votes raise questions about the legitimacy of elected representatives. Presidents who win (or lose depending on how you see the last US election result) with less than 50 percent of the potential vote struggle to retain legitimacy, based on popular support at the ballot box, at least. In Australia this problem is masked by our unusual system of compulsory voting, but the challenge is emerging here in the failure on the part of many young voters to register.

Public antipathy towards politicians is a perennial problem for representative democracy. Real scandals and fraud certainly do not help alter the popular image of the untrustworthy politician. But, leaving lurid stories aside, is there something in the nature of democratic politics itself that means even politicians *who are doing their job well* will often be accused of lying, or deception?

Declining social capital, following Robert Putnam's claim that demise in *private* participation is injurious to representative democracy,⁴ poses a threat as the 'un-civic' generation fails to embed the institutions in the requisite net of social connectedness.

All these factors have led to the re-emergence of calls for direct democracy, a nostalgia for New England town meetings, or an electronic 'Athenian assembly', made inevitable by the rapid expansion of internet access. Now, the champions claim, is the time for 'true' democracy!

In advance of the imminent arrival of the new Athenians, a growing emphasis, by the media and politicians alike, is being placed on polling. While professional polling samples require few respondents to be 'statistically' useful, the opportunity to respond to a poll has multiplied with the '1-800' (telephone) and internet opportunities at the end of just about every commercial news bulletin and current affairs show, or even when you open up your home web page.

But responding to polling buys representatives back into the dilemma of antipathy. If policy follows the polls are they being democratic by accepting the wishes of the people or engaging in a cynical grab for power at the next election? If policy eschews poll results is it an example of sound leadership against the ill-informed 'mob' or the arrogance of the oligarchs?

All of these problems and their 'solutions' provide a challenge to current understandings of the role of the representative and representative institutions. First a little about what representation means and its key features.

⁴ Robert Putnam, *Bowling Alone: the Collapse and Revival of American Community*, New York, Simon & Schuster, 2000.

Representation

The eighteenth century French philosopher Montesquieu was quite clear in delineating the competency of ‘the people’: ‘The people are admirable for choosing those to whom they should entrust some part of their authority.’ Basing their decisions on the ‘facts’ and evidence of their ‘senses’ they know very well a man’s war record and are then quite capable of electing a general.⁵ This competence does not extend to direct control over government. The people, while sufficiently capable to call others to account for their management, are not suited to manage themselves.

For Montesquieu what mattered was that public business should proceed at a pace that is neither too slow nor too fast. The trouble with ‘the people’ is that they always act too much or too little. ‘Sometimes with a hundred thousand arms they upset everything; sometimes with a hundred thousand feet they move only like insects.’⁶ Thus the ‘bare economy’ of the representative system is explained. The people have a say in matters they are competent to judge and public business is carried out expeditiously by elected officials, without what was often also the fear of the ancient philosophers, the excesses or inaction associated with direct rule by the people.

John Stuart Mill in his *Considerations on Representative Government* is more equivocal. He outlines representation as, even at best, a compromise. While he asserts ‘the only government which can fully satisfy the social state, is the one in which the whole people participate’,⁷ practical necessity requires a representative body, whose functions he does not delimit, except with the proviso that the representative body has control of *everything in the last resort*.⁸

Even from J.S. Mill, the most influential architect of the idea of representative government, we have both the direct democratic urge and the practical reality requiring the representative body as the site for final judgement. Significant features of representative democracy are that: officials are elected the people are competent to choose them; the people are, in effect, incompetent to govern themselves; and while all should participate, control of everything in the last resort rests with the representative body.

Equivocation on the part of philosophical founders and political practitioners, even from the system itself, forms the backdrop to our investigations of both problems and solutions the system is said to face.

If what we are looking at rests on equivocal philosophical foundations, it is important that we get a clear understanding of the nature of the problems that have emerged in representative democracies.

⁵ C.deS. Montesquieu. *The Spirit of the Laws*, A.M. Cohler, B.C. Miller and H.R. Stone, trans. and eds, Cambridge, Cambridge University Press, 1989, p. 11.

⁶ *ibid*, p. 12.

⁷ John Stuart Mill, *Considerations on Representative Government*, Oxford, Oxford University Press, [1861] 1994, p. 198.

⁸ *ibid*, p. 213.

Voter apathy

Voter apathy becomes a problem in representative democracy when it raises questions about the legitimacy of its incumbents. However, when we hear slogans such as ‘Don’t vote, it only encourages them’ or ‘It doesn’t matter who you vote for, a politician wins’, it is not clear that apathy towards representative democracy is necessarily addressed by offering more opportunities to participate.

One argument, of course, is that apathy actually represents a tacit form of consent. The reasoning goes something like this: ‘Politics does not impact on my life. Experience has shown me that whoever is in power will not materially affect my life and I choose to spend my time on other pursuits.’ A potential voter thinking along these lines is certainly not looking for *more* involvement in politics.

A common argument against the vote is that a single vote doesn’t have any effect. This seems to be challenged by recent close election results in the US and surprise results in a number of Australian states. The concept of the blue ribbon seat has certainly been undermined in Australia through a willingness of long-term Labor and Liberal voters to change their votes either between the major parties or to new political parties or independents. One cause of apathy might dissolve once voters see that their vote *can* make a difference.

Juxtaposed to an ideal of direct democracy, the vote has always looked insignificant. Rousseau famously saw the English as returning to bondage once their vote was cast. But especially where there is less certainty of results and less safe seats, the act of voting, rather than a trivial act of non-participation, becomes a highly significant participatory act. A vote, in fact, casts a long shadow in front of it. Importantly, the vote and the fact of the next election act as a continuous discipline on the elected, requiring them to give public account of their actions and to take constant notice of public opinion through its various channels of expression, such as media comment, opinion polls, party meetings and lobbying activity.⁹

The capacity for influence when voting, as a factor of time expended, is very high indeed. Voting delivers a considerable degree of control for a small outlay, to an extent that is liable to be overlooked if we concentrate on the act alone and ignore all that it causes to happen. In the emerging, more fluid, electoral climate a picture emerges of a ‘stronger’ democracy without a need to advocate full participatory practice or control of the agenda by the people.

The vote also reshapes political institutions. Prior to the introduction of proportional representation, party discipline had effectively removed the Senate’s role in the scrutiny of legislation. It has been restored because some voters now choose not to vote for the same major party in both Senate and House of Representatives elections.

Antipathy towards politicians

To some extent, antipathy will forever be the lot of politicians. Out-and-out bad behaviour cannot be defended or condoned, but one of the most common accusations,

⁹ D. Beetham, ‘Liberal Democracy and the Limits of Democratization’, in David Held, ed., *Prospects for Democracy*, Cambridge, Polity Press, 1993, p. 64.

that we elect them to do one thing and they do another, goes to the heart of what we should and can expect from a representative system.

As Edmund Burke famously argued, democratic representatives are necessarily more than mere agents of the peoples' changing wishes. As he informed the electors of Bristol, 'your representative owes you not his industry alone but his judgement; and he betrays, instead of serving, you if he sacrifices it to your opinion.'¹⁰

Here we have a 'trustee' model of representation, in contrast to the 'agent' model I will outline later. The representative is charged with making the best decision in *consideration of the interests* of those he or she represents. Depending on how Burke's words are interpreted, however, they might imply a radical disconnection between the representative and those they represent. Political theorist Hannah Pitkin connects them in a conversation between representative and the represented, and says of the potential for the representative to be in conflict with the electorate:

[t]he representative must act in such a way that there is no conflict, or that if it occurs an explanation is called for. He [or she] must not be found persistently at odds with the wishes of the represented without good reason in terms of their interest, without a good explanation of why their wishes are not in accord with their interests.¹¹

This expresses clearly the need for public justification as part of the process of representation. I believe that this is the area where most attention is needed to address the concerns of 'dissatisfied democrats'.

The 'conversation' also identifies the 'expertise' of representatives—their capacity both to make and defend judgements. Thus my earlier point that representatives can sometimes generate antipathy towards their class by exercising the very skill we expect of them. A rejoinder from the representative might be—what should we do when the weight of the evidence causes us to change our view?

It is not, after all that the 'stuff' of politics is fixed. In a representative democracy, under a 'trustee' model of representation at least, it is incumbent on those who make the decisions to offer a public justification of why that decision was made.

Decline in Social Capital

Robert Putnam, billed as 'the most influential academic in the world today' on his visit to Australia in 2001, has placed a problem on the agenda of representative democracy. His claim is simple yet startling. He moves from the 'conventional claim that the health of American democracy requires citizens to perform our *public* duties' to a more expansive and controversial claim 'that the health of our *public* institutions

¹⁰ Edmund Burke, 'Speech to the Electors of Bristol', in B.W. Hill, ed., *Edmund Burke on Government Politics and Society*, London, Fontana, [1774] 1975, p. 156.

¹¹ Hannah Pitkin, *The Concept of Representation*, Berkeley, California, University of California Press, 1967.

depends, at least in part, on widespread participation in *private* voluntary groups—those networks of civic engagement that embody social capital.’¹²

All the empirical evidence Putnam can muster (and the study is one of the most comprehensive ever undertaken) shows that on all the indicators not only is the performance of public duties in decline but participation in private voluntary groups is also in a massive decline. If the correlation established in previous work by Putnam between the health of public institutions and voluntary activity is correct then the continued function of those public institutions are indeed under threat.

Here I am not going to develop an argument about whether Putnam is right in his claim, but look how governments have responded, or can respond, to it.

At first glance the nature of the problem seems to limit the role government can play. In a democratic society it clearly cannot coerce people to once again go bowling in leagues, attend PTA meetings or join bridge clubs. Indeed, if, as I think it is in Putnam’s argument, the private nature of these associations is an important factor here, the government cannot have a role. Government-created social capital seems either an oxymoron or something we might expect from a totalitarian regime—one could argue that the STASI in Romania, where half the population spied on the other half, had high levels of social capital.

Where I think representative government does have a role draws on the distinction Putnam makes between ‘bonding’ and ‘bridging’ social capital. ‘Bonding’ social capital is that which draws people who are alike together—a shared interest, ethnicity and so on; ‘bridging’ social capital brings people together who are different. And I think bridging social capital can actually best be done, not by governments, but through shared participation in political processes. In fact, I would argue that bridging social capital emerges in elections. An election is one of the few times in a modern, complex, multi-ethnic society, with differences between city and regions or rural communities, when we can define a single community—those who collectively participate in the electoral process.

For representatives the message is clear. There is a need for them to respect the process, not by acquiescing to the will or whim of a majority, but by offering public justification for the choices they have been *entrusted* to make. And I will draw this point out further as I discuss the role of technology in all this.

Technological determinism

The new technology of the internet and the rapid growth in home internet access features in suggested reforms to representation. Beyond addressing some of the problems identified above, it is seen by some as presaging an age of ‘true’ direct democracy.

Governments were relatively slow in adopting the new technology but, especially in Europe, interactive government websites have become standard features. The Austrian Government’s *Help Gv* site, for example, receives nearly three million ‘hits’ per

¹² Putnam, *Bowling Alone*, op. cit., p. 336 (emphasis in the original).

month across its three levels of government.¹³ The site not only provides information but also the capacity to pay license fees, speeding tickets and application forms for all government services. What they do not currently do is seek advice from the community on matters of policy, or operate an on-line democratic forum.

A recent and bold experiment by Australian MP Mark Latham offered a form a direct participation in policy formulation via the representative. A series of questions were posted on a website and the electorate was asked whether they supported or rejected the proposal. In effect the site made the representative a true agent of his electorate. It is a fascinating experiment because it highlights some of the issues that the new technology raises and, I think, reveals that the technological availability of such a system alone does not determine its desirability.

In this experiment a response rate of about 250 per question was achieved, from 1000 registered participants. I don't know of other MPs who have attempted this experiment, but this is also about the level of interest that questions generate on the Australia-wide *Vote.com* site which undertakes to send results to the Prime Minister and the Leader of the Opposition. While Latham's stated aim was to achieve a much higher response rate, he nonetheless met his stated obligation to follow the wishes of his electorate. The result of the first ballot set him at odds not only with his own views but with party policy.

Here the experiment runs squarely into two related problems. What constitutes the wishes of the electorate? Once such is determined, what is the obligation on the representative, as 'agent', as opposed to 'trustee', to deliver it?

The agent model, while seeking to be more democratic, inevitably supports only a majority. In the case of the Latham experiment this could have been as few as 126 members in the electorate. A greater response, however, would not resolve the dilemma if the representative *in exercising their judgement* finds the majority view at fault. The advantage of the trustee model is that the representative is seen as having that trust from *all* the electorate as determined at the last election *and* re-evaluated at the next.

The new technology may prove a boon to government service delivery. The Austrian results show a willingness on the part of the people to use it for government service delivery. The desire of the people to participate in matters of policy, even when it offers the direct capacity to influence the representative, is currently very low. The experiment shows that governments should think carefully before using popular government information and service delivery sites as mechanisms for policy determination. It could either destroy the capacity of representatives to make judgements or it will set up expectations of direct control that cannot be met in a representative system.

Conclusion

The parameters for addressing voter apathy, antipathy towards politicians and a perceived decline in public trust are clearly set. There appears to be is no general push

¹³ www.help.gv.at/

for a fully participatory democracy. Rather, there is considerable scope for, and in existing democracies, a body of citizens (the ‘dissatisfied democrats’) willing to assist in reform of the practices of representative government. Such a reform process could bring the people’s satisfaction with the performance of their government into line with their overwhelming commitment to democracy as the best system of government. And here I’ll offer my equivocation—the gap, of course, should never completely close for surely one measure of the health of a democracy is its capacity to accept dissent.

So a tentative answer to my question: Who wants what, when and how?

The people want representative government to continue. I cannot find a push for direct democracy in the World Values survey or the small survey I undertook in Queensland. My own view is that many of the concerns of ‘dissatisfied democrats’ would be addressed by better performance by the representatives in the current system, in particular in the area of public justification—completing what should be a reasonable conversation between citizens and their representatives about political issues and outcomes.

There is clearly a need to address these issues now. The problems need to be seen in the manner I have explored them today, through their impacts on representative democracy rather than in response to an ill-defined, or technologically determined call that now is the time for direct democracy.

As for how this is to be done, I would argue that the new technological options should all be considered for the potential they offer for the kinds of improvement I’ve outlined. For example, to what extent can the new technology be used to improve the capacity of *representatives* to take into account the variety of views of the people (as some form of consultative process, for example) but also as an unmediated mechanism for *justifying* why decisions were taken? We need to be wary, in particular that technological possibilities alone do not drive us towards delivering expectations of direct democracy when the aim is to improve current representative practice.

Better and more frequent public justification on the part of the representatives is also more consistent with current institutional arrangements, which seem, according to the available empirical evidence, to have general community support. Giving over representative responsibility to claims of the need for more direct participation seems a much more risky strategy.

While I said at the outset that the champions of representative democracy are hard to find, there are exceptions. Nobel laureate Amartya Sen, in a newspaper article marking the new millennium, said, unequivocally, that it was the ‘best invention of the twentieth century’. He may be right, but I see it as an invention that by its very nature, seems more in tune with equivocal support—not claiming to be the best, but offering a reasonable track record at keeping the worst at bay. According to the survey evidence, the people seem to agree with that.



Question — How do you square your defence of Burke’s notion of trustee representation with the strict parties that have arisen since Burke’s time?

Patrick Bishop — The party system is often criticised. A view has developed that while we elect a local representative, that representative has to ‘toe the party line’. It seems to me, though, that the political parties still need to justify themselves. If a representative is going to support the party line, they still have to publicly justify that position. If they just say that they are doing it to keep up the numbers, then they are not completing their side of the public conversation. Of course, the party system causes an even bigger problem for representatives who see themselves as agents, as Mark Latham found out when it was suggested that, if he disagreed with his party, he should cross the floor.

Question — It seems to me that if you are strongly supporting the trustee notion of representation, we really need to move to a much more ‘multi-party’ system, where you can have much more choice as to whom you decide to give your trust. Would you agree with that, and support proportional representation for the lower house as well as the Senate?

Patrick Bishop — Proportional representation might assist, but I think it would be wrong to see our two, or a two-and-a-half party system, as excluding multiple views. There are often heated discussions between factions! So, while parties might operate as a block in the Parliament, the political process is hardly solidaristic. I think also we live in a time of greater voter volatility, which makes the process more dynamic. As Dean Jaensch said, Australians seemed to be born with a voting gene— our DNA tells us that we are going to vote Labor or Liberal. It seems that ‘genetic manipulation’ is happening here and now when it comes to people’s voting choices!

Question — I want to put the notion that representative democracy can be wider than parliament. In Australia—unlike Britain—Parliament is not supreme, but is limited by the Constitution. In the last episode of severe action by a governor-general, Parliament was dismissed. Looking at that situation, I want to suggest that the notion of representation should include a head of state who is elected, if we’re going to define democracy as, in our system, representing the people. Can you comment on that proposition?

Patrick Bishop — I think the proposition of an elected president, rather than a governor-general, is part of a push for a more democratic system, but it’s been directed more towards a disappointment with the current structures. The campaign against the republic was run on the basis that there was a danger that it would become a ‘politicians’ republic, and the contra-notion to that was that it would be more democratic if we could elect our own president. It seems to me that this buys us into a whole new level of politics, and that the representation there would be in a single person, rather than in the multiplicity of electorates that we have now. I am not sure that it would actually address your concern that a healthy democracy requires many different voices.

Question — I agree that the political strains or tensions that are evident now would be added to by having an elected president, but I don't think that should be the central issue in considering this proposal. It seems to me that if the existing constitutional powers of the governor-general could be exerted by an elected president—that is, to advise the executive and to warn them and, ultimately, where the Constitution has been severely breached, dismiss the prime minister—we would begin to have more of a genuine separation of powers at that level than we do at the moment. I'm not trying to be party political about the present situation, it could easily occur with a change of government. I believe we have an opportunity not only to build on the tradition of the governor-general—that was built on perhaps by Governor-General Deane when he ventured into the arena—but to take that further by basing the authority of an elected president on the fact of popular support and on the fact that an elected president could not be dismissed at an instant's notice.

Patrick Bishop — It is interesting that you talk about reform of an institution and then relate it back to a particular occupant, such as Sir William Deane. We need to be careful when looking at institutional change. In a particular instance we seem to have the kind of leader we might want as a president. But if there was another, different, incumbent, would you want to change the institution in the same way? Similarly with the changed role of the Senate: The Democrats or the Greens in the 'balance of power' role might appeal to some, whereas One Nation might have had less appeal. You have to be careful when you alter an institution that you are not just thinking of the current events, but that you are also thinking of how that institution is going to operate over time. It is a complex process.

Question — The example that you gave concerning Mark Latham raises the old issue of whether you have a representative or a delegate. When you elect a certain person, he represents himself as having a range of views. To take a current issue, such as whether a lesbian is entitled to have IVF—suppose the person you have elected says they are Catholic with certain views, and on the other hand they have polled their electorate and discovered that a majority take a different view. What is his or her duty? Is it to follow what the public in their electorate advocates, or is it to follow their own conscience? Where do you place the situation of a delegate against that of a representative? What is the duty of a representative?

Patrick Bishop — In the kind of improved system that I'm trying to map out here, my position would be that the decision would be made by the representative, but it would be an obligation on the part of the representative to *justify* why that decision was made. On that particular issue you would get a range of views, and some of them would be out-and-out prejudiced, or prejudiced simply because some people have not thought about this sort of thing. You could also have a range of views based on either religion or on beliefs about sexuality and so forth. The representative is in a position to make that decision. Under our current system, of course, the party will probably direct him or her on what decision to make, unless it is a conscience vote.

Interestingly enough, Mark Latham, on his web site, said he wasn't asking for community input on economic issues, as they were too hard for people to understand. Instead he was going to stick to easy issues, like ones that require moral evaluations!

While he may have thought these were less controversial, his first poll showed otherwise.

The obligation of the representative, as I'm mapping out here, is to justify why a decision was made. In some cases it may persuade people whose initial response was to say, 'No' to realise that there was a reason behind that decision that they hadn't considered. In the conversation, the representative can actually persuade people that they may have actually been wrong. If you have a delegate version, the majority—by definition—always wins.

Question — Is the internet going to take over altogether?

Patrick Bishop — I hope not. I'm worried about precisely that. If the internet takes over altogether, we dispense with parliament and with any checks. We all vote on a Friday night that we want this and don't want that and it becomes law by Monday morning. That is a frightening prospect.

Question — I'd like your comments on the availability of information. The 1970s were the high tide of Australian enthusiasm for access to information about what government is doing and has done and intends to do. You'd have to say the tide has receded considerably since then. The ability to make a considered judgement on any of these matters depends on not having the daily headlines dominated by one or two subjects, but spread over a much wider range. Also on having reasonably ready access on a whole range of subjects which the citizen might wish to identify as of interest, rather than those of people who are selling a million newspapers.

Patrick Bishop — I would agree. I'm mapping out something that is a conversation between people who have different levels of knowledge. But within a conversation like that, if the representative is going to justify their position they have to provide information that is going to support it. I don't think they can hide behind 'commercial-in-confidence' or assertions that the people can't be told now but will be told later. That kind of thing is not going to assist a process of public justification, which is where I think the representative conversation has to be improved.

I had a simple experience of this situation. The Queensland Government has regional forums, where ministers talk directly to interested members of the community. I was visiting one of these forums at Ipswich and the previous meeting had set up a couple of requests to government. It was up to the minister to report on what had happened. One request from the community had been successful and the minister was able to explain why it had been successful – generally a good news story. The minister responded to the other request by saying: 'I'm sorry. I know you wanted this, but you can't have it.'

It struck me that at that point that the people at the meeting did not immediately get up and start pulling the room apart, because he also included *why* they couldn't have it—an explanation and a public justification. I thought that was something that we don't see enough of in the political process.

My worry is that people might think that, if we had a full electronic direct democracy, it would solve the alienation problem. I think that it would bring with it far more problems, so I'm identifying public justification as probably a better avenue for politicians to overcome alienation and loss of trust. Politicians depend on the people retaining faith in the system. If people stop voting in elections or stop taking them seriously, they have a real problem.

Question — What you have just said raises the issue of compulsory voting. Given our history, what effort or impact would the removal of that compulsion have? Would those who are disaffected—the cynics—happily go home and forget about it, or would they, paradoxically, feel disenfranchised?

Patrick Bishop — It is an unusual circumstance in Australia that we have compulsory voting. I think the number of people who are not registering to vote is a significant issue now in Australia, and the general disenchantment felt toward political processes that we see in surveys of young children is also a problem.

I used to work in local government in New South Wales when voting wasn't compulsory, and nobody used to vote. Then when it became compulsory, everybody voted. It does get people out to participate. There are benefits in people participating in voting, as I have said before. It might be one of the few times when we can identify ourselves as a single community. I suppose I see compulsory voting as an Australian political fact that we have to build into our explanations of political behaviour in Australia. But I'm not a strong advocate for or against it.

Question — Could a government not use the Mark Latham experiment as an example of a way to introduce a greater opportunity for people to participate in the decision-making process, but say up front: 'These are the kinds of problems that come from using this forum for people to express their views. We don't guarantee to slavishly follow the majority position, but we'll use it as a more organised and efficient way of hearing what people have to say, rather than perhaps attending talkback radio sessions'?

Patrick Bishop — What interested me in this area was the study I had done on consultation practices—which is, consulting in the context of a representative democracy. One of the problems consultation practices run up against is if it develops an expectation that your representatives will act as your agents—and the Latham experiment was set up in precisely that way. I think there is a positive benefit in all these consultation practices. The danger of setting it up in that 'yes/no vote', '57 percent of people wanted this and 43 percent didn't' sort of way, is that the result can be interpreted to suit your purposes. It can either be used to say 'I am with the people here', or it can be used to say 'The people haven't got a clue and I am being the great leader.'

Just recently, the Australian Prime Minister has used the polls to justify a policy position, and also disparaged the polls to say why he was not going to do something. I'm not picking on him—of course, that's what all political leaders will do. But you have to throw yourself back on the question of what we are talking about when we get these kinds of undifferentiated yes/no votes.

The problem with the 1-800 number poll at the end of *A Current Affair*, for example, is that I don't think I have ever seen one of them where I haven't been able to predict what the result will be. You just know that the people who are irate about the issue are going to ring in and the people who are apathetic are not going to ring in. You can predict the result by the way that the story has been told. The danger is that that result then becomes a 'fact', and those kinds of facts can be dangerous.

Question — I am interested in the relationship between the manifestations of social capital that you talked about on the trustee representative model—particularly in terms of bridging social capital, if you have good examples of how it may have been used to sway opinion. Typically in local government we see those parochial concerns that gather around school closures or road locations and so on, and there is probably good evidence that they do affect the political process, but what about on a larger scale?

Patrick Bishop — The curious thing with the Putnam thesis is that he doesn't actually make the direct connection between people meeting in bridge clubs or going to PTA meetings, and the strength of the political process. The point of his study is that it seems that this activity in the private sphere creates a kind of network in which better understandings of representative democratic institutions are also developed—one is dependent on the other but they do not actually directly influence each other. There is no causal link established. In his studies in Italian communities, people who sang in choirs, for example, developed a high level political participation which in turn meant that the political institutions functioned well. So you can only tease out what *might* be the causal links.

Certainly, in the Australian context, governments—despite the reform processes of the last 20-odd years—are still seen by the people as having a role to play if something is going wrong. I've seen government agencies that think: 'If there is declining social capital, we'd better go out there and build it up.' But the argument is actually showing that governments can't build it. If governments are going to do anything in the social capital area, they might treat it almost like an environmental impact statement, by asking: 'Before we go in and institute this government program, what is the existing social capital we need to take account of that we might actually destroy by implementing such and such a program?' It's quite a subtle difference.

Politics at the Margin: Independents and the Australian Political System*

Campbell Sharman

The term 'independent' has good associations. It triggers thoughts of self-reliance, freedom, and open-mindedness. But, if the word is linked with 'candidate' at election time, the reaction may not be as favourable. For most voters, an independent candidate is an anomaly, to be seen as one of the names on the ballot to be ignored, or viewed as a crank who is making a fruitless protest in a party dominated world. For activist members of the large parties, the response may even be hostile; independent candidates can confuse the flow of votes in close electoral contests. Many independent candidates have previously been members of a party and may be running at the election to challenge their past associates and to voice their dissatisfaction with their former party. And if the word 'independent' is linked with 'member of Parliament', strong and usually unfavourable reactions will be found among members of Parliament who represent the large parties. This will especially be the case for members of the governing party if the support of an independent member is required to keep the government in office. In these circumstances, the response is one of apprehension and resentment.

These varying responses tell us a little about the place of the independent in the political process but there are many questions which need to be resolved. What are independent candidates independent of? What is the relationship between independents and political parties, large and small? Why do independents run for office and what determines their electoral success? Are they a new phenomenon? What is their significance for the process of representative government? And what explains the recent increase in the number of independent candidates and members of Parliament?

* This paper was presented as a lecture in the Department of the Senate Occasional Lecture Series at Parliament House on 17 May 2002.

It is this last question which has made independents an issue for both political parties and political scientists. In May 2002, there were 25 members of the lower houses of state and Commonwealth parliaments who were elected at general elections as independents.¹ This is equal to the largest number of such members since the current party system emerged around 1910. The figure was matched early in 1941 when the then major conservative party, the United Australia Party, was beginning its process of dissolution. But in 1941, 12 of the independents were members of the South Australian House of Assembly, and only one had been elected to the House of Representatives. Now, the House of Representatives and all state parliaments except Tasmania have between 3 and 5 independent members elected to the lower house. Of most significance for the largest parties, all parliaments except the Commonwealth Parliament have seen periods of minority government over the last fifteen years, with most of these being dependent on the support of one or more members of the lower house who were elected as independents. This is why independents are a hot political topic.

Two factors have combined to produce this result and enhance the political salience of independents. The first is a trend which has been visible for a number of years. In the ten years from 1993 to 2002, 44 independents were elected to state and Commonwealth lower houses. This is more than double the number elected in the previous ten years (19), and more than three times the number in the ten years before that (14). The second factor is the decline in the combined vote share of the largest two parties at general elections. The average for all state and Commonwealth lower houses has dropped by more than 10 percent over the last decade, from 85.4 percent to 74.4 percent, a decline which has been distributed fairly evenly between the Australian Labor Party and the Liberal Party. The combination of these factors has led both to an increased likelihood that independents will be elected, and to the possibility that such members will hold the balance of power.

The meaning of independent

Before looking at explanations for these changes, we should return to some of the basic questions about independents. The most fundamental of these is: 'What is an independent?' This is a question which is surprisingly difficult to answer. An independent is someone who is not associated with a political party. This is fine as far as it goes, but what is it about a political party, the absence of which defines an independent? There are two ways in which this question can be dealt with. The first is to say that an independent candidate is someone who runs for election without a party label. Electoral laws are blurring this distinction because, if having a party label means having a party affiliation listed on the ballot paper, only members of registered parties can have party labels. Candidates of non-registered parties are not independents even if they have no label on the ballot. But this distinction aside, an independent candidate for an election is reasonably easy to define. He or she is someone who refuses to run with a party label and seeks the support of voters because of the candidate's personal political values rather than those of a party.

¹ All the data used in this paper are taken from the Australian Government and Politics database held at the Political Science Department, University of Western Australia. Much of the information in the database is available on the web at: www.elections.uwa.edu.au

The second approach is to ask: ‘What is an independent member of Parliament?’ Here the party label—or lack of label—with which a member has been elected is less important than the member’s behaviour in Parliament. If a member refuses to be bound to vote with a fixed bloc of members, he or she is said to be an independent. Such representatives are not members of a parliamentary party or caucus and can vote on measures in Parliament as their own political judgement dictates. Many independents start their life in reaction to the pressures of being a member of a parliamentary party. They have had a disagreement with their party and decide to leave the caucus, sit as independents and vote in Parliament as they, rather than the party, choose.

If we put these two characteristics together, we have an independent as someone who runs for office without a party label on the understanding that he or she will not be bound by any party affiliation when voting in parliament. In both aspects, independents are distinguishable from members of parties, particularly the disciplined parties which have dominated Australian politics since 1910. In these parties, the ability for a candidate to use the party label at election time is granted on the condition that, if the candidate is elected, he or she promises to follow the decisions of the parliamentary party or caucus in casting a vote. This undertaking is explicit in the Australia Labor Party, and implicit—but hardly less binding—in the Liberal Party.

This contrast means that independents are defined by their aversion to the discipline of the modern party. But it also means that independents have much in common with the members of the loose party groupings which characterised Australian politics from the granting of self-government in the 1850s until about 1910. Such party groupings or factions were linked by shared values, commitment to similar policies, admiration of a particular leader, as well as the hope of holding office.² They formed fluid coalitions in parliament, the largest of which would support the government of the day and were often called, for that reason, ministerialists. At election time, candidates were elected because they and their policy orientations were well known in the local community rather than because of a party affiliation. Their campaigns relied on supporters who would form an organisation which would operate during the election period but would cease to exist between elections. Above all, these members represented geographically defined communities. The party groupings with which they were often associated in parliament have been called parties of notables, reflecting the dominance of personality and locality in the election of representatives. The continuing theme of community politics is the defining characteristic of today’s independents. As such, independents are the heirs of the pre-modern party of notables, representing a small but persistent reaction against the dominance of contemporary party driven politics, both in the electorate and in parliament.

Other reactions against party politics

Independents are not the only manifestation of dissatisfaction with modern party politics. If modern party politics is taken to be synonymous with the politics of the two largest parties, Labor and Liberal, the most important sign of disaffection has been the rise of minor parties. In recent times, it has been such parties as the

² For a study of some of the earliest such groupings, see P. Loveday and A.W. Martin, *Parliament, Factions and Parties* (1966).

Australian Democrats, the Greens and the meteoric rise and fall of Pauline Hanson's One Nation Party which have been the biggest factor in reducing the vote share of the largest two parties. There are several explanations for the rise of these new parties based on social and economic change, but three political themes predominate. The first is a protest against the limited policy choice offered by the large parties; the second is a concern with a particular set of issues centred around such areas as the environment or immigration; and the third is an aversion to the apparent dominance of party elites in manipulating both parliamentarians and the political process.

This last theme is one shared with independents, but the remedy offered by minor parties differs significantly from that offered by independents. For the Australian Democrats, the influence of the party machine is countered by stressing the involvement of rank and file members in all critical decisions made by the party. Policy direction, the choice of candidates and even the choice of leader are open to postal ballots by all members of the party. In addition, parliamentary members of the Democrats are not bound to vote with their colleagues if they disagree over measures before parliament.

The Greens take a different tack, putting stress on extensive consultation with members of the party at the local level. Dissatisfaction with those controlling existing parties was a major element in the original appeal of the One Nation Party, even though the party began with no policy for democratising its own structure and problems with membership of the party led to serious legal difficulties with electoral commissions over its registration as a party.

In some respects, minor parties represent the antithesis of the protest against big party politics made by independents. The support for minor parties is spread, albeit unevenly, across the whole electorate and their focus for representation is on those institutions which use proportional representation for the election of members. Such an electoral system permits the representation of parties or single issue groups which have system-wide support above a certain level, but whose votes are never sufficiently concentrated in one particular geographical district to elect a member under a single member district system. This has meant that small parties see their power base as being in the Senate and the upper houses of New South Wales, South Australia and Western Australia, all of which use variants of proportional representation. Tasmania, as is often the case, provides multiple exceptions which will get separate treatment but, Tasmania aside, small parties and single-issue groups rely on system-wide support and aim for representation in upper houses.

Independents, by contrast, live or die by the support of a narrowly defined community. As all state and Commonwealth lower houses except Tasmania use single member districts to elect their members, this means that independents are a direct challenge to the ability of the big parties to secure majorities where they count most, in the lower houses of parliament where governments are formed. The result is that, while minor parties are a nuisance, independents can be a more serious and direct threat to the aspirations of the big parties to form government.

Before exploring this further, we should note another, and once common, way of resisting the organisational limitations of the major parties. This was to run under a

label which had the word 'independent' in front of a party name. The idea was to signal the general policy and ideological stance of the candidate, but to indicate that the candidate would not necessarily be bound by the party caucus in parliament. It should be added that this remedy was often used by candidates who had had a falling out with their party, or had not been able to secure party endorsement as a candidate. These semi-independent candidates have existed in state and federal elections over the last hundred years, although they were more common in the first half of the last century. South Australia has been an exception in that such candidates have persisted until recently; two Independent Labor members of the South Australian House of Assembly were elected in 1985 and 1989, and held the balance of power in the Bannon minority government which took office in 1989. Independent Liberals have also been elected, one in 1985 and another in 1997.

The major parties dislike such candidates because the 'independent' addition to the party name provides an open invitation for disgruntled members of their parties to run against endorsed candidates. As a consequence, the major parties in most jurisdictions have conspired to preclude the label 'independent' from being added to the name of a registered party.

But the large parties cannot control what independents choose to call themselves in parliament. In the Western Australian Legislative Assembly, two candidates who were elected in 2001 as independents wish to be known as 'Independent Liberals'. Both were originally members of the Liberal Party and both have established themselves as independents and been re-elected at general elections as independents. Both, however, wish to indicate their continuing dissatisfaction with the organisation of the Western Australian Liberal Party by calling themselves Independent Liberals in parliament.

It should be noted that whenever data for independents are referred to in this presentation, only figures for genuine independents are used—candidates running under a party name with 'independent' added in front of it, are excluded. In addition, independents are only counted if they are elected as such at a general election—members who defect from their party after being elected on a party label or who were elected at a by-election are excluded. Similarly, no account is taken of what independents call themselves once they are elected. While on the topic of disclaimers, I should point out that collecting information on elections for a period of a century always involves dealing with anomalous cases. But these idiosyncrasies have little effect on the broad patterns of voting and representation.

Independents and House of Representative elections since 1996

If we return to the community politics of independents, we are still left with questions. While the unfavourable reaction to party politics may be understandable, support for independents has been only a very minor theme in Australian politics even if one which has shown recent growth. The long term vote share for independents at all state and Commonwealth lower house general elections since 1911 has averaged just under 4½ percent. As we shall see, this varies by parliament but in no lower house has the average exceeded 5½ percent. What is it about some candidates and electoral districts that enables an occasional independent to capture enough votes to win a seat? How, in other words, do independents get elected when their system-wide support is so low?

At the 2001 federal election, 1039 candidates were nominated for the 150 electoral districts which make up the House of Representatives; 113 (10.9 percent) were listed as independents and another 30 ran without a registered party name. Of all these, only three independents were elected—Peter Andren and Tony Windsor from rural New South Wales, and Bob Katter from rural Queensland. In an excellent chapter by David Solomon in the book which he edited, *Howard's Race: Winning the Unwinnable Election*,³ Solomon looks at the circumstances under which these three candidates were elected. He points to a number of shared characteristics. At the 2001 election, all three had already had experience as parliamentarians; Andren as a sitting member who first won his House of Representatives seat in 1996, Katter who had been a long time representative of the National Party in both the Queensland and federal parliaments, and Windsor who had been an independent member of the New South Wales Parliament for about ten years.

Being a local political notable clearly helps in getting elected, and Andren's success at his initial election in 1996 would have been greatly assisted by his being a local television presenter. All three had won what were once regarded as safe National Party seats, and Solomon notes that two of three, Katter and Windsor, had been members of the National Party. The disruptive effect of the One Nation Party, claims about the ineffectual role of the National Party in protecting rural interests, and disillusionment with party politicians in general are all referred to by Solomon as reasons for the election of these three independents.

The feeling of being let down by the major parties appears as a continuing theme in the success of independents. This is borne out in a helpful survey by Scott Bennett (1999) in a research paper prepared for the Commonwealth Parliamentary Library.⁴ If we go back to the 1996 election, four of the five independents elected to the House of Representatives in 1996 were contesting seats without the endorsement of parties of which they had previously been members. Graeme Campbell had been disendorsed by the Labor Party for the seat of Kalgoorlie; two former representatives from metropolitan Perth, Paul Filing and Alan Rocher, had been disendorsed by the Liberal Party; and Pauline Hanson had her endorsement as the Liberal candidate for Oxley withdrawn shortly before the election.

Of these four, Campbell and Hanson were maverick members of their parties espousing views which gave the party little choice but to expel them, and Filing and Rocher had been on the wrong end of intra-party struggles which had cost them their party endorsement. The factional disputes within the Western Australian Liberal Party brought the party into disrepute and goes much of the way to explaining how Filing and Rocher were able to win their seats against endorsed Liberal Party candidates.

All four of these independent candidates claimed that party organisations were out of touch and needed to listen to the real interests of the local community. But, as Solomon notes for the 2001 election, there were several independent candidates who could make these claims and appeared to have a good chance of getting elected but, in

³ Sydney, Harper Collins, 2002.

⁴ Scott Bennett, 'The Decline in Support for Australian Major Parties and the Prospect of Minority Government', *Parliamentary Library Research Paper* no. 10, 1998–99.

the event, did not win many votes. The explanation would seem to be that, to get elected, an independent needs both a high local profile through community engagement, and a degree of ineptitude on the part of the major party which has normally held the seat. If the Labor and Liberal parties had anticipated the problems which surfaced with the endorsement of the four candidates who ran successfully as independents in 1996, it is possible that none of them would have been elected

Notoriety over disagreement with a former party is apparently only good for one election as an independent to the Houses of Representatives. The only two independents to be re-elected as independents at general elections since 1945 have been candidates who could not have been seen simply as party renegades: Ted Mack as a former Mayor and member of the New South Wales parliament, elected to the House of Representatives in 1990 and 1993; and Peter Andren in 1996, 1998 and 2001.

Systemic explanations

Can we now answer the question of what it is about an independent candidate or the electoral district that enables an independent to be elected? There are some suggestions in the anecdotal evidence from the last three federal elections but, as all the commentators have pointed out, the election of independents to the House of Representatives is far from typical. And some of the evidence is contradictory; in 2001, the independents were all from rural electoral districts and two of the three had links with the National Party; but in 1996 two of the five were from suburban electoral districts, three were unendorsed Liberals and one was an unendorsed member of the Labor Party. And no independents were elected between 1966 and 1990.

There are good reasons to think that the House of Representatives is not the place to expect independent members or to find reasons for their occurrence. The first reason is that the day to day issues affecting people's lives are almost all within the administrative responsibility of the states. The Commonwealth may have grandiose plans and transfer lots of money to the states, but the actual administration of everything from hospitals and schools to the police, local government, the criminal law and the rules for land use and zoning are all state responsibilities. If community is the key, things that matter to the community are state and local issues, not federal ones.

The second reason is related to size. If we take all those electors entitled to vote at a general election for a parliamentary chamber and divide this number by the number of members in the chamber, we get the average number of electors to be represented by each member. If we average this number for each state and Commonwealth lower house since 1911, we get an idea of the relative representativeness of each chamber over the whole period from 1911–2001. The average enrolment for each House of Representatives member in this period is more than twice the average number for the lower houses of the New South Wales and Victorian parliaments, more than four times the Queensland and South Australian parliamentary averages, six times the Western Australian average and more than nine times the number for the Tasmanian lower house.

Table: Vote share and number of independents elected at general elections, Australian state lower houses and the Commonwealth Parliament, 1911–2001

Legislative chamber	Number of elections in period 1911–2001	Mean vote share of independents*	Number of independents elected		Elections with one or more independents elected		Average electoral enrolment per member of chamber
			mean	range	n	%	
	n	%	%	n	n	%	n
State lower houses							
New South Wales	30	4.8	2.2	0-8	25	83.3	22 893
Queensland	32	3.9	1.2	0-5	19	59.4	12 205
South Australia	30	5.5	1.7	0-12	18	60.0	12 315
Tasmania	28	4.5	0.8	0-3	14	50.0	5 857
Victoria	32	4.8	1.5	0-6	23	71.9	21 503
Western Australia	29	5.3	1.0	0-4	12	41.4	8 796
All states mean	30.2	4.8	1.4	na	18.5	61.3	13 928
Commonwealth							
House of Representatives	36	2.3	0.6	0-5	15	41.7	54 862
Senate (1949–2001, excluding territories)							
Whole chamber	21	0.7	0.5	0-2	10	47.6	123 993
NSW senators	21	0.4	0.0	0	0	0.0	276 034
Tasmanian senators	21	7.9	0.5	0-1	10	47.6	26 736

- *Independents are treated as a single party grouping and their vote share at general elections is included only if it exceeds 2 percent of the first preference vote. See text for the definition of independent and related issues.*

Source: Calculated from the Australian Government and Politics Database, Department of Political Science, University of Western Australia

It is assumed that the smaller the number of electors per member, the easier it should be for an independent to become identified with the interests of one or a small number of communities. In turn, this would allow an independent candidate to contrast his or her concern with local issues with party representatives who were bound by a party organisation and a party platform. So, the larger the enrolment for each member of the lower house, the fewer independents should be elected.

If we look at the aggregate data for all state and Commonwealth lower house general elections from 1911, the expected pattern appears for the House of Representatives. This chamber has the largest average number of voters per member but the lowest average vote share for independents for any lower house (close to half of the next lowest) and the smallest average number of independents elected over the period.

So far so good, but this explanation does not help to make sense of the variations between the states. New South Wales has the largest average enrolment per member of all state lower houses and yet has the highest score for almost all the indicators of success for independents. One or more independents has been elected at 25 of the 30 general elections (83.3 percent) for the New South Wales Legislative Assembly since 1911 with an average of 2.2 independents being elected at every election, both of

these figures being significantly higher than those for any other state. These scores are in spite of the New South Wales average vote for independents being equal to the average for all states.

Still more puzzling is the case of Tasmania. This state has by far the smallest average enrolment for each member of its House of Assembly yet it has the lowest figure for the average number of independents elected and the second lowest score for the number of elections at which an independent was elected. It is also the most decentralised state with a large number of regional communities committed to protecting local interests. Perhaps Tasmania holds the key to explaining the existence, or rather the absence, of independent members of parliament.

Tasmania—exceptions proving several rules

Tasmania is the federation's smallest state both in geographical size and in population. It has a little over 330 000 voters currently on the electoral roll for state and federal elections. Returning to the figures about representativeness, the state has had the smallest average number of electors for each member of the state lower house, the House of Assembly, over the period since 1910. The knowledgeable among you will be bursting to tell me that this is not a fair comparison because, since 1909, the Tasmanian lower house has been elected by the single transferable vote method of proportional representation (PR-STV). Members of the House of Assembly are elected from five multimember districts returning first 6, then 7 and now 5 members from each district.

But this accentuates the problem. Proportional representation is supposed to work in favour of the election of any small party and independent candidates who can secure support above a quota for representation. Why has there not been a swag of non-major party representatives in Tasmania?

Investigating the reasons for this puzzle was the object of a research project two colleagues and I undertook some years ago.⁵ Briefly, the answer is that Tasmania adopted PR-STV before the emergence of modern mass parties. When these parties did become dominant, they had to adapt to a system of representation which put a great deal of stress on the personal political appeal of members. Party candidates were not simply chosen because they had a party label but because they also had local support as individuals. Party groupings in such a system can be seen as teams of independents who happen to share the same party label. This has been reinforced by electoral rules which prevent the parties from ranking candidates in a party list, and ban how to vote cards which tell the voter of a party preferred order of candidates. The result is that each member on a party ticket is running as much against his or her team mates as against the opposing teams. It also means that the voter can vote consistently for a single party but vary the ranking of particular candidates. The result is that the Tasmanian House of Assembly has a high rate of turnover of members—members must continually prove to the electors that they are doing a good job or else they are dropped by the voters. In such a system, there is no demand for independents—everyone is a quasi-independent.

⁵ Campbell Sharman, Graham Smith and Jeremy Moon, 'The party system and change of regime; the structure of partisan choice in Tasmania and Western Australia', *Australian Journal of Political Science*, vol. 26, no. 3, November 1991, pp. 409–428.

In the years from 1890 until 1909 there had been many independents elected to the Tasmanian House of Assembly but all this changed with the adoption of proportional representation. Candidates running in teams were more likely to benefit from the exchange of preferences so that there were inducements to form party groupings rather than running as an ungrouped independent. The party groupings of Labor and Liberal have been very successful, but their origins mean that Tasmanian parties are very different creatures from those on the mainland. This difference points to the conclusion that, if large parties can incorporate a high degree of candidate responsiveness to local issues, such parties are largely proof against both the election of independent candidates, and the defection of party members to sit as independents after they are elected.

Tasmania has two other idiosyncrasies to explore. The first is its upper house, the Legislative Council. This chamber is full of independents and has been for the last century. Party members have been elected, but the largest single grouping for almost the entire period has been independents. The chamber of, until recently 19, now 15 members, has been elected from single member districts by rotation which means that the chamber has never had a general election. Here the regional nature of Tasmania is graphically displayed with the politics of locality and personality fought out in the upper house. The experience of the Legislative Council confirms the conclusion that the absence of independents in the Tasmanian lower house reflects the way the electoral system encourages large parties to incorporate local sensitivities through the process of selecting of candidates.

The Senate

Before moving to re-examine independents in other state lower houses, we should consider the last of the Tasmanian exceptions which involves the Senate.

I should say at this point that I have not examined other state upper houses as part of this investigation into the role of independents. One reason for this omission is that comprehensive information on the patterns of representation for state upper houses is not as readily available as it is for lower houses. The more important reason, however, is that state upper houses have gone through several transformations over the last century both as to their systems of representation and their role in the parliamentary process. This factor and the large variations between states makes systematic comparison of state upper houses a topic on its own, a task that I understand my colleague, Dr Bruce Stone, will undertake in a Senate occasional lecture later this year.⁶

The Senate is a different matter, although it illustrates the major structural changes which can affect upper houses in Australia. It is now famous for its role since the 1960s as a chamber in which PR-STV has enabled minor party and independent senators to hold the balance of power in the chamber.⁷ These senators use their

⁶ Bruce Stone, 'Australian Bicameralism: Potential and Performance in the State Upper Houses', Senate Occasional Lecture, Parliament House, Canberra, 8 November 2002.

⁷ Campbell Sharman, 'The representation of small parties and independents in the Senate', *Australian Journal of Political Science*, vol. 34, no. 3, November 1999, pp. 353–361.

influence to improve the quality of legislation and to enhance the parliamentary scrutiny of the Commonwealth government. Does this situation amount to a contradiction of the generalisations about independents derived from looking at the operation of PR-STV in the Tasmanian lower house? I do not believe that it does.

To begin with, the adoption of PR-STV for the election of senators from the 1949 election marks a major discontinuity in the composition of the Senate and it is only from this date that comparisons are made. Taking this period of 21 elections from 1949 until the present, the Senate has the lowest score for the representation of independents for any chamber. Of these 21 elections, there have been ten at which one or more independents have been elected. At every one of these ten elections, an independent senator has been elected from Tasmania, and on only two occasions has any other state provided an independent senator. These two exceptions were Senator Negus in 1970, and Senator Valentine (running as the Valentine Peace Group) in 1984. Both these non-Tasmanians were from Western Australia and both ran more as single-issue candidates than as independents. Syd Negus campaigned for the abolition of death duties, and Jo Valentine for anti-nuclear, peace and green issues on which she had previously been elected to the Senate as a member of the Nuclear Disarmament Party. And both Western Australians were elected only once on an independent ticket.

Compare the Tasmanians. All were elected as independents more than once: Reginald Turnbull twice, Michael Townley twice and Brian Harradine a remarkable six times. All had previously been members of one of the large parties: Turnbull had been a Labor MHA in the Tasmanian Parliament; Townley had failed to gain Liberal preselection for a House of Representatives seat (he eventually gained endorsement as a Liberal Senate candidate in 1975); and Harradine had been a major player in Labor Party and trade union politics.

How can this Tasmanian anomaly be explained? First, as we have seen, Tasmania is used to the politics of personality and locality. Secondly, the fact that Tasmania has equal representation in the Senate but has the smallest number of voters of any state, means that the average electoral enrolment per senator in Tasmania is about half the average for a House of Representatives seat, about a fifth of the national average for the Senate, and less than ten percent of the average for New South Wales senators (see Table). The result is that the number of votes required to get elected to the Senate in Tasmania at a regular half-Senate election is comparable with the number of votes to get elected to a House of Representatives seat. Senator Harradine, for example, won fewer than 25 000 primary votes in 1998, a number well below that required for winning most House of Representatives seats. So, the size principle is at work.

Senator Harradine and his Tasmanian predecessors have been able to generate enough identification from a community of supporters to gain representation. This is very much more difficult for independents running for the Senate as independents in any other state. In 1998, a comparable share of the vote in South Australia, the next largest state, would require three times the number of votes. Perhaps Tasmania isn't so much of an anomaly after all. It just uses the resources in which it is particularly rich—its small population size relative to its representation, its brokerage skills and a strong sense of local identity—to best advantage. A final paradox can be noted about the

Senate. It is not a chamber whose design is compatible with electing independents, but it is one with a structure and composition which provides strong inducements for disaffected members of the large parties to sit as independents. The brokerage power of a Senator Colston, for example, is very large. If there are independents in the Senate in the future, they are likely to have been elected as members of a party and moved to the cross benches at some time after their election. A current example is Senator Shayne Murphy from Tasmania who left the ALP to sit as an independent in 2001.

Explaining independents

The digressions to Tasmania and the Senate may have provided some information for a general explanation as to why some independents get elected. We have already established that an independent candidate must have a strong engagement with a local community and a high local profile, preferably one associated with political activity. Secondly, the candidate must have an objection to the kind of party discipline required of candidates for the major political parties. But the Tasmanian case stresses the importance of a third factor. The dominant major political party in the district contested by the independent must have a candidate selection procedure which does not accommodate local preferences. This factor can take two forms. It may result from strife in the local branch of the dominant party in the district; a fight over preselection between two local candidates, or resentment over a candidate from outside the district being parachuted in by the central party organisation. Or it may be a consequence, in the case of Liberal and National party candidates, of attempts by the party hierarchy to prevent a candidate from one of these parties being endorsed to run against the other.

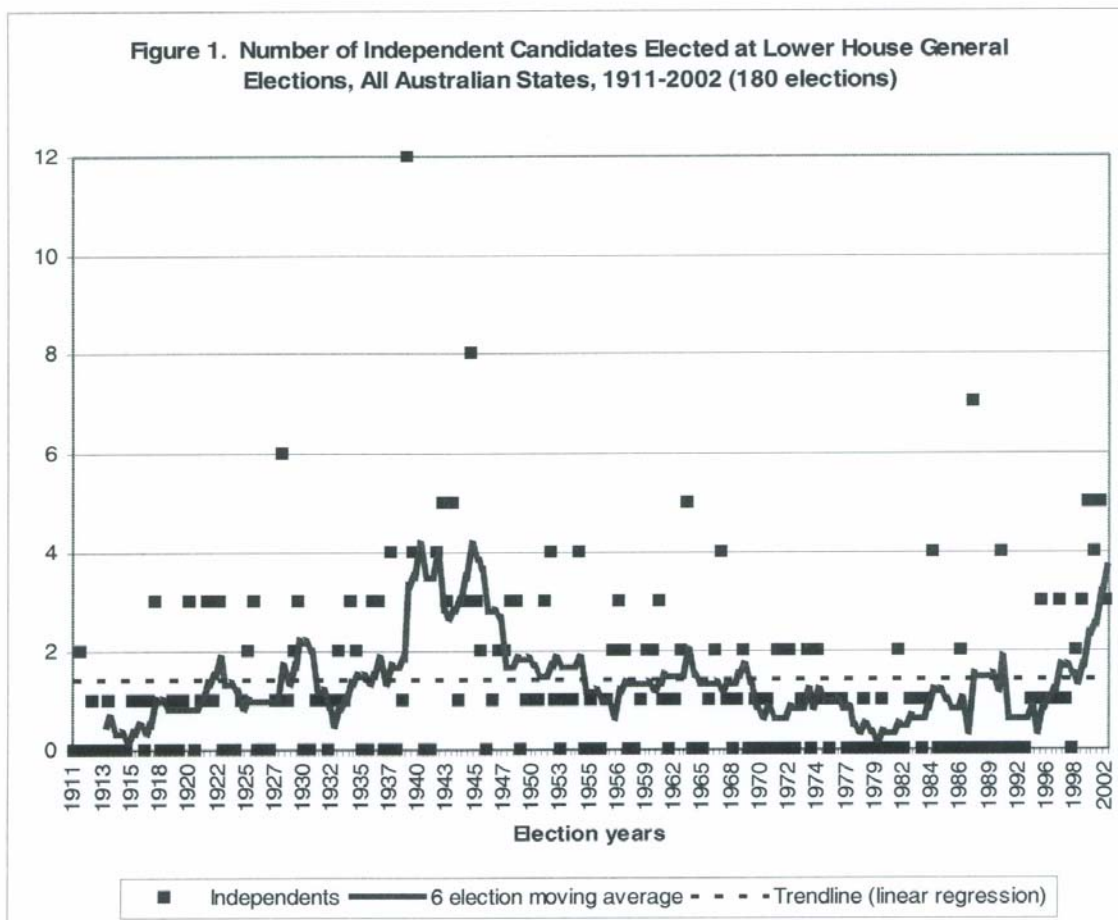
Another situation where local preferences are not accommodated is one in which the dominant major party in the district has become locked into policies which are seen to run against local interests. This is a particular hazard for rural districts represented by the National Party where the party is in coalition with the Liberals. Rural voters may feel betrayed by the compromises made by National Party parliamentarians in the interest of being a part of a coalition government. Such tensions have twice split the National Party in Western Australia over the last 80 years, and may go some of the way to explain the persistence of independents from rural areas of New South Wales. The coalition between Liberals and Nationals in New South Wales is the most consistent and long lasting of any state and the cost of the permanence of the coalition may be a relatively higher frequency of rural independent members in the state parliament.

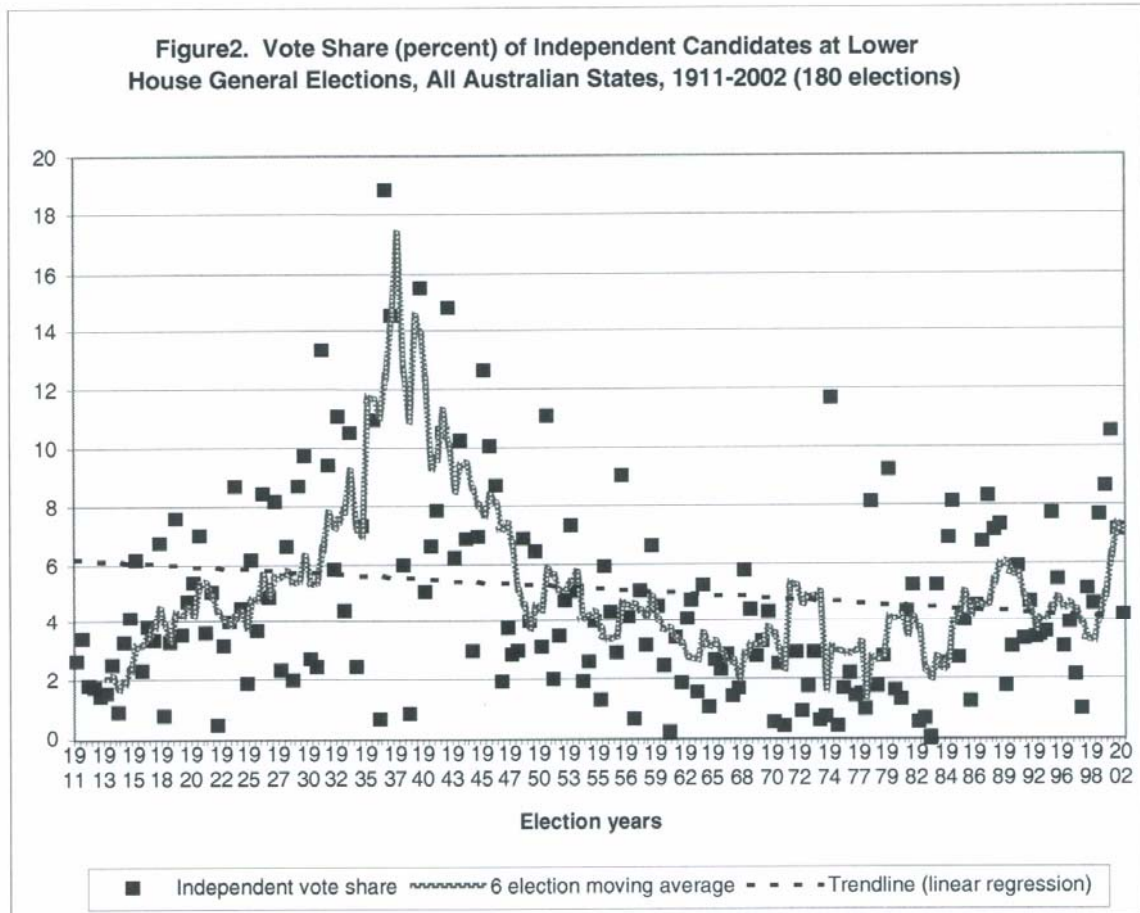
This leads to a broader observation about the relationship between major party structure and the number of independent candidates. If the control of major parties is strongly centralised or shaped by factional politics, the ability of such parties to respond to local concerns is compromised. Without looking at the details of New South Wales party politics, it is tempting to speculate that this state has seen more than its share of factional politics and intra-party strife in both the Labor and Liberal parties. This may be another explanation for New South Wales being the state which has been the most prone to elect independents over the period since 1911.

This also suggests that the reason for the recent general increase in the number of independent candidates and members of parliament may have a lot to do with the

current nature of the major political parties. These parties are going through a transformation in which they are moving from an organisational structure heavily dependent on a mass membership to one where an active membership is much less important for the success of the party. Over the last twenty years, an increasing proportion of party functions have been sub-contracted to separate agencies. Party policy is now strongly shaped by public opinion polling, campaigning by professional image makers, public relations by experts in the manipulation of the news media, and fund raising by agencies skilled in targeting the relevant interest groups. Government funding of political parties at elections and the increasingly complex rules for the registration of parties and the disclosure of expenditure are making parties look more like state agencies than voluntary associations. All this has increased the need for central coordination of political parties and enhanced the influence of the parliamentary leadership and the party elites who are responsible for running the semi-corporate structures which the large parties have become.

This leaves the local member of parliament bound to support a hierarchy over which he or she has little control. In addition, the process of candidate selection by the major parties is seen by them as one of the recruitment of talent for the party rather than as the selection of agents who can best representing local interests. Such a situation goes a long way to explain why there is a diminishing attraction for people to join political parties other than as activists interested in gaining party office. It also explains why independent candidates are making increasing inroads into the vote share of the large parties. Independents can draw an increasingly stark picture of the cartel-like nature of the major parties and their difficulty in responding to local concerns.





Source: *Calculated from information from the Australian Government and Politics database, University of Western Australia*

The proportion of the vote for independents is still small but there is a final point that the large parties should note. The last time the number of independents elected and their average share of the votes and seats was as high as it is at present, and rising, was in the 1930s (see Figures 1 and 2). This was associated with major realignments in the party system and a period of considerable volatility in party politics. There is no reason why this pattern should repeat itself but, if I were a member of a major party, I would be a little concerned. I would be wondering how the process of selecting party candidates for elections and the nature of campaigning could be changed to involve a larger local component. This is a complicated issue because it challenges the direction in which the major parties have been moving for the last 20 years, but it is one which needs resolution. If it is not dealt with, the term ‘independent’ could become much more familiar than it is at present. And the role of independent members of parliament in holding the balance of power might become a commonplace. Independents live their political lives on the margin, but it is at the margin where the action is. Whatever its associations, the idea of an independent may be doomed to become increasingly important for our political system.



Question — Have you done any research into the idea that maybe one of the best ways for parties to re-engage the community is to try and source a lot of their staff support from the local community? I've often been quite surprised when I've met people working for members of parliament, how often the people who work in their office have no attachment at all to the locality from which they have won an election.

Campbell Sharman — This is part of the recruitment pattern for people in major parties. In some ways, the major parties are in a real bind. They are large organisations and they need bright young people to run them, but the career structure—as with most organisations—may have much more to do with how well you please your superiors than with how closely integrated you are into the local community. So the incentives of large parties at the moment are not designed to encourage greater responsiveness to local issues.

Question — I am worried about the corruption of independents. Senator Mal Colston allowed John Howard to sell part of Telstra because John Howard looked after him. Mal Colston should have died but he's still alive and well, and he and his sons are millionaires. That says corruption to me. Independents appear to look after themselves, not the country or the community.

Campbell Sharman — I lived in Tasmania for five years, so I know about independents. There are a number of points on this issue. The first one is, if you hold the balance of power, you have no power unless you have at least half the Senate with you. So anything Senator Colston may or may not have done he did with the help of someone else.

Secondly, using your brokerage power to gain benefits for your state or your special interests in the community occurs all the time, but usually it occurs in private, because the people with the most to gain from government activity lobby the bureaucracy or the minister. So when this occurs in the Senate—say when Senator Harradine uses his position to help pave Tasmania over with asphalt or whatever he thinks is a good idea—then this is simply the kind of operation which is visible and open, and he has to defend it. Whereas most of the activities which are hidden away in government lobbying are, of course, invisible.

The third point is that, if you take away political parties, you leave to the representatives the question of framing policy. Some people believe that you need only two parties, and that the only choice you need to make is at election time. Then you let one of the parties rip for three years and then hold them to account at the next election. The whole point of a representative institution is that you have a running check on the system, so that if you believe that parliament has a role in scrutinising government activity you need to fill it with people who are not part of the government. And as far as I'm concerned, it doesn't matter who they are as long as

they are not part of the government—because only those people are going to ask awkward questions, and awkward questions are the only ones worth asking.

Question — I was interested in your link between small electorates and support for independents. Most of the states in Australia have been through fairly extensive periods of electoral malapportionment—certainly Queensland, Western Australia and South Australia have. Has there been any research done, or is there any evidence to suggest that, in those electorates which due to malapportionment were smaller than the average, there was higher than average support for independents—which would tend to support your hypothesis?

Campbell Sharman — We're dealing with small numbers here. There is another reason why the major parties are in a bind. Supposing the major parties do increase their sensitivity to local issues, and one of the effects of malapportionment or very small rural districts is that the major party local members there are very sensitive to local issues. The parties are afraid to do anything about these members even if they behave in a non-party way or if they flout party activity, because they know the local members can run as independents. Their threat is 'well, if you don't listen to me, or do x and y, I might run as an independent'. Of course that has happened in Western Australia—Larry Graham did just that—and I suspect it occurs in other states, where there are relatively well-entrenched major party members who are mavericks. That's why Graeme Campbell stayed for long as he did, because the Labor Party quite rightly assessed that it was a maverick electoral district, so why not have a maverick inside the tent?

Question — During your talk, one of the things that intrigued me was a consideration that makes the structure of Australian politics very different from politics in most other countries, and that is the existence in this country—and almost nowhere else—of compulsory voting. I wondered whether that factors into any of the points that you've made today? I have in mind, for example, that in Queensland three or four years ago in an election for the state lower house, a large number of Pauline Hanson's party were returned. Now they weren't independents, they were members of a party, but nonetheless it was considered that their votes reflected dissatisfaction with the major parties. In particular, analyses that were done here at the ANU seemed to demonstrate that a lot of their support came from disgruntled Nationals—which stands to reason. If the election of independents often flows from the same consideration, I wonder whether the propensity we have in this country for forcing people to vote bears on the question that you have just been addressing. There are a number of intriguing questions here, particularly the Tasmanian example, which I find interesting.

Campbell Sharman — The book I referred to by David Solomon makes that point, and argues that the informal vote dropped significantly in the three electoral districts that elected independents in the 2001 election. In effect, he is saying that some of the informal vote is disgruntlement, because voters feel that no matter who they vote for, they're going to elect a politician. I think in Andren's seat informal voting is something like one-and-a-half percent, a very small informal vote. But conventional wisdom is that compulsory voting by itself doesn't have much effect—when Colin Hughes looked at the introduction of compulsory voting he didn't find too much

difference in the outcome. But if you are dealing with very small margins and the fact that there may be more dissatisfaction with the system now than there was—and the fact that it is not even ‘optional preferential’, it is ‘compulsory preferential’—then maybe the more the system is compulsory, the more independents will benefit. It’s an interesting thought, but I have no evidence for it.

Question — I would like to draw your attention to the fact that the Labor Party in Western Australia is making a very big run to eliminate a number of rural and mining areas. Do you think that if that change is successful, in those electorates which will be eliminated—even though those areas will still have to have representation—will that representation be more likely to be independent than previously?

Campbell Sharman — One of the points of my lecture was that the major parties have done a pretty good job up to reasonably recently in accommodating these problems. And as I just mentioned, most parties outside metropolitan areas know that if they are going to be successful they probably have to have someone who is well known in the area. Now, if you make rural electoral districts in Western Australia larger, then you are going to break down that community linkage and therefore you would expect there to be *fewer* independents. Indeed, one of the problems with the system is that if the electoral districts get too big, you lose regional identity. I was involved in a commission that looked at trying to getting rid of this. We realised we had to increase the size of parliament, otherwise the Pilbara would be linked in with the Gascoigne and you would get mining and pastoral people all voting for the same person—which, if you’ve got some sense of community representation, is not very sensible. But of course, the base for independents at the moment is not in the country, it’s in the urban areas. The two people I mentioned, Phil Pandal and Liz Constable, are very firmly ensconced in metropolitan—normally liberal—electoral districts. And to that extent, if there is a redistribution on more equal sized electoral districts, their electoral districts will get smaller, so there may be more urban independents even if there is a lesser propensity to elect rural ones.

Auditing in a Changing Governance Environment*

Pat Barrett

Introduction

The Australian National Audit Office (ANAO) is pivotal to the system of checks and balances that support democracy in Australia. Public reports from an independent Auditor-General ensure that the Parliament, and beyond it the Australian citizenry, has a degree of assurance in relation to the proper administration of Commonwealth resources. The ANAO has a dual role in terms of reporting on the financial management and overall performance of the public sector. Our first aim is to provide independent assurance. This is the more traditional ‘watchdog’ audit role. Our second role is to suggest improvements to public administration. Increasingly, it is this second, advisory role that is most important for a public sector which, in the proper pursuit of greater efficiency and effectiveness is challenged by diverse governance issues which are growing in complexity.

A responsive relationship with the Parliament is integral to the ANAO’s ability to continue to deliver products that add value in the contemporary public sector environment. The notion of getting the mix right to provide adequate assurance and suggest improvements in administration highlights the symbiotic nature of our relationship with the Parliament. The success of the relationship depends on its ability to support, and reinforce, frank and open dialogue on trends challenging public sector accountability in the Commonwealth context.

* A lecture based on this paper was presented in the Department of the Senate Occasional Lecture Series at Parliament House on 21 June 2002.

For example, recent corporate collapses in the private sector are again leading to calls for strengthened internal and external control and scrutiny. Although not driven by the same imperatives, the public sector governance environment is also changing. Citizens have higher expectations of government and the public service and demand more effective, efficient and economical levels of service. Public sector managers are responding to the demands of their particular operating environments by developing tailored approaches; streamlining and adapting traditional ways of providing services, particularly through technological advances; and by taking advantage of partnerships and similar alliances that blend the public and private sectors.

It is incumbent on Parliament and the ANAO to have a good understanding of the new public sector business environment, so that together we can contribute proactively to change. Ongoing guidance—or at least any perspectives from the Government and Parliament in any redefinition of the boundaries of the changing public sector environment—are crucial. In this latter respect, the increasing involvement of the private sector in the delivery of public services is challenging traditional notions of accountability, an issue that is central to good governance.

While diverse governance approaches may now be required by the dynamic nature of the contemporary public service environment, one lesson remains constant: sound process will lead in most cases to good outcomes. Results count, but it is also important *how* these results are achieved. For the ANAO, a key issue is getting the balance right between control and innovation¹ in order to provide the guidance and the leadership demanded by a rapidly changing world virtually shrunk by modern communications and transport. In achieving this goal, the ANAO relies importantly on ongoing feedback and guidance from the Parliament and other audit clients as to the areas they see as adding most value to public administration. This dependence is recognition that these stakeholders are important in the distillation of wider public concerns.

One of my senior audit colleagues underlined the importance, for all those responsible for implementing sound corporate governance arrangements in a more complex environment, to understand the legal and quasi-legal construct of their obligations. He pointed to the often numerous pieces of legislation applying to public sector organisations, as well as a raft of policy and other guidelines that need to be taken into account. The Public Service Commissioner recently observed that: ‘The first principle, in my view, for good decision-making is compliance with the law’²

Nevertheless, corporate governance is not wholly a legal concept, for example where, for private and public corporations, aspects of internal corporate regulation are directed by the *Corporations Act 2001*. Many of the procedures and practices of a

¹ It should be observed that risk management can minimise the uncertainty surrounding innovation, by requiring the assessment of a range of options in terms of the likely opportunities for improved service delivery and program outcomes, and what needs to be done to manage the risks associated with each option. See, for example, Northern Ireland Audit Office, *Investing in Partnership: Government Grants to Voluntary and Community Bodies*, Belfast, 16 May 2002.

² Andrew S. Podger, ‘Improving Government Decision Making’, Opening address to IPAA (ACT Division) Seminar on Improving Government Decision Making, Canberra, 31 May 2002, p. 2.

corporation are left to be determined and implemented by each corporation.³ In my view, auditors have valuable roles to play in providing assurance about compliance as well as about the effectiveness of actions taken to ensure robust governance arrangements.

This paper, which draws on a recently published Occasional Paper⁴ on the future direction of auditing, begins with a discussion of the role of the ANAO in supporting democracy. It then moves to an analysis of governance and auditing in the changing accountability environment. The paper concludes with a discussion of the importance of dynamic relationships with both the Parliament and the Australian Public Service (APS) for the ongoing relevance and credibility of the ANAO as the independent external auditor of Commonwealth organisations.

The Australian National Audit Office

Role and responsibilities

In the context of the Commonwealth, the Office of an independent Auditor-General is an essential element of our system of democratic government. The Auditor-General provides vital assurance as to the transparency and accountability of public sector operations, as well as providing guidance and leadership in relation to some basic elements of good governance. This is particularly important for a public sector characterised by continuous change. Independent financial and performance audits give the public confidence in both the public service and our system of government. As the Secretary of the Department of Prime Minister and Cabinet noted in an address marking the centenary of the APS, an ethical and accountable approach to public sector leadership requires ‘a strong system of checks and balances, including a powerful Australian National Audit Office.’⁵

Legislation

The *Auditor-General Act 1997* (the Act) provides a strong legislative framework for the Office of the Auditor-General and the ANAO to provide support to Parliament. The Act establishes the Auditor-General as an ‘*independent officer of the Parliament*’—a title that symbolises the Auditor-General’s independence and unique relationship with the Parliament. The Act also outlines the mandate and powers of the Auditor-General and the functions of the ANAO, as the external auditor of Commonwealth public sector entities.

The Auditor-General’s mandate extends to all Commonwealth agencies, authorities, companies and subsidiaries with the exception of performance audits of Government Business Enterprises (GBEs). Performance audits of wholly owned GBEs may only be undertaken at the request of the responsible minister, the Finance Minister or the Joint Committee of Public Accounts and Audit (JCPAA). The JCPAA recently

³ Kathy Hoffman, ‘Corporate Governance: not just for directors’, *Journal of Chartered Secretaries Australia Ltd*, vol. 54, no. 5, June 2002, p. 290.

⁴ Pat Barrett, *The Future Direction of Audit—A National Audit Office Perspective*. Occasional Paper, Canberra, ANAO, May 2002.

⁵ Max Moore-Wilton, ‘The Australian Public Service—100 Years of Change’, Address to the IPAA Centenary of the APS Conference, Canberra, 19 June 2001.

undertook a review of the Act to reinforce the important notion of independence and to enhance the ANAO's capacity to perform efficiently and effectively.⁶

The Act is a robust piece of legislation founded on the important notion of audit independence. It has generally been recognised as better practice audit legislation. Consequently, while the ANAO is part of the changed contemporary auditing landscape currently challenging both public and private sector auditors, we are also set apart from it due to our statutory independence. This is one of our major strengths, which enhances our reputation and effectiveness.

Contribution to public sector accountability

The office of the Auditor-General of the Commonwealth of Australia dates back to the beginning of Federation, being created by the Commonwealth Parliament in 1901. As discussed above, the Auditor-General has a broad mandate, currently enshrined in the *Auditor-General Act 1997*, to audit the financial statements of all Commonwealth entities, and subject to some qualifications, to undertake performance audits of those same entities.

The Auditor-General, through the ANAO, provides an independent review of the performance and accountability of Commonwealth public sector in its use of public resources. Through the delivery of an integrated range of high quality audit products that are timely, cost effective and consistent with public sector values, the ANAO aims to meet the needs and expectations of the Parliament, the Executive and audit clients and to add value to public sector performance and accountability. As with other public sector organisations, we expect to be judged both by our results and the manner in which we achieve those results.

The ANAO provides independent assurance on the financial statements and financial administration of Commonwealth public sector entities to the Parliament, the executive, boards, chief executive officers (CEOs) and the public. We also aim to improve public sector administration and accountability by adding value through an effective program of performance audits and related products including Better Practice Guides. As well, communication of our activities and their outcomes through representation at a range of parliamentary committees, agency audit committees and boards of government authorities and companies, is a growing element of our value-adding activities. We also seek opportunities to contribute to the development of the accountability framework, including better practice and standards (including harmonisation) in public sector accounting and auditing, through professional and other audit bodies in Australia and overseas.

Contribution to the Parliament

The Parliament is our primary client, using New Public Management (NPM) terminology. Our interaction with both individual parliamentarians and committees gives us the opportunity to ensure that our financial and performance audit products and services are tailored to Parliament's needs. Our relationship with the Parliament is crucial to our ability to maintain the quality and reliability of our reports, and consequently for our performance. It is the Parliament that makes the ultimate

⁶ Joint Committee of Public Accounts and Audit 2001, *Review of the Auditor-General Act 1997*, Report No. 386, Canberra, August 2002.

decision on the ANAO's resources. This is important for signalling the independence of the Auditor-General, by removing the issue of fee dependence between auditor and auditee in the Commonwealth Public Sector.⁷ Parliament is our number one client, which is a clearly different relationship to that experienced in the private sector. Nevertheless, all ANAO products are fully costed and transparent as an important part of our accountability to Parliament.

A key feature of the legislation supporting the ANAO's independence is the role of the JCPAA in approving the Prime Minister's recommendations of both the proposed Auditor-General and the ANAO's Independent Auditor; in advising on planned ANAO audit activity; and in recommending the budget for the ANAO to the Parliament and the government each year. The JCPAA is also a conduit for the communication of parliamentary leadership and guidance in relation to matters challenging public sector administration. While the ANAO seeks to build strong relationships with all members of Parliament through a variety of forums, including parliamentary Committees, it is the JCPAA that has a special role in relation to the ongoing activities of the Auditor-General.

The special relationship between the JCPAA and the ANAO is also what sets us apart, in several important areas, from other independent agencies charged with the regulation, or review, of public sector activities. As noted earlier, the ANAO has a powerful position within the democratic framework, which is reinforced by robust legislation. It is not dependent on any individual minister for authority, which means that the Auditor-General has the ultimate responsibility for setting the scope of his or her activities. Finally, by contrast with the CEOs of other independent government agencies, the Auditor-General is appointed with the direct involvement of the JCPAA, rather than solely by the executive and/or a particular minister. This also ensures that the position is seen as not being subject to political influence, given its direct line of responsibility to the Parliament, rather than to a particular minister or the government.

One important element supporting the Auditor-General's ability to report without fear or favour, is the application of parliamentary privilege to performance and financial statement audit reports tabled in the Parliament. This privilege can operate to protect the Auditor-General and ANAO staff from being held liable for statements contained in audit reports. This in turn allows the Auditor-General to report freely, openly and responsibly on matters examined in the course of audits. Recently, however, there has been some concern as to whether draft reports and working papers leading to official public reports are similarly covered by parliamentary privilege. The JCPAA examined this issue in the course of its recent review of the Act. The Committee recognised that:

The provision of parliamentary privilege is an essential element in protecting the office of the Auditor-General so that it may provide a fearless account of the activities of executive government.⁸

⁷ All agency audits are charged on a notional basis reflecting the full cost of understanding, and reporting on, each individual audit. While audit fees are charged for all audits of statutory authorities and government companies, these fee receipts are paid directly to consolidated revenue. The ANAO's costs are directly funded by parliamentary appropriation.

⁸ Joint Committee of Public Accounts and Audit, *Review of the Auditor-General Act 1997*, Report No. 386, Canberra, August 2001, p. 16.

Legal advice provided to the ANAO suggests that, until a court decides to the contrary, it is proper for the Auditor-General to proceed on the basis that Parliamentary privilege does apply to draft reports and working papers. The JCPAA accepted this approach. However, the Committee considered that the Privileges Committees of both the Senate and the House of Representatives should examine this complex issue to provide greater clarity.

The ANAO notes that this is a particularly important issue given the increasing involvement of the private sector in public administration. We are sensitive to concerns of commercial confidentiality, which could lead to reputation and market problems if not handled well in public reports, as well as possible legal action. However, such concerns need to be looked at in a broader context, as I will discuss later.

The problem extends beyond the Commonwealth to the states and territories. For example, on this point, it should be noted that a recent ACT Supreme Court ruling may have significant implications for legal liability arising from working papers or draft reports prepared in the process of producing public documents. The ACT Supreme Court found, in its review of the board of inquiry into disability services (the Gallop inquiry), that parliamentary privilege does not retrospectively protect the preparation of a document by or for the government (even if the document is subsequently tabled in Parliament) if the report has been tabled for a purpose other than that for which it was originally intended.⁹

The JCPAA has the power to report to Parliament on the use of public moneys by Commonwealth entities with respect to any matters concerning their accountability, lawfulness, efficiency and effectiveness. The JCPAA examines ANAO reports on a quarterly basis to assess the significance of matters raised and the adequacy of responses from audited agencies. This is an important level of scrutiny both of the audited agencies and of the ANAO's activities and findings. The JCPAA may conduct public hearings on matters raised in ANAO reports at which agencies are required to attend and give evidence. The Committee's findings and recommendations are set out in reports that are tabled in both houses of Parliament. This enhances the level of assurance provided to the Australian public and can lead to important administrative or even, in some cases, policy change.

My colleague, the Controller and Auditor-General of New Zealand, recently observed that Parliament and the general public will be confident the Audit Office has done a good job when public entities:

- are delivering what they have been asked to;
- have operated lawfully and honestly, and have not been wasteful;
- have fairly reported their performance; and
- know that, if this is not the case, we will tell them.¹⁰

⁹ Harry Evans, 'The limits of parliamentary privilege', *The Public Sector Informant*, May 2002, p. 8.

¹⁰ The Controller and Auditor-General of New Zealand, *Annual Plan 2002–2003*, Wellington, 23 April 2002, p. 15.

As well, government and public entities:

- will effect improvements in public sector performance and accountability in areas where we have advised that there is potential for improvement.¹¹

Accountability in the Twenty-first Century

The major trend influencing public sector accountability in the twenty-first century, is the convergence of the public and private sectors in Australia and overseas. Convergence has occurred in response to demands for more effective service delivery and as a direct consequence of the introduction of contemporary public sector reforms under the NPM banner. The most significant of these reforms, in terms of their far-reaching effects on governance arrangements, has been the trend toward the outsourcing of functions and the greater focus on the contestability of services in the public sector.

The reforms were largely based on the premise that greater efficiency and lower costs could be achieved by applying private sector practices to public sector service delivery. In some cases, this means that private sector management models have overlaid traditional public sector activity. In others, the private sector has become fully incorporated in the delivery of public services through contract, through varying degrees of cooperative and/or partnership arrangements.

The changed business environment has created new challenges for the ANAO just as it has for the agencies we audit. New operating conditions and increased complexities have reinforced the importance of strong and dynamic relationships with all of our clients, but most particularly with the Parliament itself.

Governance in a changing public sector environment

Convergence, and other external trends, including the impact of new technologies, has added a new level of complexity to traditional accountability frameworks. This has reinforced the importance of implementing robust and responsive corporate governance approaches. Citizens are increasingly directly involved in the public sector decision-making process. They are demanding improved levels of access and standards of service from Commonwealth agencies.

While the achievement of value for money outcomes is well established as a public sector priority, the opportunities offered by new service delivery arrangements, and more flexible funding initiatives, including the use of private financing, produce additional challenges for accountability and, consequently, for governance. What we have seen in recent years has been the emergence of tailored approaches defined, and largely determined, by individual agency CEOs. This was what would have been expected from the devolution of authority from the central agencies as a key element of public sector reform. While this may be an appropriate response to the changing business environment, the ANAO is committed to ensuring that, whatever their strategies or approaches, agencies are giving effect to Parliament's intentions while

¹¹ *ibid*, p. 15.

managing their identified risks in a proactive and responsible manner. Again, this should be expected with governments and parliaments providing legislative authority for efficiency/performance audits.

Expectations of citizens

New client service interfaces, and improved access to information and communication technologies, have raised citizens' expectations of more responsive public sector service delivery. Technological developments increase citizens' demands for the same type and level of service from government as they receive from the private sector, that is, virtually on demand. Governments worldwide are focussing on harnessing the opportunities created by new technologies, while managing the risks inherent in this new form of service delivery. Government use of new technologies is discussed later in this section of the paper.

Those more actively engaged citizens are also participating more fully than ever before as partners in public sector decision-making and service delivery. The challenge for the public sector is to tailor traditional notions of governance to make room for diverse stakeholders while still ensuring robust accountability to Parliament. This is not always straightforward, as it becomes increasingly difficult to separate the concept of 'the public interest' from the interests of community participants actively engaged in service delivery.

Another key expectation of Australian citizens is obtaining greater value for money from government services. Those judging the performance of the public sector need to understand the wide-ranging scope of that concept. Value for money involves more than simply realising the lowest possible price. Rather, it involves maximising overall value for the taxpayer and ensuring proper accountability for the use of public resources. This includes consideration of less tangible elements such as client satisfaction, the public interest, honesty, justice, privacy and equity. In meeting the challenge of obtaining value for money in a climate of sectoral convergence, it is imperative that public sector agencies entering into partnerships with the private sector have a full appreciation of risks to the public resources with which they have been entrusted. Such risks include taking advantage of opportunities as well as avoiding, for example, degradation, inefficiency and loss of resources and of performance. As one commentator posits:

there is ... no room for complacency as the public sector environment has changed from an administrative culture to a management culture in which governments and citizens expect better value from the same and continually reducing financial resources.¹²

Convergence of the public and private sectors

The convergence of the public and private sectors has occurred largely as a consequence of demands for more responsive service delivery and for improved efficiency in both sectors, for example, as part of the National Competition Policy, impacting on all levels of government and private sector firms. It provides the opportunity for public sector agencies to gain from specialist expertise and

¹² I. Percy, 'The Best Value Agenda for Auditing', *Financial Accountability & Management*, vol. 17, no. 4, November 2001, p. 353.

international better practice in complex and dynamic areas such as information technology and communications. However, convergence also brings into sharp focus the differences between the two sectors, which need to be managed responsively on a case-by-case basis. Together, the Parliament and the ANAO have a very important role to play in terms of defining and strengthening acceptable accountability frameworks for the twenty-first century.

Public and private sector agencies have very different legal and accountability requirements. For the public sector, legal responsibilities are defined by specific functional statutes as well as general requirements outlined in legislation such as the *Financial Management and Accountability Act 1997* and the *Commonwealth Authorities and Companies Act 1997*. By contrast, private sector organisations have specific obligations under corporations law¹³ and trade practices legislation, as well as relevant state/territory legislation. The legislature has further contributed to strengthening private sector accountability. For example, the amendments to the *Privacy Act 1988*, which came into effect on 21 December 2001, have exposed the private sector to similar privacy obligations to those that already existed in the public sector. Commonwealth agencies have their primary accountability to the Executive and the Parliament. Private sector companies, however, have as their primary responsibility the provision of shareholder value.

While there are obvious potential tensions when the two sectors work together, there are also opportunities for both parties to benefit. As the Commonwealth's independent audit office, our goal is to use our knowledge and experience of the impact of convergence across the public sector to assist our clients in achieving their aim of doing their business better within the public sector accountability framework, however that is developed and applied. To be able to achieve this goal, we must continue to work in strong cooperation with the Parliament to ensure that the wide-ranging goals of the Parliament, and, beyond it, of the Australian people, are being effectively achieved.

I noted a particular emerging problem in my Annual Report for 1999-2000 with the increasing coverage of the private sector in performance audit reports. I recognised the possible consequences for a firm's reputation and its market situation flowing from any adverse audit comments, or references, on actions or lack of action and/or management/administration practices. The situation seems to be accentuated where there is overseas ownership. In particular, the legal issue of defamation has been raised which can result in the use of language that may be counter to simple, clear, and straightforward explanations.

The provision of a draft performance audit report for comment under Section 19 of the *Auditor-General Act 1997* is not a 'negotiating process'. It is a means of ensuring that the ANAO has an accurate understanding of the 'facts' and those facts are correct. This is necessary for the credibility and acceptability of audit findings and recommendations. Conflicts of public and private interest are not new but their

¹³ The revised *Commonwealth Corporations Act 2001* came into operation on 15 July 2001.

resolution in performance audits is a challenge for all parties without a genuine shared understanding of what constitutes public accountability.¹⁴

In response to concerns expressed about accountability to the Senate in a recent Senate Finance and Public Administration References Committee report, the government indicated that it is supportive of making suppliers to government aware that contracts and contract-related material may be requested by, and provided to, Parliament and its committees, recognising, where appropriate, the application of public interest immunity.¹⁵ The response also noted that the *Commonwealth Procurement Guidelines and Best Practice Guidance* (February 2002) require that:

Agencies should include provisions in tender documentation and contracts that alert prospective providers to the public accountability requirements of the Commonwealth, including disclosure to Parliament and its Committees.¹⁶

Challenges to transparency

The main element of public sector accountability is openness or transparency. With the greater involvement of the private sector, concerns have been expressed about commercial considerations, particularly in maintaining competitive advantage. Most would accept that the tendency in the private sector has been not to go public unless it is clearly in the organisation's interests. The requirements, if not the fact, in the public sector should be the reverse, except in special circumstances such as national interest considerations.

The ANAO has found that value for money results from public-private sector partnerships can be particularly difficult to demonstrate where commercial-in-confidence provisions of contracts apply. With the increased convergence of the public and private sectors, demonstrating transparency, accountability and the ethical use of resources has the potential to become clouded unless the Commonwealth takes a proactive and consistent stance to the scrutiny of contracts involving public funds. As one commentator noted:

while [Commercial-in-Confidence] may be good for business, it is inimical to the fragile processes of participatory democracy.¹⁷

In general, the roles and responsibilities of both public and private sector partners in relation to commercial-in-confidence issues require clarification. All parties involved in service delivery must clearly understand their accountability requirements and their ultimate responsibility to the Parliament. The ANAO has undertaken a number of audits in this area to date in response to Parliament's concerns. One report, entitled

¹⁴ Auditor-General, *Annual Report 1999–2000*, pp. 4–5.

¹⁵ Senator Nicholas Minchin, Government response to Senate Finance and Public Administration References Committee Report, *Commonwealth Contracts: A New Framework for Accountability*, 5 June 2002, p. 7.

¹⁶ *ibid.*, p. 7.

¹⁷ William de Maria, 'Commercial-in-Confidence: an Obituary to Transparency?' *Australian Journal of Public Administration*, vol. 60, no. 4, 2001, p. 93.

The use of confidentiality provisions in Commonwealth contracts,¹⁸ found that there was a lack of consolidated government-wide guidance available to agencies on the use of confidentiality provisions in contracts. The audit found a number of weaknesses in the ways in which agencies generally deal with the confidentiality provisions in contracts. There was a lack of clarity in terms of the specific information that should be regarded as commercial-in-confidence in contracts, and agencies were addressing commercial-in-confidence issues in a less than rigorous, or risk-managed, way. This was threatening accountability and frustrating parliamentary committees and other forums of review.¹⁹ The ANAO made a number of recommendations in the report aimed at enhancing the management of commercial-in-confidence issues in contracts.

The commercial-in-confidence issue was revisited by the ANAO in the recent audit of the implementation of a Senate Order of 20 June 2001²⁰ that required all agencies covered by the *Financial Management and Accountability Act 1997* to list contracts over \$100 000 in value on the internet. The Order requires that agencies indicate, amongst other things, whether contracts contain provisions requiring the parties to maintain confidentiality of any of their provisions or whether the parties regard any provisions of the contracts as confidential. The ANAO found that, overall, there was a positive response to the Senate Order. There were also positive indications that a number of agencies were developing, progressively, more detailed guidance to assist staff in determining aspects of contracts that might need to be protected as confidential. This is a step in the right direction, although agencies still have some way to go in applying guidance in a manner expected by Parliament. Nevertheless, the onus is now clearly on those wishing to maintain confidentiality to justify that position. Put another way, it has been suggested that business, commercial or financial information should generally be available in the public domain:

unless it can be demonstrated that to disclose it would be to prejudice the competitive position of the private contractor in question.²¹

Resolution of this issue is just one of the problems facing agencies negotiating the converging governance landscape. Commercial-in-confidence issues have challenged both agencies and their auditors, in terms of our ability to provide assurance as to the efficient and effective administration of public resources. The JCPAA has recently moved to provide greater clarity in this area with a recommendation that:

¹⁸ ANAO, *The use of confidentiality provisions in Commonwealth contracts*, Report No. 38, Canberra, 24 May 2001.

¹⁹ See, for example, Senate Finance and Public Administration References Committee in William de Maria, 'Commercial-in-Confidence: an Obituary to Transparency?' *Australian Journal of Public Administration*, vol. 60, no. 4, pp. 103–104.

²⁰ ANAO, *Senate Order of 20th June 2001 (February 2002)*, Report No.33, Canberra, 25 February, 2002.

²¹ Spencer Zifcak, 'Contractualism, Democracy and Ethics', *Australian Journal of Public Administration* Vol, 60, no 2, June 2001, p. 90.

all CEOs under the Financial Management and Accountability Act 1997 should, whenever claiming commercial-in-confidence, issue a certificate stating which parts of a contract and why these parts are to be withheld.²²

In its response to this recommendation, the Government noted that it:

does not support the view that commercial information is inherently confidential. Any decision to withhold information on [commercial-in-confidence] grounds needs to be fully substantiated, fundamentally stating the reasons why such information should not be disclosed.²³

A related issue is that of cabinet confidentiality and collective responsibility for administrative decisions. In a recent audit of the Federation Fund program,²⁴ the ANAO found that reasons for ministers selecting, or not selecting, particular Federation Fund projects were generally not available. Successive governments have supported the conventions of cabinet confidentiality and collective responsibility by the practice of not disclosing the deliberations of, or reasons for, decisions by cabinet and its committees.

The lack of documentation surrounding the ministerial appraisal process and the lack of information on reasons for decisions highlights a tension between the standards expected for public administration and the normal cabinet conventions. In the case of the Federation Fund, this precluded the ANAO from forming an opinion as to whether the proposals selected by the government were likely to represent best value for money in terms of the program objectives. This is a tension for government and the Parliament to resolve. As public sector auditors, we will be guided by the accountability standards that Parliament indicates are appropriate. However, in a changing governance environment, accountability issues are constantly emerging, and, where addressed by public sector managers, are likely to be considered either in the 'traditional' accountability framework or in a more private sector influenced environment.

New service delivery arrangements

As well as contemplating the benefits of public and private sector convergence, many agencies in Australia, like their counterparts overseas, are currently reconfiguring the way that they do business to take advantage of opportunities for networked or 'joined up' service delivery with other public and private sector agencies. Canada has experimented with networked partnership arrangements to good effect. The United Kingdom has indicated that 'joined-up government' is central to its modernising government initiative.

While there are potential benefits in this type of approach, there is also a need to clarify the governance arrangements that are intended to support the demonstration of

²² *Commonwealth Parliamentary Debates* (Senate), 14 May 2002, p. 1370.

²³ *ibid.*

²⁴ ANAO, *Administration of the Federation Fund Programme*, Report No. 11, Canberra, 19 September 2001.

accountability. Traditional public sector accountability arrangements do not fit these diverse forms of partnerships. Consequently, there is a need for tailored, innovative approaches based on a full appreciation of the risks and benefits involved, if there is to be credible accountability to Parliament for both the results and the manner in which they are achieved.

This is particularly the case where the public sector makes use of private sector financing to deliver public services. Private financing initiatives (PFI) have been used in areas such as infrastructure, property, defence and information technology, and have been explored in a number of countries in response to fiscal pressures. Private financing gives rise to additional challenges and demands for public accountability and transparency because of the substantial shifts in risk. The potential liabilities accruing to governments may be substantial.

The evaluation of the costs and benefits of private financing are not straightforward. This is because the government can usually borrow funds at a lower rate than most private organisations. The real potential benefit from private financing lies in the cost savings of the total package and/or the transfer of risk. Nevertheless, there is the concern that the ultimate risk always rests with the public sector to the extent that the public sector has over-arching and enduring accountability responsibilities, regardless of the commercial relationships it enters into, to achieve its objectives. This is particularly evident in the Defence area and raises issues about the nature of lease arrangements and their accounting treatment.

In Australia, the states and territories rather than the Commonwealth have undertaken most private financing to date, although the recent priority given to public/private partnerships in the context of the AusLink land transport plan may considerably increase the use of PFI at the Commonwealth level. Victoria and New South Wales have already used private financing arrangements for road and associated infrastructure projects. State Audit Offices have noted difficulties in establishing clear financial benefits from the private financing approach and, in one case in NSW, Parliament was denied access to the contract deed between the public sector roads authority and its private sector partner.²⁵ This further highlights the tensions inherent in the convergence of the public and private sectors that I raised earlier in relation to commercial-in-confidence issues.

For agencies, private financing poses significant challenges in terms of accountability. Agencies need to demonstrate the net benefits from adopting private financing as well as the satisfactory management of risks. The net benefits may well involve intangible benefits that are not easily verified. In addition, risks need to be managed in a transparent way that enables full disclosure of the probity arrangements in place. Of particular interest is any cost/benefit evaluation, the basis used for risk allocation and access to information in the possession of the private sector. These elements of decision-making can be quite complex and are not without resource implications. As a result, we will be conducting audit reviews in the future on PFI arrangements.

²⁵ Audit Office of NSW, *Roads and Traffic Authority: the M2 Motorway*, Audit Office of NSW, Sydney, 1995, p. 3.

Tailored approaches

Greater flexibility in management, and corresponding increases in personal accountability, have become central features of the current administrative arrangements. For example, personal responsibility has been delegated to the heads of agencies, now known as CEOs. This approach reflects the private sector management model. It also creates new opportunities and risks that require effective and appropriate corporate governance frameworks if the public interest is to be protected without stifling the benefits offered by the new flexibilities. A real challenge for such frameworks is to strike an appropriate balance between conformance and performance. I spoke earlier of the need to understand the legal construct and the compliance imperatives, for example in personal liability concerns by governing boards. However, there is also a need to both address such concerns and achieve required outcomes or results.

While the devolution of responsibility for agency accountability to agency heads may create the conditions for more responsive tailored management approaches, it also brings some significant risks in terms of overall public sector governance. Currently, it could be argued that we are determining accountability requirements by default as agencies are engaged in setting their own boundaries, which may or may not be acceptable to Parliament, in the absence of across the board guidance on these issues. The ANAO's position, as the public sector auditor, gives it some scope to assist in this area. However, there is also a strong need for widespread debate on this issue and for guidance from the government and the Parliament. Such guidance would be more helpful if it went beyond a general requirement for agencies to remain ultimately accountable, or that they cannot outsource accountability.

Values and ethics are a very important part of Commonwealth administration. The *Financial Management and Accountability Act 1997* requires CEOs to promote the efficient, effective and *ethical* use of Commonwealth resources for which they are responsible. The *Public Service Act 1999* sets out values, and the APS Code of Conduct for Commonwealth employees. However, in contractual arrangements, it is often very difficult to enforce conditions relating to values and ethics on private service providers. Interestingly, some Commonwealth contracts are now including clauses that seek to apply the relevant sections of the *Public Service Act* to private sector employees. It is difficult to envision how the disciplines could be applied in practice. However, if it is an indication of intent, and goodwill, the legal imperative may not prove to be particularly relevant.

One approach is to endeavour to create partnerships with bodies that have a shared culture, including values and ethics. At a minimum, there needs to be a shared understanding of what is acceptable behaviour in a public sector context, as well as appropriate corporate governance arrangements in place to at least manage adherence where this is critical to the success of the initiative or material to the risks involved. Parliament can play an important role in this area by indicating what it regards as acceptable, or unacceptable, public sector behaviour. The ANAO will continue, as part of our Audit Strategy, to conduct performance audits that examine the appropriateness of corporate governance arrangements in individual agencies. Such audits take into account those factors that bear directly on appropriate accountability and outcomes being achieved. In many cases, the former are integral to the latter.

The Government has committed to pursuing the benefits of partnership approaches both between, and among, the public and private sectors. A range of approaches from the application of elements of private sector management models, to partnerships, and right through to fully outsourced arrangements has reconfigured the contemporary governance landscape. Advances in technology have served only to accelerate the impacts of these changes. The key challenge for agencies is to ensure that, in taking advantage of the various opportunities of the new environment, they do not lose sight of their ultimate accountability to the Parliament, and beyond the Parliament to the Australian public.

Government use of new technologies

As well as heightening citizen expectations of access and service (as mentioned earlier), advances in technology have offered new opportunities to harness the benefits of convergence and alliance-making both between, and among, public and private organisations. For example, the UK's 'joined up government' strategy recognises that planning for improved electronic service delivery offers the opportunity to break down departmental boundaries and alter the 'silo-based' delivery modes traditionally associated with government agencies acting independently. A fundamental principle of the UK strategy is that citizens interacting with government should be able to do so whenever they choose. They should not need to understand the way in which government is structured to secure the services they need. The aim is that the complexity of dealing with government disappears, while at the same time the UK's 'Government Gateway' provides security and benefits for government.²⁶ In Australia, the e-government strategy—'Government Online'—has similar aims.

Rapid advances in technology offer both opportunities and challenges in the converging business environment. In my experience, a major risk inherent in the shift to electronic delivery and decision-making is that of security. In addition, there are accountability issues for agencies, and consequent evidentiary issues for their auditors, when traditional forms of record keeping are overtaken by the outputs of new technology. For example, we need to make links in the chain of decision-making in agencies which have largely, or totally, shifted out of paper records. One consequence is that audit trails have to be embedded in electronic records and/or archival data tapes. This is important in terms of agencies' capacity to demonstrate accountability to the Parliament.

The delivery of services via the internet also introduces new risks and exposures that can result in a legal liability for government. Well-designed security and privacy policies can minimise such risks and liabilities, while informing agencies' clients of important aspects of the standard of service they can expect to receive. The benefits associated with a radical re-thinking of the structures and manner in which government services are delivered to citizens could be considerable. In this respect, there has been concern expressed about equity of access to government services through technology for those who do not have such ready access. Continuation of more traditional service delivery methods as an option to ensure equity, imposes costs which need to be balanced against the overall objectives to be served. The message I

²⁶ A. Mather, 'The Seamless Society', *into IT*, issue 14, January 2002, pp. 27–28.

an endeavouring to convey is that there are commensurate risks that have to be managed well within a robust control environment that is central to sound corporate governance.

Record-keeping

Transacting business in the electronic environment, whether acting as an individual agency, in partnership with the private sector, or other government agencies, also raises the issue of record-keeping, and particularly the provision and maintenance of electronic records. The use of e-mail in decision-making is often not supported by record-keeping protocols able to withstand independent scrutiny. My Office has been incorporating reviews of electronic records in its auditing methodology for some time now. For example, in the absence of an adequate suite of supporting hard copy documents, the ANAO reconstructed and analysed the electronic e-mail record to establish the decision-making trail in its investigation of the probity and effectiveness of the decision to include Magnetic Resonance Imaging (MRI) machines²⁷ that were 'on order' in the 1998 budget.

In the public sector at the moment, we have a three tiered hierarchy of records as follows:

- hardcopy documentation (traditional paper file based records);
- electronic or digitally based information (including diaries and e-mail archives); and
- oral communications which may or may not be supported by notes.

While the format in which information is gathered may change, the accountability obligations on public service officers do not. The ANAO has recently undertaken an Assurance and Control Assessment (ACA)²⁸ audit of record keeping²⁹. The audit assesses record-keeping policies, systems, and processes in terms of good business practice, requirements under the *Archives Act*, relevant Government policies, and professional record-keeping principles. As well, it identifies some better practices and strategies organisations can adopt to manage the transition to an e-government environment. The audit findings will guide future developments by National Archives.

A critical factor identified was to view record keeping strategically as part of information management more broadly, and to view records as a corporate asset. Record keeping helps in servicing clients and in dealing positively with legal and other risks. Tied in with broader information management, record keeping assists overall business performance. Unfortunately, history shows that, in a pressured environment, record keeping lapses, despite its importance for both internal and external stakeholders. This is a challenge for the governance framework.

²⁷ ANAO, *Magnetic Resonance Imaging Services—effectiveness and probity of the policy development processes and implementation*. Report No. 42, Canberra, 10 May 2000.

²⁸ ANAO Assurance and Control Assessment audits were known as Business Support Process Audits from 1 July 2002.

²⁹ ANAO, *Recordkeeping*. Report No. 45, Canberra, 1 May 2002.

As well, records are an indispensable element of transparency, and thus of accountability, both within an organisation and externally. Records are consulted as proof of activity by senior managers, auditors, members of the public or by anyone inquiring into a decision, a process or the performance of an organisation or an individual. It is worth noting that, since 1996, the National Library of Australia (NLA) has been storing electronic publications that it considers have national significance (in parallel with its hard copy collection.) The NLA includes ANAO audit reports in its electronic archive to ensure that Australian citizens will have access to this aspect of their documentary heritage now and in the future.

As we move towards the era of e-government, ensuring the creation and maintenance of appropriate electronic records will be equally as important as ensuring appropriate security and privacy in electronic transactions between governments, citizens and the business community. This is necessary for the confidence of all stakeholders, and particularly for the Parliament.

Auditing in a changing public sector environment

The Auditor-General, in partnership with the Parliament, has an important role to play in the new accountability environment in terms of providing assurance and advising on change and its impacts across the public sector. In this regard, the ability of the Auditor-General to investigate and report, freely and fearlessly, is crucial. The essential challenge is for managers to balance efficiency and effectiveness imperatives with the need for accountability to all stakeholders. Accountability mechanisms should be tailored to the individual risks identified for each particular program or outcome. In navigating the new business environment, agencies require clear guidance in relation to appropriate standards of accountability. In this regard, guidance from both the government and the Parliament is vital.

Audit independence

Corresponding with public sector changes, the role of the Auditor-General and the place of auditing in democratic government have also changed. While the accountability imperative remains constant, the role of the ANAO has evolved to take account of, and respond positively to, the public sector reform agenda. In today's environment, our role includes providing independent assurance on the performance, as well as the accountability, of the public sector in delivering the government's programs and services and implementing effectively a wide range of public sector reforms. I cannot overstate the importance of the independence of the Auditor-General in this respect. As the public and private sectors converge; as the business environment becomes inherently riskier; and as concerns for public accountability heighten; it is vital that Auditors-General have all the professional and functional freedom required to fulfil, fearlessly and independently, the role demanded of them by Parliament.

The debate over audit independence is not new, although it has attained an increased popular profile in the wake of the collapse of Enron in the United States. Audit bodies and the accounting profession worldwide have been actively engaged in clarifying and reinforcing independence for many years. However, recent events have put the debate on to a different plane with higher level expectations being generated. While the ANAO takes a professional interest in this ongoing debate, it is also set apart from it by virtue of its statutory and functional independence. Nevertheless, there is also an

operational imperative with the ANAO outsourcing a not insignificant proportion of its audit work to private sector accounting firms. As well, with the increasing use of such firms by the public sector for internal audit, we are often dependent on their work in coming to an audit opinion on organisations' control environments and financial statements.

As discussed earlier in this paper, the independence of the Commonwealth Auditor-General is a key feature of our democratic system of government. Three elements are crucial to reinforcing the independence of the Office: the powerful *Auditor-General Act 1997*; direct financial appropriation as part of the Budget process; and the ability of the Auditor-General to develop and set professional standards for his/her Office. Recently, Senator Murray outlined what he considered to be the four fundamental pre-conditions for more generic auditor independence as follows:

- the appointment process must be objective, on merit, and not influenced by improper considerations;
- security of tenure has to be guaranteed for a known and viable period;
- ending the appointment must be subject to known and proper criteria, not capricious or improper considerations; and
- remuneration has to be sufficient to ensure that the task can be properly fulfilled, sufficient to prevent improper inducements being attractive, and sufficient to cover reasonable risk arising from the task.³⁰

While the debate will continue amongst the profession worldwide, the issue of audit independence will come under further scrutiny in Australia with the JCPAA's recent decision to launch an inquiry into this topic. The JCPAA will examine whether government should intervene to regulate the auditing profession. The issue of auditor independence is also likely to be considered as part of the royal commission into the collapse of HIH. The Statement of Auditing Standards AUS 1 requires an auditor not only to be independent, but also to appear to be independent. For the purpose of this Statement:

- (a) actual independence is the achievement of actual freedom from bias, personal interest, prior commitment to an interest, or susceptibility to undue influence or pressure; and
- (b) perceived independence is the belief of financial report users that actual independence has been achieved.³¹

While the Statement of Auditing Practice provides guidance to auditors when considering independence, the recently released Professional Statement F1, entitled 'Professional Independence' addresses the principles of independence. The ANAO

³⁰ Senator Andrew Murray, 'Auditors Matter', *Opinion, CPA Australia Magazine*, June 2002, p. 17.

³¹ Extracted from CPA Australia Members' Handbook, December, 2001, issue AUP32.

supports the Ramsay Report³² recommendation that the auditor should make an annual declaration, addressed to the board of directors, that the auditor has maintained his/her independence in accordance with the *Corporations Act 2001* and the rules of the professional accounting bodies. I should note that, pursuant to that Act, the Auditor-General is a registered company auditor.

As a result of the Enron collapse in the United States, we have already seen the separation of audit and consulting activities in major accounting firms. Private firms in Australia are responding to these challenges in a number of ways, with PricewaterhouseCoopers recently establishing an independent board to oversee the firm's audit standards, whereas Ernst & Young has stated the preference for 'embedding strict quality control procedures in the culture of the firm rather than necessarily having an oversight board.'³³

Another concern has been the rotation of auditors within specified time periods. Recently, there has been a suggestion by the Australian Securities and Investments Commission (ASIC) that companies be required to rotate audit firms rather than engagement partners.³⁴ This is an issue of some contention, for example, in relation to practicality, effectiveness and higher cost. It has been suggested that higher costs be amortised over five years, equal to a seven per cent increase in audit fees each year.³⁵ The ANAO has covered this, and a number of other relevant issues, in its submission to the JCPAA inquiry.

The issues relating to independence are difficult and are still to be resolved. The need for active ongoing discussion is clear. As the United States Panel on Audit Effectiveness noted in its review of the current audit model:

Independence is fundamental to the reliability of auditors' reports. Those reports would not be credible, and investors and creditors would have little confidence in them, if audits were not independent in both fact and appearance. To be credible, an auditor's opinion must be based on an objective and disinterested assessment of whether the financial statements are presented fairly in conformity with generally accepted accounting principles³⁶

There is growing pressure for the exclusion of audit firms from other activities within the same organisations. For some years, there has been general acceptance of the desirability of those firms *not* being engaged both as internal and external auditor. In my view, the questions about possible conflicts of interest, audit rotation and selection of auditors are central to the roles and responsibilities of audit committees as part of

³² Ian Ramsay, *Independence of Australian Company Auditors, Review of Current Australian Requirements and Proposals for Reform*. Canberra, The Treasury, 2001.

³³ Fiona Buffini, 'PwC starts oversight board', *Australian Financial Review*, 3 May 2002.

³⁴ A. Fabro & F. Buffini 'Accountants agree to adopt new professional standards', *Australian Financial Review*, 24 May 2002.

³⁵ Fiona Buffini, 'Rotation plan stirs auditors', *Australian Financial Review*, 29 May 2002, p. 11.

³⁶ United States Panel on Audit Effectiveness, *Report and Recommendations*, Stamford, Connecticut, Public Oversight Board, 2000, p. 109.

the corporate governance framework. One challenge is therefore how to strengthen those roles to enhance their effectiveness and credibility in the eyes of both internal and external stakeholders. However, I note that an ASIC survey of auditor independence found that ‘it was not normal for the level of non-audit services to be given consideration by the board or the audit committee.’³⁷ In fact, usually the Chief Financial Officer was the primary person responsible for engaging the external auditor in these roles. Reverting back to the auditor rotation issue, the survey also indicated that ‘the vast majority of respondents did not have a policy of rotating audit firms.’³⁸

The recent series of high profile Australian corporate collapses including HIH, One.Tel and Ansett have renewed attention to the issue of the roles and responsibilities of both private and public sector auditors in the Australian context. Citizens are more aware of governance issues than ever before. Of particular recent interest has been the focus on personal accountability of directors and senior executives whose performance bonuses may be inversely proportional to trends in share prices and company profits. The public expects that auditors will alert shareholders or other stakeholders to the fundamental soundness (or otherwise) of business entities. It should also be noted, however, that the mere fact that auditors are independent will not save companies from collapse or agencies from the impacts of poor management. As noted in a recent legal update on corporate governance:

It is clear that the most rigorous and independent audit will not save a company with poor management and business practices from insolvency.³⁹

This view was endorsed recently by the Chairman of the Australian Securities and Investments Commission who noted that, when it comes to a company’s compliance and accounting standard, ‘*the final buck stops with the board*’ rather than with company auditors.⁴⁰ Auditors do, however, have a very important role to play in terms of providing advice that draws on their broad range of experiences which may range across the public and private sectors. Any concern and/or suggestions should be conveyed in the audit management letter and/or discussed directly with the board of directors, who actually appoint the auditors in the private sector. One issue is whether, how, and to what extent, the contents of such a letter should be conveyed to other stakeholders. As an aside, I note Senator Murray, in the article previously referred to, observed that audit independence requires appointment by a *third* party, for example an elected corporate governance board additional to the main board.⁴¹

However, I cannot overstate the fact that the ANAO operates in an advisory capacity, rather than participating directly in decision-making by public sector managers. While I urge my officers to ‘stand in the managers’ shoes’ in order to understand the

³⁷ Australian Securities & Investments Commission, ‘ASIC announces findings of auditor independence survey’. Media Release 02/13. 16 January 2002, p. 3.

³⁸ *ibid*, p. 6.

³⁹ Blake Dawson Waldron, *Corporate Governance Update: Audit Independence*, March 2002.

⁴⁰ Quoted in 2002, ‘Auditors could be whistleblowers, ASIC chairman proposes’, *Committee Bulletin* vol. 13, no. 3, February 16–28 2002, p. 3.

⁴¹ Senator Andrew Murray, 2002, *op. cit.*, p. 17.

complexities of the particular business environments under review, it is for the managers themselves to decide whether or not they will act on ANAO or other advice with reference to their particular risks and opportunities. This is one essential difference between management consultancies and the public sector audit approach. Our 'observer status' as public sector auditors reduces the risk of conflict of interest issues arising in the course of our work. Nevertheless, that does not absolve us from any responsibility to the Parliament for our views and actions.

The ANAO considers that there is a range of steps that could be taken to strengthen the independence of auditors and provide greater public confidence in their performance and the role that they have in adding credibility to financial reports prepared by companies, including:

- underlining the independence of auditors in statute;
- enhancing the role of audit committees in corporate governance;
- improving the disclosure of 'other services' provided by auditors;
- encouraging the profession to tighten current guidelines on 'other services' work that auditors are able to undertake;
- encouraging the rotation of auditors after a suitable time period, for example, seven years; and
- encouraging the wider involvement within the profession of users and preparers of financial statements and reports, particularly in the setting of auditing standards and guidelines.

These options for enhancing the independence of auditors may be pursued under the current co-regulatory model or through other forms of statutory or non-statutory regulation. These are matters for decision by the government and the profession co-operatively, given the level of interdependence between both parties in current arrangements. Of interest, in this respect, is a recent report of the New York Stock Exchange Corporate Accountability and Listing Standards Committee which recommends that the US Securities and Exchange Commission 'should prohibit relationships between independent auditors and audit clients that may impair the effectiveness of audits.'⁴²

Audit mandate

One particular challenge in the changing public sector environment is the increasing tension regarding the mandate of the Commonwealth Auditor-General and the boundaries between government policy and its implementation. The Auditor-

⁴² New York Stock Exchange Corporate Accountability and Listing Standards Committee, *Report*. New York, 6 June 2002, p. 26. The Committee, among other matters, also proposed that listed companies must have an audit committee comprised solely of independent directors; the chair of the committee must have accounting or financial management experience; and audit committees must have sole responsibility for hiring and firing the company's independent auditors, and for approving any significant non-audit work by the auditors.

General's performance audit mandate stops short of review of government policy decisions. The scope of a performance audit may, however, incorporate the audit of information leading to policy decisions, an assessment of whether policy objectives have been met, and an assessment of the results of policy implementation both within the administering agency and, externally, on other involved bodies. The issue was given some prominence at the federal level following two performance audits my Office undertook on property sales and IT outsourcing.⁴³

The audits attracted a significant amount of comment. Some of this comment focussed on the difficulties of negotiating the grey area between investigating government performance and commenting on public policy matters. Problems can arise where policy is difficult to separate from implementation, as was the case in both of the audits mentioned above. Professor Richard Mulgan, an academic at the Australian National University, sums up the nub of the issue:

Performance audit assumes a clear distinction between policy objectives (set by elected governments) and policy implementation (carried out by servants or contractors). Auditors are assumed to leave the objectives to government and confine themselves to the efficiency, effectiveness and probity with which these objectives have been implemented. However, because the lines between policy and implementation, or between ends and means, are blurred and contested, the extent of the Auditor-General's jurisdiction is similarly open to question.⁴⁴

One 'positive' to come out of this debate is the recognition that government policy objectives need to be stated in less ambiguous terms, to assist in making perceived distinctions between policy and implementation reasonably clear.

From time to time, a number of performance audit reports raise issues including value judgements concerning the probity of the actions of the government or ministers, for example, the audits of ministerial travel claims,⁴⁵ GST advertising,⁴⁶ and the Federation Fund.⁴⁷ These are not matters that the Auditor-General has the mandate to resolve; rather, this is a matter for the Parliament. It is not the role of the Auditor-General to directly hold the government to account. This is the role of the Parliament and, ultimately, of the people. In that respect, Parliament has the benefit of audit reports to hold the executive accountable. The media can also make a significant contribution to both public knowledge and understanding of relevant issues.

⁴³ See ANAO 2001, *Commonwealth Estate Property Sales*, Report No. 4, Canberra, 1 August; and, ANAO 2000, *Implementation of Whole-of-Government Information Technology and Infrastructure Consolidation and Outsourcing Initiative*, Report No. 9, Canberra, 6 September.

⁴⁴ Richard Mulgan, 'Policy versus Administration: the Auditor-General's clash with Finance and the Minister', *Canberra Bulletin of Public Administration*, no. 101, September 2001, p. 40.

⁴⁵ ANAO, *Ministerial Travel Claims*, Report No.23, Canberra, 22 December 1997.

⁴⁶ ANAO, *Taxation Reform—Community Education and Information Program*, Canberra, 30 October 1998.

⁴⁷ ANAO, *Administration of the Federation Fund Programme*, Report No. 11, Canberra, 19 September 2001.

The performance audit mandate is an essential element of the accountability process in all public jurisdictions. However, performance auditing is not a static process. There will be a continued emphasis on improving our service to Parliament as our role is reconfigured and redefined in the changing governance environment.

Setting standards for accountability

Under the *Auditor-General Act 1997*, I am required to set auditing standards with which individuals performing Auditor-General functions must comply. This gives the ANAO the flexibility to set its own agenda and to develop appropriate auditing tools for the contemporary environment. In setting the standards, I acknowledge the commonality of professional requirements between private and public sector auditors and, as such, the ANAO auditing standards are formulated with regard to the auditing standards issued by the Auditing and Assurance Standards Board of the Australian Accounting Research Foundation (AARF). Consistency with international standards, including the International Organization of Supreme Audit Institutions (INTOSAI) Auditing Standards, and those of the International Auditing and Assurance Standards Board of the International Federation of Accountants, is also a consideration. My deputy is currently a member of both the national and international auditing standards boards.

The current ANAO Auditing Standards incorporate the codified Auditing Standards and Auditing Guidance Statements issued by the AARF. In this context, and our broader role in the accounting environment, it is important for the ANAO to contribute to the process of setting these standards. Such involvement also gives us the opportunity to reflect distinctive public sector issues in the standard setting process. The same applies to accounting standards but with international harmonisation largely focussed on the private sector. However, I note that, in the Australian Accounting Standards Board (AASB) Policy Statement (PS4) on International Convergence and Harmonisation Policy, the AASB will take account of the interests of *both* the public and private sectors in Australia.

The importance of bringing together public and private sector accountants has also been recognised by the profession with the Institute of Chartered Accountants in Australia (ICAA) holding its first Government Accounting Forum earlier this year. This will become an annual event that brings together government finance representatives to share experiences and to debate government finance policy.⁴⁸

However, there is more to accountability than technical compliance. In this regard, the ANAO is guided by the Parliament in terms of appropriate accountability standards for the broader APS. As the preceding discussion has demonstrated, agencies are faced with diverse challenges for which tailored approaches are required. The 'privatisation' of the public sector neither limits nor obviates the need for accountability to stakeholders. Rather, new players in the accountability chain, less direct relationships between stakeholders and service providers, and greater flexibility in decision-making, strengthen the need for accountability regardless of the manner in which it is determined. While the Parliament sets the acceptable boundaries for agencies in the new business environment, the ANAO is charged with ensuring that

⁴⁸ S. Harrison, *Making a statement*, CA Charter, May 2002, p. 9.

agencies get the balance right between efficiency and accountability within the boundaries specified by Parliament.

Systems for managing fraud and conflict of interest, in particular, are very important regardless of whether a service is delivered through the public or private sector. Conflict of interest is particularly topical at the moment with a number of former ministers being engaged as consultants by the private sector to deal with their former agencies, or advising on policy issues relating to their former portfolio responsibilities. There has been concern expressed in the Parliament about the absence of protocols in this area. By request, the ANAO recently undertook an examination of a grant of five million dollars from the former Minister for Health and Aged Care to the Royal Australian College of General Practitioners (RACGP) to assist in the co-location of GP House.⁴⁹

Within agencies involving close interaction with the private sector, the question of the value of intellectual property and commercial-in-confidence information is also increasingly subject to probity considerations. Probity advice is crucial in the conduct of large-scale privatisations and outsourcing.

The concept of accountability is not exclusive to the public sector. No one doubts, for example, that the boards of private sector corporations are accountable to their shareholders who want some kind of return on their investment. It is the nature and extent of that accountability which public sector commentators would contend distinguishes the two sectors. As one commentator posits:

In the public sector, audit is required by citizens through Parliament to maintain confidence in the probity, and regularity of financial transactions and the attainment of best value from public expenditure, which contrasts with the private sector's need to give confidence to the capital markets.⁵⁰

Of note, it is the adoption or adaptation of private sector approaches, methods and techniques in public service delivery, which has highlighted trade-offs between the nature and level of accountability and private sector cost efficiency. Accordingly, the essential issue, as is so often the case in public administration, is to achieve an *appropriate balance* between accountability and efficiency given the particular parameters of the situation at hand. Achieving this balance is imperative when the convergence of the private and public sectors focuses attention more sharply on both the similarities and the differences between the two.

Focus on results

The changing public sector environment calls for a more pragmatic approach to accountability. While the accountability regime should not stifle innovation or other management activity, it is important that appropriate mechanisms are in place to ensure the ethical and accountable use of resources. These mechanisms will vary

⁴⁹ ANAO, *A Preliminary Examination into the Allocation of Grant Funding for the Co-Location of National General Practice Organisations*, Report No.50, Canberra, 16 May 2002.

⁵⁰ I. Percy, 'The Best Value Agenda for Auditing', *Financial Accountability & Management*, vol. 17, no. 4, November 2001, p. 351.

depending on the particular business risks of individual program areas. While the business environment is changing, and the processes needed to effectively perform change accordingly, in my experience, one tenet remains constant: sound process leads in most cases to sound outcomes. This lesson is worth reiterating at a time when managers are apparently being urged to focus almost solely on outcomes or results, or at least this is a common perception. Some argue that a sound process can be a good result in itself. However, organisations do need to have clarity about means and ends.

The focus on results has also heightened the importance placed on rigorous performance information systems capable of quantitatively and qualitatively measuring results and demonstrating achievement. This is a major issue worldwide. Under the accrual budgeting framework in Australia, agencies are required to define inputs, outputs and outcomes. Under the Commonwealth legislative framework, agencies are also required to demonstrate the efficient, effective and ethical use of resources. Performance information is therefore essential to the achievement of statutory accountability requirements defined by the Parliament. The quality of performance information has been subject to a number of audits that have found substantial shortcomings in many important areas as agencies adjust to the new budgeting and accountability framework.

The ANAO reviews performance information as a matter of course in most performance audits. This includes review of the *appropriateness* and comprehensiveness of the relevant performance measures. In addition, a Better Practice Guide was produced in 1996⁵¹ and has been recently updated in relation to performance information in Portfolio Budget Statements⁵². While recognising that good performance information involves time and cost considerations, this is an area with substantial scope for improvement. The benefits of cost effective performance information include the capacity to better manage risks, to adjust programs to meet changing client needs, and to demonstrate to Parliament that Commonwealth resources have been used efficiently and effectively. In that respect, I will be interested to review a model for rating departmental performance reports developed by my colleague the Auditor General of Canada. The latter observes that rating a department's performance report enables Parliamentarians to:

- compare the report with those of other departments that have also been rated;
- ask the department to take specific steps that will improve its report; and
- assess the department's progress in improving its report if it has been rated previously.⁵³

⁵¹ ANAO and the Department of Finance, *Performance Information Principles*. Better Practice Guide, Canberra, November 1996; *Performance Information Principles—Lessons Learned*, Canberra, December 1996.

⁵² ANAO, *Performance Information in Portfolio Budget Statements*. Better Practice Guide, Canberra, May 2002.

⁵³ Auditor General of Canada, 'Foreword and Main Points' in *Report to the House of Commons*, Ottawa, 16 April 2002, p. 11.

Materiality

Like its client agencies, the ANAO is also charged with getting the balance right between efficiency and accountability to best target its service to Parliament. An analysis of materiality assists us in setting our strategic audit coverage from year to year. Materiality is the technical term for the threshold for determining the seriousness with which auditors will regard information which, if omitted, mis-stated or not disclosed, has the potential to affect adversely decisions made by users of a financial report about the allocation of scarce resources or by the management or governing board of an entity in the discharge of their accountability to stakeholders. To aim to detect *all* errors or mis-statements would be cost prohibitive. However, materiality is important in relation to the issue of fraud or waste of taxpayers' funds, which is of concern to all our stakeholders, especially Parliament, and consequently is an ongoing focus for our work.

The ANAO takes a risk-based approach to the identification of fraudulent behaviour across the whole of government. It is fair to say that both the public and private auditing standards require an audit to be designed to obtain reasonable, but not absolute, assurance that a material misstatement due to fraud will be detected. There is no guarantee that we will detect all incidences of fraud. However, we aim to ensure that our approach gives us adequate coverage of areas of risk.

For 2001–02, the level of materiality adopted by the ANAO in planning for the Consolidated Financial Statements (CFS) audit was approximately 5 per cent of the average net results for the CFS over the previous 3 years, or 400 million dollars. I acknowledge that this is a figure that gives some concern to a number of parliamentarians. However, to make the most efficient use of our resources in providing a high level of service to Parliament the ANAO must take such a risk-based approach.

This does not mean that issues identified as less material for the purposes of financial statement audit are immune from review by the ANAO. In the event that financial statement auditors have concerns with matters arising in the course of an audit, they are encouraged to bring those concerns to the attention of their team leader, who can consider whether to examine the issue further as part of the audit, or whether to defer it to a subsequent audit or, if appropriate, and it is an issue likely to apply to a number of agencies across the APS, consider referring it for an assurance or performance audit. Currently, in Australia, increased attention is being given to the issue of potential fraud due to the introduction of a new auditing standard that explicitly requires auditors to consider, document and communicate with management on the issue of fraud. For example, there would need to be assurance of the existence of fraud control plans and that detected fraud is brought to attention. However, there is still no expectation that all fraud would be detected by an audit. The standard (AUS 210) states that:

The primary responsibility for the prevention and detection for fraud and error rest both with those charged with the governance and the management of an entity.⁵⁴

Adding value through audit

Our risk-based approach to setting our audit strategy allows us to target areas of most interest and value to the Parliament and the APS. We remain responsive to the needs of a changing public sector and endeavour to ensure that better practice and lessons learned in individual agencies both in Australia and overseas are disseminated across the APS. In recent years, we have responded to the trend towards New Public Management (NPM) with a series of products focussing on the challenges and opportunities inherent in the NPM approach. Recent audits have covered, among other things, outsourcing, asset sales, contract management and networked service delivery.

Outsourcing

A feature of the changing public sector environment has been the outsourcing of many functions that, it is judged, the private sector can undertake more efficiently and cost-effectively than the public sector. Outsourcing advocates point to the opportunities offered in terms of increased flexibility in service delivery; greater focus on outputs and outcomes rather than inputs; the freeing of public sector management to focus on higher priority activities; encouraging suppliers to provide innovative solutions; and cost savings in providing services.

There have been some successes; for example, the outsourcing of human resource management functions in the Department of Finance and Administration was assessed as positive for the agency's core business, and the agency won a worldwide outsourcing achievement award.⁵⁵ In addition, a recent audit of the management of Commonwealth national parks found benefits both in terms of savings to the Commonwealth and in increased employment opportunities in some rural and remote communities.⁵⁶

However, outsourcing also brings risks. My Office's experience has been that a poorly managed outsourcing approach can result in higher costs, wasted resources, impaired performance and considerable public concern. For example, an ANAO audit of the implementation of IT outsourcing across the public sector found that benefits realised by agencies were variable and that costs were well in excess of the amounts budgeted.⁵⁷ A subsequent inquiry into the issues raised by the ANAO noted that:

⁵⁴ Australian Accounting Research Foundation, *The Auditors' Responsibility to consider Fraud and Error in an Audit of a Financial Report*. Australian Auditing Standard AUS 210. Issued on behalf of the Australian Society of Certified Practising Accountants and the Institute of Chartered Accountants in Australia, January 2002, para. 10.

⁵⁵ 'DOFA wins International Outsourcing Award', *HR Report*, no. 220, 7 March 2000, p. 2.

⁵⁶ ANAO, *The Management of Commonwealth National Parks and Reserves—conserving our country*, Report No. 49, Canberra. 13 May 2002.

⁵⁷ ANAO, *Implementation of Whole-of-Government Information Technology and Infrastructure Consolidation and Outsourcing Initiative*, 2000, op.cit.

Priority has been given to executing outsourced contracts without adequate regard to the highly sensitive risk and complex processes of transition and the ongoing management of the outsourced business arrangement.⁵⁸

The main message from this experience is that savings and other benefits do not flow automatically from outsourcing. Indeed, the outsourcing process, like any other element of the business function, must be well managed to produce required outputs and outcomes and must be suitably transparent to protect public accountability. Nevertheless, the increasing private sector trend to so-called ‘smartsourcing’ to meet a specific business need, as opposed to cost savings or avoiding difficult recruitment and retention problems, needs to be looked at in the public sector.

In addition to the immediate impact of outsourcing on public accountability, the transition to outsourcing arrangements has other significant effects over the longer term. For example, there is a particular risk that incumbency advantage may reduce the level of competition for subsequent contracts. Incumbents may have greater information and knowledge about the task than either potential alternative service providers or the Commonwealth agency directly involved. The risk becomes more pervasive when the outsourced activity has a significant impact on core business, or where competition in the market is limited.

The customer relationship with the business also changes following outsourcing. It is important that the ongoing customer relationship is subject to appropriate pricing arrangements and that private sector competitors are given the opportunity to bid for government business. In the appropriate circumstances, the use of competitive tendering and contracting promotes open and effective competition by calling for offers that can be evaluated against clear and previously stated requirements to obtain value for money. This, in turn, creates the necessary framework for a defensible and accountable method of selecting a service provider. In addition, it should facilitate the best outcome for customers who, it should be noted, are also taxpayers and citizens.

The convergence of the public and private sectors will continue to introduce new levels of complexity and risk to public sector agencies. Managing the new risks is crucial to the achievement of value for money—the primary gain from involving the private sector in the first place. Convergence has many different dimensions and involves a wide range of stakeholders including both non-government and community players. As discussed earlier in this paper, agreeing governance structures and demonstrating accountability are particular challenges in the new business environment. Agencies can outsource functions—in full or in part; however, Parliament insists that they cannot outsource their responsibility or overall accountability. The government recently reinforced this point in noting that:

agencies remain accountable for the delivery of services, even where the service delivery is provided by the private sector. Central to the

⁵⁸ Richard Humphry, *Review of the Whole of Government Information Technology Outsourcing Initiative*, Canberra, 17 May 2000, p. 10.

accountability principle is the need to maintain awareness of client needs and how they are being met.⁵⁹

Yet, practically, there is a question of just how accountable agencies can be, in the traditional meaning of the concept, if they have virtually no responsibility for the delivery of particular public services nor relevant information or experience. This issue has obvious implications for the ability of Parliament to scrutinise the efficiency and effectiveness of outsourced operations.

At the end of the day, it may be the courts that determine accountability for outsourced business activities. There have already been cases where the courts have ruled on the ultimate accountability of government agencies for outsourced activities, and the ANAO is currently assisting with such a matter that is before the courts.

Asset sales

A key issue in my performance audits of the sale of Commonwealth assets—particularly Commonwealth businesses – has been the role of financial, legal and other private sector advisers in the sale process. In Australia, the privatisation process itself is now subject to extensive outsourcing under multi-million dollar advisory contracts. This places considerable emphasis on contract management and balancing commercial interests with the overlaying public accountability requirements of the public service. One of the key outcomes from our privatisation audits has been the identification of opportunities for significant improvements to both the tender process and the management of the contract itself.⁶⁰ The implementation of improved processes can lead to improved overall value for money and project quality management in subsequent sales. In short, the emphasis is on better practice to add value to public administration as a major audit objective. As the Chief Secretary of the United Kingdom Treasury noted recently:

We have a duty of care to the taxpayer to eliminate poor procurement methods and to ensure value for money improvements. For every pound saved in procurement is a pound more for front line public services like hospitals, education, fighting crime and investing in transport.⁶¹

Overall, there have been mixed results from the greater use of private sector practices. Some fifty billion dollars has been raised in asset sales, which has contributed to debt reduction and provided the funds for pressing policy initiatives such as environmental protection and community services in rural areas.

However, many public sector businesses were established to provide services or products that were important to the public interest. The sale of these businesses does not end the public interest in the provision of these services and products, and this is often reflected in ongoing regulation of the relevant business or industry.

⁵⁹ *Commonwealth Parliamentary Debates* (Senate), 14 May 2002, p. 1365.

⁶⁰ See, for example, ANAO, *Sale of One-third of Telstra*, Report No. 10, Canberra, 19 October 1998.

⁶¹ Quoted in SAI United Kingdom, *SAIs' Involvement in System Development: Opportunities and Risks*, Principal Paper—Sub-theme III, Prepared for the Commonwealth Auditors' General Conference, Kuala Lumpur—6–10 October 2002, p. 10.

Accordingly, where government has seen a public interest need for the regulation of privatised companies or industries in which privatised companies compete, Auditors-General can perform an important accountability function in examining and reporting on the public sector's performance in regulating privatised businesses and/or administering government contracts with these businesses. This is an important accountability mechanism for the Parliament.

Contract management

I noted earlier that sectoral convergence highlights the fact that there remain (necessary) differences that are often reflected in the area of contract management. By contract management, I mean the whole process from the initial release of tenders through to ongoing contract performance monitoring and review, including transition arrangements. The nub of these differences is that taxpayers' dollars are at stake. It is crucial that the process of awarding contracts is adequately documented, ensures open and effective competition, and achieves value for money outcomes. The process must be transparent and able to withstand parliamentary, and other, scrutiny.

Contracts must include clearly specified qualitative and quantitative performance standards. They should include appropriate arrangements for monitoring and reviewing contractors' performance. It is important that the ongoing business relationship between the public sector and the privatised business is defined by a legally enforceable agreement. The written contract must accurately reflect the understanding of all parties to the contract, and must constitute the *entire* agreement between the parties. Should this not be the case, the documentary trail supporting the authority for the payment of public money, the contractual performance requirements, incentives and sanctions may not be clear. The Government has acknowledged the importance of giving greater attention to this aspect of public administration. In its response to the JCPAA's review of contract management in the public service, the Government noted:

the importance that contract management now assumes in the ... APS and the enhanced benefits that it can offer. The Government is also keenly aware of the importance of transparency and accountability when managing Government contracts.⁶²

Just as it is incumbent upon public sector agencies to ensure that they have a sound understanding of the commercial nature of any contract, private sector entities entering into commercial relationships with the Commonwealth need to recognise that there are overlaying public accountability issues that need to be addressed that may not normally be pertinent to purely private sector transactions. Contractual performance is maximised by a cooperative, trusting relationship between the parties. This may take some time to secure. However, it should never be forgotten that such relationships are founded on a commercial basis in which the parties do not necessarily have common objectives. Accordingly, good commercial practice requires a contractual framework appropriate to the business relationship. That is, one size does not fit all.

⁶² *Commonwealth Parliamentary Debates* (Senate), 14 May 2002, p. 1382.

Importantly, there should be no equivocation about either the required performance or the obligations of each party. I stress that this is as much about achieving the desired outcome as it is about meeting particular accountability requirements. In an article quoted earlier, reference was made to a recommendation, in relation to Victoria, that a two-tiered system of performance measurement be adopted.⁶³ While not the first time this approach had been suggested, the main idea was that, first, a series of quantitative measures be developed against which contractual performance measures should be assessed. Second, a series of additional measures, both quantitative and qualitative, would also be developed which would act as more general indicators of performance by a private sector provider. The notion is that these latter measures, while not directly enforceable through the contract, may be made available *publicly* to enhance program accountability.⁶⁴

In large part, the foregoing is a reflection of a concern about the nature of accountability in public/private partnerships. The recently released Commonwealth Fraud Control Guidelines require agencies to take care that outsourcing does not compromise the agency's fraud control arrangements by putting in place measures to ensure external service providers meet the high standard of accountability needed as part of the Commonwealth's procurement framework.⁶⁵ There are lessons to be learned by both sectors in this important area of the governance framework.

The ANAO has produced a number of audits and two better practice guides on the issue of contract management in an attempt to assist agencies and their private sector partners in this very complex and fast-growing area. The JCPAA has also reviewed this issue and its implications for public sector accountability. In its recent review of the *Auditor-General Act 1997* (referred to in the first section of this paper), the JCPAA stated that:

the increasing role of the private sector in the provision of public goods and services requires an administrative mechanism to ensure the Auditor-General has access to the premises of Commonwealth contractors. The Auditor-General requires this power to obtain documentation and information to arrive at an opinion about the efficiency and effectiveness of program administration.⁶⁶

I consider that access to contract related records and information should generally be equivalent to that which should reasonably be specified by the contracting agency in order to fulfil its responsibilities for competent performance management and administration of the contract. Access to premises would not normally be necessary for 'products' or 'commodity type' services, such as maintenance and cleaning, which are provided in the normal course of business. It would be a different matter where

⁶³ Spencer Zifcak, 2001, *op. cit.*, p.94.

⁶⁴ *ibid*, p. 94.

⁶⁵ Attorney-General's Department, *Commonwealth Fraud Control Guidelines*. Issued by the Minister for Justice and Customs as Fraud Control Guidelines under Regulation 19 of the FMA Regulations 1997 (Guideline 5), Canberra, May 2002, p. 19.

⁶⁶ Joint Committee of Public Accounts and Audit, *Review of the Auditor-General Act 1997*, Report No. 386, Canberra, August 2001, p. 33.

government information or other significant assets were located on private sector premises.

The JCPAA has stated that standard access clauses should be included in all government contracts unless there are strong reasons not to. The Committee resolved, as part of its power to review and change the Annual Report Guidelines, that it will require government agencies to include in their Annual Reports a list showing all contracts by name, value, and the reason why the standard access clause, which provides the Auditor-General with access to the premises of Commonwealth contractors, was not included in the contract.⁶⁷ This provides Parliament with the opportunity to scrutinise agencies regarding their decisions.

While the Government has yet to respond to this Report, it stated, in response to an earlier JCPAA recommendation, that:

its preferred approach is not to mandate obligations, through legislative or other means, to provide the Auditor-General automatic right of access to contractors' premises

and that

the Government supports Commonwealth bodies including appropriate clauses in contracts as the best and most cost-effective mechanism to facilitate access by the ANAO to a contractor's premises in appropriate circumstances.⁶⁸

The response also stated that:

the Commonwealth Procurement Guidelines would be amended to emphasise the importance of agencies ensuring they are able to satisfy all relevant accountability obligations, including ANAO access to records and premises.⁶⁹

While noting the Government's response, the ANAO continues to encourage the use of contractual provisions as the key mechanism for ensuring agency and ANAO access to contractors' records for accountability purposes. The ANAO and the Department of Finance and Administration developed a set of standard access clauses which the Minister for Finance and Administration approved as part of the revised Procurement Guidelines issued in September, 2001.⁷⁰ More recently, use of such

⁶⁷ *ibid*, para 3.29, p. 34.

⁶⁸ Government response to Recommendation 5 of the 368th Report of the Joint Committee of Public Accounts and Audit: Review of Audit Report No. 34 1997–98, *New Submarine Project Department of Defence*. Letter from the Prime Minister to the Minister for Finance and Administration dated 12 August 2000.

⁶⁹ *ibid*.

⁷⁰ The clauses are available on the ANAO's website, [**Error! Hyperlink reference not valid.**]. See also Department of Finance and Administration, *Commonwealth Procurement Guidelines—Best Practice Guidance*, Canberra, February 2002, p. 3.

clauses by agencies, on a case by case basis, was re-endorsed by the Government's response⁷¹ to the JCPAA's Report on Contract Management in the Australian Public Service mentioned earlier. The Government went on to note that:

In addition to these formal measures, the ANAO might also consider the development of an information package for agencies, which gives practical examples of best practice and illustrates the benefits to agencies in negotiating appropriate provisions with their contractors. However, as an independent agency, this is a matter for the ANAO.⁷²

We are looking again at what further direct and indirect support we can provide to agencies in this respect.

This is an issue that is currently challenging the private sector also. The regulatory body for the major banks has recently expressed reservations about its ability to review the administration of credit cards, for example, that may have been outsourced to third parties. The Australian Prudential Regulatory Authority (APRA) has drafted new rules covering outsourcing which will give it the power to impose terms and conditions on such contracts, as well as to conduct on-site inspections.⁷³

Contract management experiences were positive, for example, in relation to the construction of the National Museum of Australia (NMA), which was recently reviewed by my Office. In late 1996, the Government announced its commitment to establish new facilities for the NMA and the Australian Institute of Aboriginal and Torres Strait Islander Studies in Canberra. The project was allocated a budget of 155.4 million dollars and the government decided to pursue a project alliancing strategy to achieve time, cost and quality objectives in the construction of both facilities. Project alliancing is a relatively new method of contracting that seeks to deliver a cost-effective outcome within a set time frame for a project through which the project owner—in this case the Commonwealth—shares project risks and rewards with the contractors.

The ANAO found that, overall, the contract management process was well handled by the Department of Communications, Information Technology and the Arts (DCITA). The process for the appointment of architects, building and service contractors, and exhibition designers complied with the Commonwealth procurement guidelines. The development and use of probity guidelines in the selection processes added valuable assurance. Successful project alliancing depends on skilful management of the particular risks involved. With respect to this project, the ANAO considered that appropriate financial incentives were in place to encourage 'best for project' behaviour from both the Commonwealth and its commercial alliance partners.

The ANAO also found that DCITA and its commercial alliance partners had sound processes and procedures in place to monitor appropriately the progress of construction and manage time, cost and quality requirements. Overall, the ANAO

⁷¹ *Commonwealth Parliamentary Debates* (Senate), 14 May 2002, pp. 1384–5.

⁷² *ibid.*, p. 1385.

⁷³ M. Mellish, 'Banks face IT contracts scrutiny', *Australian Financial Review*, 27 May 2002.

considered that DCITA managed the project well having regard to the project's magnitude, the agency's lack of experience with the relatively new project alliancing approach and the tight timetable involved. The management of the construction of the NMA demonstrates the advantages of robust contract management in achieving value for money outcomes.⁷⁴ Importantly, there was shared understanding about what the latter involved for the partnership.

Managing the risks associated with the increased involvement of the private sector in the delivery of government services, particularly through contract arrangements, has required the development and/or enhancement of a range of commercial, negotiation, project and contract management skills across the public sector. Risks to be addressed by agencies include external risks such as legal issues, policy changes, contractor business failure and internal risks, such as lack of appropriate skills/knowledge for awarding and managing contracts, failure to meet performance targets, and management information system failures. These risks need to be analysed prior to the commencement of the contractual relationship as well as during the life of the contract. By using a sound risk management approach to support contract management, corporate governance is enhanced and, consequently, there is a greater assurance that the risks are managed effectively. This is one of the major challenges facing contemporary public sector managers in demonstrating accountability to the Parliament.

Networked service delivery

The ANAO has also sought to add value through its audit activity in the area of networked service delivery. As discussed earlier in this paper, agencies are increasingly making use of new forms of partnerships with both public and private sector counterparts to enhance service delivery. We now operate within an 'accountability continuum' that accommodates the wide variety of approaches implemented by individual agency heads, or agency heads in partnership, to meet their objectives. The ANAO has sought to provide guidance in relation to better practice and lessons learned in this complex field.

The ANAO's audit of the management of Job Network contracts examined the effectiveness of a network of 300 private, community and government provider organisations in finding jobs for unemployed Australians.⁷⁵ The ANAO found that the first round of Job Network contracts had been managed in an efficient and effective manner, however, there were some areas for improvement. In particular, the audit focussed on an issue worth considering by all agencies entering into networked relationships—that is, the need for regular communication on strategic, higher level issues between responsible agencies and their network partners. While the ANAO made recommendations aimed at enhancing some aspects of contract management, it also considered that the Job Network afforded better value for money than previous employment assistance arrangements. The lesson is that networked arrangements can offer a range of benefits in terms of enhanced service delivery provided they are appropriately managed.

⁷⁴ ANAO, *Construction of the National Museum of Australia and Australian Institute of Aboriginal and Torres Strait Islander Studies*, Report No. 34, Canberra, 16 March 2000.

⁷⁵ ANAO, *Management of Job Network Contracts*, Report No. 44, Canberra, 16 May 2000.

Similarly, the ANAO examined the effectiveness of networked service delivery in its review of Commonwealth Emergency Management Arrangements.⁷⁶ Although the protection of life and property is a state responsibility under the Constitution, the Commonwealth has significant involvement in national emergency management arrangements through its planning, coordination, financing, education, training and research activities. Many cooperative arrangements have been implemented between the Commonwealth and the states and territories with the aim of advancing public safety objectives. At the time of the audit, the ANAO found that there was no whole-of-government approach to Commonwealth emergency management. While stakeholders considered that individual Commonwealth agencies were meeting the needs of the community, they also identified the need for greater attention to strategic issues. The ANAO found, among other things, that coordination of Commonwealth emergency management could be more effective if interdepartmental coordination arrangements were made more transparent and better directed. As is so often the case, the audit identified the need for rigorous strategic planning, and ongoing monitoring and review, to enhance agencies' capacity to achieve the outcomes specified by Parliament.

The trend toward 'networked' or cross agency approaches is one that is likely to continue as agencies take advantage of the opportunities offered by more responsive service delivery mechanisms. Both Parliament and the ANAO will have an important role to play in setting accountability standards and helping to define appropriate governance frameworks. At the very least, there should be recognition that governance issues need to be given greater prominence and consideration.

For example, it may be deemed appropriate for governance arrangements to be set out in Cabinet submissions where cross agency issues arise. Alternatively, governance committees could sit above individual administering agencies and take responsibility for *collective* outcomes. Such committees should set out and review objectives and performance measures to ensure that agencies are achieving required results. Governance arrangements may be formal or informal but should be clearly set out and reviewed. They may range from formal boards through to informal committees; they may be formalised through MOUs or may be the sole responsibility of a lead agency. The important thing is that someone takes responsibility for accountability and governance to provide assurance as to the stewardship of public resources.

This is particularly important for demonstrating program outcomes. For example, in the recent audit of the Federation Fund (mentioned earlier) it was noted that, where more than one agency is responsible for delivering the government's program objectives, the concept of whole of government performance reporting through the identification of a 'lead agency' is an area for improvement in Commonwealth reporting and accountability.⁷⁷ In relation to the Federation Fund, reporting only in individual agencies led to a 'silo effect' that should be avoided in the future through

⁷⁶ ANAO, *Commonwealth Emergency Management Arrangements*, Report No. 41, Canberra, 28 April 2000.

⁷⁷ ANAO, *Administration of the Federation Fund Programme*, Report No. 11, Canberra, 19 September 2001.

more comprehensive reporting of overall outcomes. This is a generic issue worthy of further consideration given the trend towards cross agency and whole of government approaches.

How the ANAO Assists Parliament and the Australian Public Service

Like all public sector agencies negotiating the challenges of the changing governance environment, the ANAO has modified its own business practices to respond to new needs and directions. The ANAO has responded to the changed environment on two levels: both strategically and tactically. On the strategic level, we have given renewed attention to relationship management and well-targeted products and services. On the tactical level, we have focussed on ensuring that our work continuously improves as we demonstrate accountability to Parliament.

In recent years, the ANAO has strengthened its assurance function and extended its advisory role. By reinforcing its traditional functions, while remaining open to new approaches and innovation, the ANAO is well placed to lead and guide in partnership with the Parliament in the contemporary public sector environment. We are committed to a more responsive and strategic risk-based audit approach. Our goal is to have relevant products that are state of the art. Our ability to compare operations across the public sector, as well as our statutory independence are our strengths.

The challenges that the Commonwealth public sector is currently facing are not unique. The trend towards the convergence of the public and the private sector is also underway in many countries, such as Canada, the UK, the US and New Zealand. It is important that my Office continues to participate actively in debates around the complexities of the changing public sector environment and their resolution. In this respect, a dynamic relationship with the Parliament is vital.

Focus on relationships

Relationship with the Parliament

Independence is important for the ongoing credibility of the Auditor-General but, it should also be noted, so are meaningful relationships with a range of stakeholders. The most important of these, in terms of our ongoing relevance, is our symbiotic relationship with the Parliament.

As noted earlier in this paper, the ANAO regards its primary client as the Parliament. Indeed, it could be argued that, given our proximity to the day-to-day operations of the APS, we are Parliament's 'eyes and ears' on Commonwealth administration, particularly in a devolved NPM environment. We take this responsibility seriously, as the support of the Parliament for the work of the ANAO is vital. The ANAO could not continue to be relevant without Parliament supporting our audit work program, our recommendations, and assisting us in determining appropriate accountability standards for the APS.

Relationship management is important to us. Indeed, such is the strategic importance of meeting our clients' needs, it comprises the first of our four key results areas. Our objective is to satisfy the needs and expectations of the Parliament, the executive government and our audit clients in relation to performance assurance and

accountability. We aim to do this by, among other things, enhancing our dialogue and relationship with all members of Parliament, particularly the JCPAA and other parliamentary committees, so that they are well informed about our activities and so that we, in turn, can provide them with timely and constructive assistance.

As part of its regular business, the ANAO provides briefings to ministers, shadow ministers, parliamentary committees and their staff on audit reports tabled in the Parliament. ANAO officers also liaise closely with committees, and staff may be seconded to assist committees with more complex matters. Senior executives at the ANAO have individual targets for parliamentary liaison, and the Office as a whole has performance targets linked the satisfaction of Parliament. For example, each year we aim to have JCPAA support for all of our reports tabled in Parliament. We aim to have 95 per cent of our recommendations supported by the JCPAA and other parliamentary committees.

The ANAO works hard to ensure that we are meeting Parliament's needs. We monitor our progress in this regard by analysing the results of client satisfaction surveys, and building a strong and effective relationship with the JCPAA and other parliamentary committees. As well as guiding us in targeting and refining our annual audit work program, the JCPAA is, however, the main channel for formal dialogue between the ANAO and the Parliament.

Recent years have seen an increasing tendency to direct requests by ministers for audits of particular programs or issues. While this represents a useful measure of our ongoing relevance and credibility, it also has the potential to challenge the issue of the Auditor-General's independence. The Office must ensure that, where direct requests for audits are accepted, such audits are in the public interest. Direct requests for audits are also considered in light of the planned audit work program and potential resource implications. That program is developed annually against the background of the APS environment, including the business risks that are likely to impact on the APS during the period under review. These risks are taken into account in identifying themes, such as contract management, to be addressed in the work program. The intention is to provide Parliament with an assurance, over time, of the performance of *all* public sector agencies.

The key conduit for ongoing parliamentary input to our work is the JCPAA. The JCPAA is responsible for bringing together issues of parliamentary interest for consideration in the ANAO's planning processes. As discussed earlier in this paper, the JCPAA also has an important ongoing role through its scrutiny of our reports in providing assurance that our activities are covering the 'right' ground from a parliamentary perspective. The basis of selection of audits and their coverage are comprehensively set out in our annual audit work program, which is made available to all parliamentarians and agencies.⁷⁸ As well, we table two Audit Activity Reports each year in Parliament, which provide a summary of audit outcomes for the previous six months.⁷⁹ All such documents are included on our web site. These are part of our policy of 'no surprises'.

⁷⁸ See ANAO, *Audit Work Program 2001–2002*. Canberra, July 2001.

⁷⁹ See ANAO, *Audit Activity Report: July to December 2001*. Report No 31, Canberra, 13 February 2002.

Relationships with APS agencies

It is vital that the ANAO continues to be an active participant in the public sector's negotiation of the changed governance environment. While in the past the ANAO's prime focus may have been on ensuring compliance with legislation, this has now been subsumed as part of a broader approach to assist agencies in improving public sector administration. To be successful, this approach requires considerable cooperation between my Office and the agencies and other bodies with which we deal. This means that links are constantly being formed and strengthened with our major clients.

Our relationships are managed responsively and there is no single method for success. The ANAO's clients are extremely varied, and this necessitates tailored approaches. Audit bodies can no longer afford to take the traditional 'big stick' approach, although the need for powerful independent review bodies supported by robust legislation should also not be understated in the current climate. However, the ANAO emphasises the importance of building strong relationships with agencies and other stakeholders to foster a culture of accountability in preference to a more prescriptive approach. We aim to focus on outcomes and results to provide products and services that suit the needs of both the audited agencies and the Parliament.

We encourage agencies to make early contact where they are faced with new or difficult administrative issues. Our experience across a range of issues both in Australia and overseas allows us to assist agencies in understanding the opportunities and risks inherent in diverse management approaches. We are always mindful, however, of the need to maintain our independence whilst assisting agencies at the 'front end'. As noted earlier in this paper, it is for public sector managers to make their own decisions on whether or not to accept ANAO advice based on the particular risks and opportunities operative in their business environments.

It is crucial that we work cooperatively with agencies at all stages of the audit process to gain genuine acceptance of our recommendations. This is essential if we are to add value and maintain our credibility. Our preferred approach is to give agencies encouragement, and to acknowledge and reinforce any action taken in the course of audits. We endeavour to meet formally and informally with agency top management throughout the year. In particular, we promote their interest and involvement at the start of each audit and in our planning processes, notably in our audit strategy statements for individual agencies and in our Audit Work Program, referred to earlier. Finally, we aim to meet our clients' needs by periodically reviewing the relevance and mix of our products and services, striving for innovative approaches and improving our quality and effectiveness. The above initiatives are aimed at securing the engagement and commitment of all stakeholders to our work.

Products—designed to be relevant and state of the art

In order to meet our clients' changing needs, the ANAO has moved towards a more strategic, risk-based audit approach. Our goal is to add value through audit products that are state of the art. We encourage innovation within a clearly defined auditing standards framework. The ANAO is committed to working closely with our national and international colleagues to ensure that we remain at the leading edge and that we

have the right mix of assurance, compliance, accountability, and performance products at any point in time and over time.

Audit product continuum

ANAO audit products run the continuum from high-level performance audits that may target particular issues across the APS, to the traditional financial statement and financial control and administration products that provide assurance as to the stewardship of public funds in individual agencies. In addition, the ANAO disseminates better practice through a series of Better Practice Guides, AMODEL and Business Support Process Audit reports on a range of issues challenging the contemporary APS. Our reports are authoritative and our annual audit of the Consolidated Financial Statements and our assessment of agency control structures, for example, provide a unique overview as to the ongoing financial performance of over 200 Commonwealth entities.

In addition to leveraging off our Australian and international colleagues, the ANAO is committed to an integrated auditing framework that draws on the strengths of each side of our business; that is, financial (assurance) and performance audits. These audits are tailored to the assessed situation (needs) of public sector organisations. The approach capitalises on intelligence gathered in each field and allows us to target areas for audit activity that add most value. In addition, it allows us to assess the value of our products over time, and to fine-tune our outputs. Our objective is to deliver high quality audit products that maintain and improve the high standards and professionalism of our audit and related services.

Cross portfolio audits

The ANAO is uniquely placed to provide an analysis of performance across the public sector, as indicated earlier. This is important as agencies increasingly find new methods to deal with common issues, and form alliances and partnerships, including with the private sector, to deliver government services. In considering the future of the Australian Public Service, the Prime Minister has indicated that:

Whole of government approaches, collectively owned by several Ministers, will increasingly become a common response.⁸⁰

Recent years have seen an increase in the number of ‘across the board’ and cross-portfolio audits undertaken that compare experiences in a range of agencies. For example, the ANAO has recently undertaken cross-portfolio analysis of, among other things, internet security, the management of bank accounts, and performance information in Portfolio Budget Statements. Our ability to compare operations across the public sector, and sometimes the private sector, as well as our statutory independence, are significant strengths and add value to a wide range of stakeholders.

Promoting better practice

In terms of getting the ‘right mix’ for the contemporary environment, my Office has fine-tuned its focus on products that add value by bringing together lessons learnt

⁸⁰ The Hon. John Howard, ‘The Centenary of the APS Oration’, Presentation to the Centenary Conference of the Institute of Public Administration Australia, Canberra, 19 June 2001, p. 5.

across the public sector. In particular, our benchmarking studies and Better Practice Guides (BPGs) have been well received by program managers interested in learning from the experiences of others. BPGs serve a dual purpose: they provide a unique analysis of trends affecting the public service as a whole; and they provide a very valuable source of audit criteria for future work in related fields. BPGs aim to improve public administration by ensuring that better practices employed in individual organisations in Australia and overseas are promulgated to the whole of the public sector.

Depending on the subject and nature of information collected during an audit, BPGs may be produced in conjunction with a performance audit or what we now term Business Support Process audits. Alternatively, a BPG might be prepared as a result of a perceived need to provide guidance material in a particular area of public administration. Recent BPGs produced cover a wide range of topics including: grant administration; contract management; planning for the workforce of the future; internet delivery decision-making; AMODEL non-commercial authority financial statements; life cycle costing; rehabilitation issues; and developing policy advice.

In terms of benchmarking services, our products currently comprise functional reviews of the major corporate support areas. The overall results of these reviews are published generically and tabled in the Parliament. At the audit client level, a customised report is provided to all entities participating in the benchmarking study. Our most recent benchmarking studies have covered the following areas: the implementation and production costs of financial management information systems; the finance function; and the internal audit function. We are soon to release a study on human resource management. Finally, as well as benchmarking and analysing public sector performance, we compare our own performance to that of our peers in Australia and internationally.

Follow-up audits

Until 1999, there was a requirement for portfolio ministers to submit periodic reports to the Minister for Finance and Administration to report on action taken on matters raised by the Auditor-General in ANAO audit reports. As part of this process, the Department of Finance and Administration undertook an assessment of the adequacy of these actions. The Prime Minister devolved this responsibility to agency heads in 1999, and there is now no formal requirement for the progress of implementation of ANAO recommendations to be reported in Parliament.⁸¹ However, it is recommended that entities provide to the ANAO and the JCPAA copies of regular reports or follow-up action on these matters, including a suggested model of a suitable follow-up process.⁸²

The ANAO works closely with the various audit committees of public sector organisations to monitor the implementation of its recommendations. However, as discussed earlier, the most effective action is the JCPAA's quarterly public hearings on selected audit reports and any JCPAA inquiry conducted as a result of these

⁸¹ Department of Finance and Administration, *Follow up of Auditor-General Matters*, Finance Circular No 1999/02, 23 October, 1999.

⁸² *ibid*, pp. 3–4.

reports. The ANAO also conducts its own follow-up audits to monitor the implementation of recommendations, as well as to report on any other emerging issues that may be of interest to Parliament. It is important to us that our recommendations are both accepted and implemented, and that Parliament and agencies consider that our audit activity adds value to public sector administration.

Real time auditing

The ANAO seeks to assist agencies expeditiously, and both technological developments and responsive relationship management can assist us in this. The trend towards 'real time' or 'early intervention' auditing, as discussed earlier, may have some implications for audit independence. However, 'real time' products and services are also of increasing value to our audit clients and consequently require further analysis as part of our strategic planning processes. This is particularly the case in terms of our financial statement audit approach.

Over recent years, the timeframe for the preparation of financial statements by Commonwealth agencies has been significantly compressed. The *Charter of Budget Honesty Act 1998* requires that the Final Budget Outcome Report be tabled in Parliament by 30 September each year. To meet this deadline, the financial statements of all material entities must be prepared and audit-cleared by 15 August. This continues to pose significant challenges for all entities involved, including the ANAO.

Most major Commonwealth entities do not meet better practice standards. As noted in the most recent report on financial statements across the Commonwealth, entities took on average 60 days to produce signed financial statements.⁸³ This reflects the fact that a number of agencies are continuing to struggle to achieve 'hard closes'⁸⁴ prior to the end of the financial year. A 'hard close' is generally associated with the traditional 'close of the books' process for the production of financial reports for outside regulators. It typically involves performing reconciliations; searching for undetected accruals or transactions processed in the wrong period; verification of physical balances; and analysis of transactions and balances to detect errors arising from misclassification or misposting. It may also include obtaining independent appraisals and estimates for balances not able to be determined by other means. Better practice organisations undertake a 'hard close' only where there is an external, regulatory requirement to produce financial statements. For most Commonwealth organisations, this will be their annual financial statement.

To increase their capacity to meet the 15 August reporting deadline, agencies now aim to have as much of their financial statement preparation (including audit clearance) as possible finalised prior to 30 June. There has consequently been a shift away from peak workload periods by undertaking a 'hard close' before financial year-end, where entities are in a position to do so.

This is in line with the ANAO's BPG on Building Better Financial Management Support, which advocates a shift away from peak workload periods. The BPG also

⁸³ ANAO, *Audits of the Financial Statements of Commonwealth Entities for the Period Ended 30 June 2001*, Report No. 29, Canberra, 21 December 2001.

⁸⁴ *ibid.*

notes that world best practice organisations have reduced the total time for the financial statement preparation process to two days. Finally, it indicates that it is now common practice to produce financial reports within five to seven days of the end of the reporting period.⁸⁵ At this stage, both of these outcomes would be somewhat ambitious for most public sector organisations.

To move towards best practice, entities need robust accounting systems and processes in place that allow the performance of a hard close several months before the end of the financial year. The achievement of hard closes in March, for example, will continue to be encouraged. The development of improved accounting systems and processes will also ultimately mean more robust financial information for decision-making and management demand for hard closes on a regular basis throughout the year.

The achievement of these tighter timeframes by agencies also requires some shift in audit practices from *ex post* to *ex ante* or at least a real time audit process. This means that the ANAO has in many ways had to mirror its client agencies in terms of responding to the new time pressures on the production of financial statements. A shift to real time auditing can be more valuable to our clients as issues can be identified and brought to the attention of management early. Nevertheless, with the move to real time auditing we also need to remain conscious of the need to manage potential conflicts of interest. The early identification of issues for the attention of management is actively encouraged. However, care needs to be taken that auditors remain separate from the decision-making framework to protect their independence.

The need to maintain independence while remaining responsive to our clients' needs is also the reason that my Office has, to date, undertaken only a very small number of probity audits. It is my view that in terms of probity, the greatest value can be achieved from independent *ex post*, rather than *ex ante*, auditing. There may, however, be some areas where our experiences across the public service offer opportunities for promulgation of better practice in the development of systems and procedures. For example, my Office is currently planning a cross-portfolio audit of the use and effectiveness of Human Resource Management Information Systems in Commonwealth agencies.

Keeping Parliament and the APS informed

Accessibility

The ANAO aims to keep Parliament and the APS up to date on its ongoing audit activity—from the audit work program planning process right through to assistance to committees of inquiry established after publication. As well as working with Parliament and agencies on specific issues under review, we aim to be accessible to all stakeholders through a variety of forums. The ANAO website⁸⁶ has recently been enhanced to provide improved functionality and content. The website has links to all of our publications including audit reports, better practice guides and speeches. It

⁸⁵ ANAO 1999, *Building Better Financial Management Support*, Better Practice Guide, Canberra, November.

⁸⁶ [<http://www.anao.gov.au>]

includes a list of audits in progress, a tabling schedule, information on tenders and contracts, recruitment details, and links to our national and international colleagues. The website incorporates information on relevant contacts for each of the business units, and a request form for further information.

In addition, the ANAO is pleased to provide briefings on particular issues or audit reports by request. This is an important way for us to enhance understanding of the complexities of the changing public sector environment, and also to secure direct input from Parliament and other stakeholders in terms of the redefinition of acceptable accountability frameworks for the twenty-first century.

As discussed earlier, we also welcome early contact from agencies faced with new or challenging administrative issues. While we are vigilant in terms of maintaining our independence, our access to a range of comparative experiences both in Australia and overseas can often assist. Finally, we aim to continue strong working relationships developed in the course of audits by remaining available to program managers beyond the formal audit conclusion. Agencies are increasingly maintaining contact as they implement ANAO recommendations and beyond, which is an important way for our officers to assess the ongoing utility of their work.

Liaison

In addition to the ‘ad hoc’ contact referred to above, the ANAO builds regular and ongoing liaison into its annual schedule of activities. The most important of these, in terms of setting strategy for the Office over successive financial years, is the development of the ANAO’s audit work program. There is obviously little discretion about the financial statement audits. However, audit topics are generally selected on two grounds: the capacity of an audit to add the greatest value in terms of improved accountability, economy, efficiency and administrative effectiveness; and the desire to ensure appropriate coverage of entity operations within available audit resources. Annual themes are used in selecting topics to ensure that the audit program is targeted appropriately to add value to public administration. An important part of this planning process is the early engagement of stakeholders including agency heads and the Parliament, through the JCPAA, to ensure that the work program is optimally targeted.

The other key focus for our ongoing liaison work is the assistance provided to parliamentary and audit committees. As discussed earlier in this paper, ANAO officers provide significant assistance to parliamentary committees charged with reviewing matters relevant to ANAO audit reports. To this end, a number of ANAO staff are seconded each year to assist committees with more complex inquiries over longer periods of time. Audit managers and senior executives also attend audit committee meetings within those agencies for which they are responsible. This is an important medium for the exchange of information and ideas, and assists us in fine-tuning our work over time. Finally, as mentioned earlier, senior executives at the ANAO have targets for parliamentary liaison built into their individual performance agreements. Our ultimate aim is to be accessible to Parliament and the APS to enhance the reach and significance of our work and to maintain our relevance and credibility.

Demonstrating accountability to Parliament

Annual Report

The ANAO's annual report is the most public and comprehensive mechanism for demonstrating accountability to the Parliament. We aim to include an analysis of our achievements to date, as well as challenges outstanding for the future. In this way, we provide Parliament with a comprehensive overview of our performance over the preceding financial year and an indication of areas of interest for the future.

The Annual Report includes an assessment of the Office's achievements against its annual scorecard. The scorecard incorporates the ANAO performance indicators set out in its Portfolio Budget Statements. Performance measures relate to three output groups: performance audit services, information support services and assurance audit services. These link back to the ANAO's twin outcomes: improvement in public administration and assurance. The scorecard includes both quantitative and qualitative measures and is intended to provide interested parties with an understanding of the link between the ANAO's products and their resulting impacts. It is then possible to assess how cost-effectively the ANAO is delivering its products and to what extent the ANAO is achieving its agreed outcomes. This provides Parliament with assurance that we have the right systems in place to produce reliable reports.

Each year, our Annual Report also includes results of quality assurance processes including peer review and benchmarking activities. It also includes commentary on the key strategic issues targeted by the ANAO for the next 12 months. This commentary, together with the publication of the results of our audits every six months in the activity reports, allows us to contribute to contemporary debate on a broad range of issues facing the APS. Importantly, it also provides a focus for ongoing discussion with the Parliament in relation to setting strategies for the future.

Client surveys

Another important performance management and assessment mechanism is the entity survey. After each performance audit is tabled, feedback on the audit process is sought independently from the senior manager responsible for the audited program by means of a questionnaire and interview. An independent consultant performs this evaluation. The results of the most recent survey were positive on the whole. Managers continued to support the ANAO's efforts to move to a more 'value adding' approach. They also referred to the value of ANAO reports and recommendations in providing assurance and in providing leverage to facilitate particular activities. The entity survey is one of the most direct ways we have to test that our ongoing commitment to relationship management is achieving results.

In addition, as well as the regular contact that we have with the JCPAA and other parliamentary committees, the ANAO conducts face-to-face surveys of parliamentarians. These surveys are conducted periodically to ensure that we are hitting the mark in terms of our product mix. This ensures that we will continue to be able to respond to the challenges of the future, and that we have a shared understanding of appropriate standards of accountability to lead and guide agencies into the future.

External scrutiny

As well as our internal review and quality assurance procedures, the ANAO is subject to several layers of external scrutiny, including those applying to all other APS entities. The most important of these, in terms of demonstrating our accountability to Parliament, is the JCPAA. The JCPAA reviews all of our reports. Consequently, a strong and dynamic relationship with this Committee, as our main point of contact with the Parliament, is crucial to our ongoing viability. I have also previously mentioned the scrutiny and assessment by entity audit committees. As well, we are under constant challenge by agencies to justify our decisions and our findings. All our products are subject to public scrutiny and included on our web site, as noted earlier.

The Independent Auditor of the ANAO carries out both the audit of the ANAO's financial statements and selected performance audits of the ANAO. The Act (Section 43) requires the Independent Auditor to have regard to the audit priorities of the Parliament as determined by the JCPAA, in the conduct of performance activities. Performance audits conducted over the years range from an overall assessment of the economy, efficiency and effectiveness of the Office,⁸⁷ our human resource management,⁸⁸ benchmarking of our performance,⁸⁹ our strategic planning framework,⁹⁰ our planning and resource allocation processes,⁹¹ and our audit management processes.⁹²

Conclusion

The ANAO supports the Parliament in holding the Executive to account as part of the democratic process, while at the same time helping agencies to improve their performance in the changing accountability environment. While our independence is an essential element of our work, we can only meet our objectives if we earn the trust and respect of the Parliament. Clearly, we have that respect and we will continue to work hard through ongoing quality assurance and review to ensure that the relationship remains strong and positive. It is worth reiterating that we regard the relationship as symbiotic in that we provide vital support to Parliament in terms of our assessment of the quality of administration across the APS to inform its deliberations, while we also rely on Parliament for advice as to appropriate accountability boundaries and for ongoing priority-setting. Our advice and support is complementary and, it is to be hoped, mutually beneficial.

⁸⁷ Michael Sharpe, *Report of the Independent Auditor on an Efficiency Audit of the Australian National Audit Office in accordance with the Audit Act 1901*. Canberra, AGPS, 16 October 1990; and *Report of the Independent Auditor on an Efficiency Audit of the Australian National Audit Office in accordance with the Audit Act 1901*. Canberra, AGPS, 18 September 1992.

⁸⁸ David Boymal, *Performance Audit of Human Resource Management in the Australian National Audit Office*. Canberra, AGPS, 30 October 1996.

⁸⁹ David Boymal, *Review of Benchmarking in the Australian National Audit Office*, Canberra, AGPS, 18 December 1997.

⁹⁰ Michael Coleman, *Report on Results of a Performance Audit of the Strategic Planning Framework of the Australian National Audit Office*. Canberra, 3 April 2000.

⁹¹ Michael Coleman, *Report on the Results of a Performance Audit of the Planning and Resource Allocation Processes in the Australian National Audit Office*. Canberra, 22 December, 2000.

⁹² Michael Coleman, *Report on the Results of a Performance Audit of the ANAO Audit Management Processes*, Canberra, 18 October 2001.

Because of the changing business environment we face in the public sector, auditing needs to be adaptive and alert to the risks involved to ensure that we target the issues of most interest and value to Parliament, the public and contemporary public sector managers. The governance landscape has changed, and managers need access to better practice, leadership and guidance to ensure that their own business strategies are effectively determined and put in place. Our statutory independence, as well as our expertise across the board, gives us a unique position within the accountability framework. It is crucial that we capitalise on these strengths in setting our agenda for the future. That agenda will continue the assurance and advisory roles for which we are well known and respected. However, we will also need to ensure that we remain responsive to the emerging pressures on Parliament as well as our client agencies. The ANAO has been monitoring trends in public sector change and setting our responses accordingly. This ensures that our approach and coverage will continue to be relevant and add value.

The ANAO recognises the importance of being an active participant in the process of change. This allows us to target products that span the accountability continuum from the assurance based products for which we are traditionally known and on which Parliament relies, through to our better practice guides and benchmarking studies that add value to agencies' operations. While our approach needs to be monitored and reviewed for effectiveness over time, it should allow us to capitalise on our traditional strengths and to move into new value-adding areas in the future. We have pursued a focus on quality products as an essential element of our corporate planning which will assist us in meeting the objective of adding value to public administration.

Convergence of the public and private sectors

I would like to conclude with some final thoughts on convergence and its impacts on the ANAO's work. Convergence of the public and private sectors requires agencies to find the appropriate balance between efficiency and accountability with regard to their particular business opportunities and risks. Whether this will result in a different kind of accountability will largely be a decision of the Parliament and/or the government.

As our public sector audit clients are renegotiating their activities within the changing governance landscape, so the ANAO is continuously refining its own processes and emphases to provide the optimal level of support to Parliament and to ensure that our relationship remains dynamic. In the coming years, the ANAO will continue to strengthen its assurance and advisory functions. We will continue to play an active role in the accounting and auditing profession. We will also continue to refine our strategic audit approach. We have some way to go, but we have identified a vision and we are working towards it. Change is inevitable. The challenge is to strategically position ourselves to respond to emerging circumstances by tailoring our products to continue to be relevant and to take advantage of opportunities for improvement and value adding as they arise.

Like our counterparts in the Australian states and overseas, we are engaged in identifying areas of risk, and opportunities for improvement, in setting our strategic agenda. Managing public sector businesses effectively in the international marketplace of the future will undoubtedly be challenging, with the increased

emphasis on monitoring and reporting on intangible performance elements such as values, ethics, social and environmental responsibility. All public sector agencies, as well as the ANAO, will need to continue to engage globally in identifying national approaches and solutions for greater effectiveness.

The emphasis will increasingly be on cooperation, sharing and communication as we now witness the move internationally to more ‘joined up’ government and the pressure for more citizen participation in the governance framework. Such developments have important implications for the public interest and accountability that need to be addressed, or at least understood, by Audit Offices. As in other areas of our responsibilities, we will be largely judged on our performance on such matters. Being passive is not an option. Being strategic and proactive is. The quality of the relationship between the Parliament and the ANAO will be vitally important for public sector accountability into the future, particularly as the public and private sectors converge. The ANAO’s symbiotic relationship with the Parliament is crucial to its ability to respond strategically and tactically to change and to set its agenda for the future.

Meeting the challenges

I would like to conclude with some comments that I made in the ANAO’s Annual Report for 2000-2001, our one hundredth year of auditing:

As we enter our second century of auditing, we must stay focussed on identifying and adapting to the ever-changing public sector environment. We have an ongoing commitment to the development of different audit practices and procedures in the face of new and emerging issues. We must continue to work to attract and retain staff with the right mix of skills and attributes. Fortunately, modern telecommunications has enabled us to deal with the tyranny of distance much more easily in meeting the challenge of auditing the activities of a Commonwealth spread across vast distances than was the case in the early days of Federation. To meet these and more recent challenges, we need to continually develop new and better strategies to deal successfully with such challenges. Our ability to do this will be enhanced if we can achieve an environment that is conducive to that result, including sustaining the professionalism and commitment of our staff and positive relationships with all our stakeholders, most notably the Parliament.⁹³



Question — I was interested in your comments on the issue of tax expenditures and the role of the Auditor-General in making sure that they receive the same scrutiny as direct spending by the government. For example, about two or three years ago your office said it was going to treat tax expenditures in the same way as it was treating direct outlays, but that has not happened. What do you see as the implications of that?

⁹³ Auditor-General, *Annual Report 2000–2001*, p. 11.

Pat Barrett — Whatever the expenditure of public money and whatever the format, we are still responsible for chasing the public dollar. The problem, of course, is in the ways these expenditures are actually made. In recent years we have pursued a whole range of grant mechanisms where there has been arm's length between the people who actually get the grants and the bodies that are responsible for delivering those grants. The bodies that deliver them are not at arm's length—but the arm's length is between them and the budget face itself, and there is a problem for us in that respect. Internationally, it is recognised in the same way, I might add, in terms of aid monies. Nonetheless, we would pursue it in the same way as any other expenditure of monies where in fact it is still within the Commonwealth preserve to be able to do so. I'm not sure whether you have non-profit organisations or other private sector organisations responsible in that area or not. But we would pursue them to the extent to which we can.

I don't think that at this stage there has been support in many audit offices for going beyond their own mandate in relation to the responsibilities for their particular levels of government. So we would be careful in that respect.

But nonetheless, I agree that, no matter what format, it is important that there be a degree of accountability. The issue really becomes the performance measures that are in place and, in essence, for the organisations that are responsible, we would want to make an assessment of those performance measures to see that at least they are getting information on which they can reasonably be held to be accountable. After all, the government and the Parliament are saying that even if you do not have responsibility for the actual delivery of services, you are still going to be held accountable for it. So, we would need to see what the first line of responsibility is actually doing to make sure they are accountable for those expenditures.

Question — You said you keep your eyes and ears open. How do you identify issues to investigate and how do you set the order in which you investigate—apart, of course, from requests from Parliament?

Pat Barrett — When I said that we keep our eyes and ears open, I was really referring to the issues of fraud and inappropriate or unethical behaviour, which increasingly are of concern to the Parliament.

Sometimes, when you adopt a straight-ordered approach of materiality, there is a concern that auditors—and, in fact, the audit standards—do not require us to be responsible for detecting all fraud *per se*. Nevertheless, I have always accepted Parliament's concerns for inappropriate behaviour or fraud, no matter what kind.

Even if we adopt materiality levels, that would not guarantee that we would not necessarily, by those investigations, detect fraud or inappropriate behaviour. I always ensure that my auditors have their eyes and ears open if there are any concerns that are expressed by the staff in an agency, or from their own observation, or if there are issues that perhaps don't quite gel or that they don't have a ready answer for—issues that, in a financial statement meaning, are not material to getting a true and fair view of the financial statements themselves. There is a standard requirement for the

auditors to discuss that with the audit manager. Then there will either be, if there is time available in that audit process, an investigation in that area, or if there is not, then there will be a later follow-up audit. However, there are no guarantees. All I am saying is that if the right questions are asked and if people are on the lookout for issues that may not be readily apparent simply by looking at a few numbers, then you have some chance of ensuring that if there are more important issues around, you will pick them up. They may not be in that financial statement audit, they may be in some other audit process.

Question — You mentioned that increasing informality in relations between bureaucrats and advisers and so on, and the use of email and other electronic communications methods, were creating an accountability problem. I wondered, firstly, if there were any recent events that led you to that conclusion, and secondly, what you think should be done about it?

Pat Barrett — I think I know what you are referring to, but, no, this conclusion does not arise from recent events, it has been an issue for years. I mentioned to you the magnetic resonance imaging report, where in fact we had to get the assistance of experts to try to retrieve emails from hard disks. That should not be necessary, and it should not be what managers and ministers would want to have happen either. So we are looking for a system whereby good managers make sure that the basis for their decisions are readily available in either electronic or paper format, and not simply in a series of emails that are deleted after the event, to be blunt.

Obviously, technology has a lot of things going for it, but there is always the question of how to best use the technology, rather than abuse it. Many times, in a busy public service with the use of emails growing exponentially, it is easy just to conduct a lot of business via emails and at the end of the day delete a lot of them. A lot of the emails involve decision making, and it is important for people to know who made which decisions and on what basis. My suggestion is that that is as important for a manager—and many times for a minister—as it is for an auditor.

Question — You mentioned the importance of giving free and honest advice, and that is obviously something that has been under scrutiny in the public service recently. Can you tell us how you deal with pressures in that regard? For example, do you ever get ministers phoning you up and saying that they don't agree with your report?

Pat Barrett — I would have to say that I can't ever recall a minister phoning me up—thank heavens. However, as witnessed recently, ministers have no trouble whatsoever in criticising the Australian National Audit Office. And I have no trouble in writing back to the minister and indicating where I think that criticism was unfair or unjustified, and suggesting that perhaps if the minister cared to have closer look at the report and what it actually said, they might then have a different view. That's not just a defensive approach; I think it is important for me to say this. I am very concerned that Parliament has given me a very fine piece of legislation and I should not be letting the Parliament down. In other words, I should be ensuring the maintenance of the credibility and the professionalism of the agency, and not, by my silence or inappropriate actions, in any way casting aspersions or doubts on the credibility and professionalism of the organisation. I say to my colleagues that if they have an issue

to discuss with the Australian Audit Office, they should do so. They can telephone or write to me or we can have a meeting, or whatever suits them. However, if they are going to go on the public record as being critical of what we do and how we do it, or of our deficiencies, they will have to expect that I will equally do the same thing. In other words, I will not sit on my hands and say ‘very sorry about all that’.

We will always say *mea culpa* if we get it wrong or behave inappropriately for whatever reason—and I have to say honestly that I can’t think of any circumstance where I would say that. Therefore, in many cases either the observation that has been made has been made partially or on inadequate information, or there has been a misreading of our report.

I will always accept that, if our reports are not fully explanatory or if people have good reason for coming to an interpretation of an event that is not accordance with the intention of the report, then we have an obligation to provide that explanation and to make sure that it doesn’t happen again.

I am happy for my auditors to provide factual comments which elaborate on what a report is actually saying. But there’s only one report, and that is to Parliament. We do not report to the press, and we do not report to the government. In essence, if there were some issue on which there was genuine public concern on misinformation, I would issue a public statement or a press release to ensure that the general public understood the issue. But when reporters talk to me, my insistence is that I don’t have anything else to say. Everything we have said is in the report—and there is only one report.

Question — You have only mentioned financial auditing. What interest or activity, if any, exists in non-financial auditing, such as management systems, risk, occupational health and safety, environment, energy, technology, strategy, operational activities and so on?

Pat Barrett — I thought I actually had alluded to most of those topics. We have a comprehensive range of performance audits which cover virtually all that list of issues that you have indicated.

What we try to do when we are looking at our audit program is to look at the risk and the risk areas of the public sector. We then try to deal with those areas, and it is important for the Parliament and the general public to get assurance of the use of their resources throughout the public sector in the best way possible. So it’s not a case of just dealing with a few areas that perhaps from the monetary or risk point of view are important.

Nevertheless, there are areas of change in governments that are important, and these have loomed large in our selection of audits in recent years—such as technology, computing systems, data systems and the like. We conduct a lot of audits that cover these areas as a matter of course, and individual audits that direct specifically to them. We have had a whole series of audits now on fraud control and the like, and a range of audits on human resource management.

We have also had a series of audits on how we best manage our people resources, which is a very important area in a period where there is a considerable turnover, ageing of staff, greater private-public sector interaction, downsizing of the public service and so on.

In new government areas we always ensure in our audit program that some kind of audit activity is taken after a reasonable length of time. Sometimes these are done in an *ex ante* sense, because the agencies concerned want to get us in early, to review what they intend to put in place—virtually real time auditing—so that they can get greater assurance themselves and have greater confidence in the systems they are putting in place to carry out particular outputs or outcomes.

Certainly with things like sustainable development, I mentioned the emphasis on triple bottom line reporting, which means that rather than just concentrating on financial results, a number of reports are increasingly looking at environmental and other sustainable development concerns. We've also had a whole range of audits on social welfare areas.

So you can see it is quite comprehensive. If you look, you will be pleasantly surprised at how comprehensive our audit program actually is. We will be looking to do 67 performance audit reports in 2002, and they cover a range of areas, including those areas you articulated.

Government and Civil Society: Which is Virtuous?*

Gary Johns

‘What happens to an idea when it becomes a reality?’ This question, posed in a recent novel,¹ serves as a useful introduction to our lecture on government and civil society. I contend that the faculties of useless knowledge have been working overtime of late to convince the electorate, which elects members to this Parliament, that truth, justice and democracy lies in civil society and not in the corridors of Parliament House. I beg to differ.

In a liberal representative democracy a major virtue of government, and the Parliament from which it is derived, is the enfranchisement of the unorganised. It gives them a voice and limits the claims that the many organised interests make against the commons. Civil society, whether church, corporations, trade unions or non-government organisations (NGOs), provides citizens with vehicles to exercise private initiative. In a liberal democracy they are, thankfully, free to pursue their aims. Indeed, democracy may be enhanced by an energetic civil society. When civil society organisations, however, organise in pursuit of public purposes they compete with government and the unorganised. If successful in that competition, they become in effect, civil society regulators.² The aims of this paper are, first, to report progress on

* This paper was presented as a lecture in the Department of the Senate Occasional Lecture Series at Parliament House on 23 August 2002.

¹ Yuri Dombrovsky, *The Faculty of Useless Knowledge*, London, Harvill, 1996.

² See Gary Johns, ‘Corporate Social Responsibility or Civil Society Regulation?’ *Harold Clough Lecture*, Perth, 16 August 2002.

the new breed of civil society regulators—advocacy NGOs—and the implications of their activities for representative democracy; and second, to suggest to legislators a tool for establishing a proper relationship between government and those would-be civil society regulators.

Here are some examples of the recent activity of advocacy NGOs, including their relations with national governments, international organisations, and business:

- The Australian Conservation Foundation announces: ‘by 2050 Australia will be a civil society. There will be a high level of community engagement in decision-making processes, a higher level of trust with their decision-making institutions.’
- The Sydney Organising Committee for the Olympic Games allows Greenpeace to judge the environmental performance of the 2000 Sydney Olympics.
- The Federal Court of Australia gives standing to a lawyer and a civil liberties group that have no instructions from, or prior contact with, the potential asylum seekers on the vessel *MV Tampa*.
- The United Nations announces that it will use Amnesty International to monitor human rights in China.
- BP announces that henceforth it is withdrawing support for political parties and funding NGOs exclusively.
- An NGO consortium lobbies the Senate to impose reporting obligations for non-financial considerations in investment products as the price of passing the *Financial Services Reform Act*.

These events suggest that civil society is taking a role in regulating the behaviour of all other actors, whether government, corporations or individuals. They are doing so through the courts, by monitoring and even delivering government programs, by influencing legislation, and by working directly with other centres of power, for example business and international organisations.

These activities suggest a civil society acting in a new mode. Where, in the past, civil society has acted in *opposition* to government, it has helped to secure guarantees of formal legal, political and civil equality. It has helped to secure the law and institutions that safeguard the liberty to conduct ones business based on ‘a kind of trust among non-intimates’.³ In other words, it has helped to secure a ‘civil’ society. And civil society continues in an *apolitical* mode, when it identifies problems, such as the amelioration of the plight of the sick and the poor, and produces its own solutions. In this mode, it is self-directed and voluntary, and makes few collective moral or resource claims on other citizens. In other words, it exists apart from government and the state.

³ Martin Krygier, ‘The Sources of Civil Society’, *Quadrant*, October and November 1996, pp. 12–22 and 26–33.

The dominant mode in which civil society now operates is essentially *communitarian*. The examples above suggest multiple agendas. It appears to want to further democratise⁴ liberal democracy. It seeks a democratic community and collective solutions; it makes increasing claims on the community in an increasing number of guises and ways. For example, it is a vehicle for the idea of citizenship⁵ which becomes the basis and the source of welfare claims we have against each other. It is used as an ethical or normative idea, a vision and prescription for the good life.⁶ It seeks distributive or social justice⁷ in an increasing number of areas, including the economy. Civil society in the communitarian mode has been taken up and pressed into service as a tool to criticise liberal democracy, in particular by those who think that the state has been decimated by ‘neo-liberals’. It is used as a political slogan to advance the cause of the democratic community and as a weapon to mediate the effects of the ideology of individualism and self-interest.

It may be that liberalism is excessively individualistic and insufficiently democratic. Whether democratising the community can solve these problems, however, is problematic. Communitarians insist on the need to override the wishes of the individual in the name of the greater good.⁸ Democratic communitarians assume or require that participation in politics is the norm, whereas, in fact, it is the exception. The work of democracy always comes down to activists, so the question is—which activists, and what recourse to their activity do the citizens have? NGOs expand the range of voices but, in doing so, do they expand the participation of the community or the ranks of a political elite? A cardinal tenet of liberalism is to keep democracy in its place, to regard it as an activity of limited application. By contrast, the democratic way of life encompasses more than the periodic business of government and elections. It is to be applied to most institutions, democracy in the courts (individualised justice, liberal rules of standing) the home (feminism), the workplace (industrial democracy), the corporation (corporate social responsibility), the economy (market socialism). Democracy may work in some of these without destroying the purpose of the institution, but where it does not, there are costs attached. The application of democratic processes to all walks of life should be contingent on its utility, not on its ‘morality’.

As for social justice agendas, these attempt to justify the transfer of funds from one group of people to another.

Justice turns into the problem of how to distribute goods and losses without any very direct relation to law and order or even constitutionality. To mark its new role, the term ‘justice’ is commonly partnered by ‘social’, and social justice is what happens

⁴ J. Cohen, and A. Arato, *Civil Society and Political Theory*. Massachusetts, MIT Press, 1992, p. 26.

⁵ D. Harris, *Justifying State Welfare*. Oxford, Basil Blackwell, 1987.

⁶ A. Seligman, *The Idea of Civil Society*. Princeton, NJ, Princeton University Press, 1992, p. 201.

⁷ K. Minogue, ‘Ideal Communities and the Problem of Moral Identity’, in John Chapman and Ian Shapiro, eds, *Democratic Community*, New York, New York University Press, 1993.

⁸ C. Berry, ‘Shared Understanding and the Democratic Way of Life.’ in *Democratic Community*, *ibid*, p. 67.

when all basic goods, which may notionally include individual talents and skills, are centrally distributed in accordance with a rational scheme.⁹

The welfare state continues to grow, seeking ever more elaborate justification. ‘The core of the citizenship theory of the welfare state is community membership. From our membership in our community flow the welfare rights we can assert and the *duties we owe* to contribute to the support of our fellows.’¹⁰ Often it is the second part of citizenship which is left out. Moreover, what happens when insufficient people believe in the theory?

Challenges to the Virtues of Government

The new mode of civil society has become more prominent because the earlier work—the establishment of liberal democratic institutions and the welfare and regulatory state—has been largely achieved. This communitarian civil society stems also from the massive growth of professional activist groups and the pressure they bring to bear on government (see Box 1). It has resulted in an explosion of the channels by which political business is conducted. The new civil society demands new relations between government and civil society.

Communitarian civil society is growing because liberal democracy’s ability to voice citizen disquiet is unprecedented. It makes the present democratic institutions appear inadequate, less trusted. This position is one that cashed-up NGOs and international agencies favour, and business has to live with. The irony is that the critics of liberal democracy—indigenous, feminist, gay, environmentalist, civil libertarian, socialist—have all had their greatest successes in liberal democracies. They are not doing so well in crony capitalist, Islamic, or communist states, even less well in tribal polities. In fact, where they threaten to do particularly well is at a supra-national level—EU and UN—where electorates have no direct control over them. Having been granted many of their wishes, these movements challenge the legitimacy of important elements of the system that sustains them—the electorate’s veto over policy-makers, the distribution of the economic surplus, the commitment to evidence as the basis for policy, and the rule of law—hallmarks of the liberal democracies. Each of these is being challenged, in part by prominent NGOs, in part by other players within and outside government. The result may herald the rise of a dictatorship of the articulate, the aptly named Culture of Complaint.¹¹

⁹ Minogue, *op. cit.*, p. 42.

¹⁰ Harris, *op. cit.*, p. 145.

¹¹ R. Hughes, *Culture of Complaint: the Fraying of America*, New York, Oxford University Press, 1993.

Box 1: Dimensions of a New Civil Society**Size**

Oxfam has an annual income of \$862 million and 2 million supporters in 14 countries. WWF has an annual income of \$720 million, 3 300 staff and 5 million supporters across 96 countries. Amnesty International has an annual income of £19 million, 320 staff worldwide and one million supporters in 162 countries.

Number

There were 213 international NGOs in 1909; presently there are over 50 000.¹² In 1998 about 9 500 international meetings were organised worldwide in 184 different countries (17 percent took place in Asia and Australasia), up from 8 800 and 170 respectively in 1993.¹³

Reach

There are more than 5 000 transnational NGOs (NGOs based in one country that regularly carry out activities in others).¹⁴ The number of country-to-international NGO links increased from 24 136 in 1960 to 126 655 in 1994.¹⁵

Australia

There are 37 000 Income Exempt Charities and 15 000 organisations that have Deductible Gift Recipient status, which indicates the very large number of organisations that have significant access to the Commonwealth Government.¹⁶

The work of the state is as much to counter the tyranny of the minorities, including individuals, as to counter the tyranny of the majority. The task is to limit the claims on the commons, to depoliticise much of life, to make it less amenable to public dispute. In the most prosperous of times, in the most prosperous of nations, there is the invention of permanent poverty.¹⁷ In the most benign of modern production regimes, there is the invention of a permanent litany of environmental disaster.¹⁸ In the most egalitarian and peaceful of nations, there is the invention of a permanent litany of human rights abuses.¹⁹ The application of these civil society agendas to the liberal democracies shows a lack of objectivity and loss of sense of perspective and of magnitude on the part of the advocates.

In what ways is communitarian civil society beginning to stretch representative democracy's capacity to cope? In what ways is civil society gaining influence over the political and economic realm? The major difficulties arise from its two major alleged virtues—democracy and social justice. The inappropriate application of democratic

¹² *Yearbook of International Organisations 1909–1999*. [<http://www.uia.org/uiastats/ytb299.htm>]

¹³ G. de Coninck, *Statistics on International Meetings in 1993*, Union of International Associations [<http://www.uia.org/uiastats/stcnf93.htm>]; G. de Coninck, *Statistics on International Meetings in 1998*. Union of International Associations, [<http://www.uia.org/uiastats/stcnf98.htm>].

¹⁴ T. Carothers, 'Think Again: Civil Society.' *Foreign Policy Magazine*. Winter 1999–2000.

¹⁵ A. Judge, 'NGOs and Civil Society: Some Realities and Distortions: the Challenge of "Necessary-to-Governance Organisations" (NGOs)', *Union of International Associations*, [<http://www.uia.org/uiadocs/ngocivil.htm>].

¹⁶ ATO submission to *The Inquiry into the Definition of Charities and Related Organisations*, January 2001, p. 26.

¹⁷ Norman Dennis, *The Invention of Permanent Poverty*, London, The Institute of Economic Affairs 1997; J. Cox, 'The Poverty Line Revisited,' *Agenda*, vol. 9, no.2, 2002, pp. 99–111.

¹⁸ B. Lomborg, *The Skeptical Environmentalist: Measuring the Real State of the World*. Cambridge University Press, 2001.

¹⁹ A. Karatnycky and A. Puddington, 'The Human Rights Lobby Meets Terrorism.' *IPA Review*, vol. 54, no.1, pp. 6–10. Also J. Robertson, 'Take the Candle to the Darkest Dark First.' *IPA Review* vol. 54, no.2, pp. 7–8.

processes and the inappropriate claim to justice will undermine the legitimacy of liberal representative democracy. The result may be an electorate less likely to trust government, less likely to favour equality, and more individualistic, less likely to believe in common action.

To a large extent, political activism has been contracted out. In the early phase of the establishment of the major political parties there was certainly a strand of, or at least pretensions to mass (class) involvement in politics, although in fact the numbers were never large. At present, the parties are brand names run by professionals, paid for by the state to do the work of politics.²⁰ This is not a criticism. On the contrary, the criticism is of those who believe that civil society activists are more democratic. Civil society activists, as represented by NGOs are brand names—the World Wide Fund for Nature (WWF), Greenpeace, Amnesty International—run by professionals. They are less constrained by their membership than say business and union interest groups, and totally unconstrained by the need to run candidates for public office. They are good at voicing opinion, not at resolving the myriad claims that present to government. They have a different part to play in the great democratic panoply, but they are no more democratic.

Communitarian Civil Society in Action

To some extent our communitarian civil society is a straw man. We have loaded it with a great many dubious virtues. Nevertheless, the fact is that civil society has been used as a vehicle for these very virtues and it is legitimate to gather them for scrutiny. The following case studies illustrate sources of challenge to government in a representative democracy. To the extent that the challenges succeed, they damage the virtues of liberal democracy. The ways are many; among them are: the misuse of evidence in physical science, the use of social science techniques in an attempt to impose minority views on the electorate, governments handing responsibility to NGOs, courts straying into the legislative domain, legislation that invites a wide ambit for civil regulation, and bogus measures of corporate reputation.

Case Study 1: WWF and the Great Barrier Reef²¹

The WWF mounted a campaign that led to both the Commonwealth and Queensland governments recommending urgent and significant changes to land management practices in catchments that drain onto the Great Barrier Reef. WWF alleged that there was evidence for localised deterioration on nearshore reefs from agricultural run-off. In June 2001, WWF published a *Great Barrier Reef Pollution Report Card*, which concluded that the Great Barrier Reef was being threatened by land-based pollution. While the report made many allegations of reef impact from agriculture, it did not substantiate any of the claims.

The Queensland Government responded to pressure from the WWF campaign by establishing a Reef Protection Taskforce. At its establishment, representatives on the Taskforce asked that the current level of scientific understanding on impacts of

²⁰ See Gary Johns, 'Desirability of Regulating Political Parties', *Agenda*, vol. 8, no. 4, 2001, pp. 291–302.

²¹ See J. Marohasy and G. Johns, 'WWF Says Jump: Governments Ask, How High?' [<http://www.ipa.org.au/pubs/ngounit/wwffs.html>]

terrestrial run-off on the Reef be provided. A science statement was developed for the Taskforce to provide a 'consolidated view of our current understanding of the impacts of terrestrial run-off on the Great Barrier Reef World Heritage Area.' Further, 'the statement seeks to allay concerns that there are conflicting views in the scientific community.' This document discussed threats to the Reef, but provided no reference to actual damage to the Reef.

Several Taskforce members noted this fact, with the following comments being made by members: 'So the widespread impact [of terrestrial run-off] is not substantiated.' 'But the scientists have tried very hard to prove there is an impact.' 'Let's not get hung up on the science.' And this from the WWF member: 'Let's go forward on the basis of the precautionary principle.' At the insistence of several Taskforce members, the science adviser agreed to redraft the science statement. A revised science statement was issued with the comment to the Chairman of the Taskforce that 'We wish to clearly point out that whilst there is no evidence of widespread deterioration, there is documented evidence of localised deterioration on individual nearshore reefs.'

This was the first statement from reputable scientists clearly alleging an impact from land-based run-off on the Reef. Unfortunately for the proponents, the scientific papers on which this conclusion was drawn provided no evidence that agriculture or other land-based sources of run-off were having an adverse impact on the Reef.

The Reef Campaign came at the price of undermining scientific integrity. According to Professor Carter of the Marine Geophysical Laboratory, James Cook University:

one of the relatively new problems that faces us is that governments are increasingly basing their actions on advice provided by unnamed consultants, or on unrefereed reports from government agencies ... This is a recipe for disaster. Good science operates on a consensus basis, using material that has been subjected to rigorous peer review and published in journals of international standing. It is therefore at their own peril that democratic governments attempt to 'control' the scientific process for political ends.²²

It is a dereliction of duty for governments to devise standards for water quality and run-off regimes without direct studies of impact. That some scientists would play along with them suggests that politics and science are no strangers. The issues could have been resolved if governments had been prepared to scrutinise the evidence in the published scientific literature.

Case Study 2: Deliberative Polling

Deliberative polling²³ is a technique which combines deliberation in small group discussions with random sampling to provide public consultation for public policy and for electoral issues. The technique assumes that citizens are often uninformed about many public issues, especially where they have little reason to confront trade-

²² *ibid.*

²³ Developed by James Fishkin of Texas University, The Center for Deliberative Polling. [<http://www.la.utexas.edu/research/delpol/cdpindex.html>]

offs or invest time and effort in acquiring information. At its core is the belief that if citizens were better informed they would come to the ‘right’ conclusion. It stems from the romantic notion of participatory democracy,²⁴ a part of the communitarian philosophy. In fact, what the poll does is to gather unsuspecting citizens and subject them to an intensive browbeating by the consensus of intellectual fashion at a particular point in time. It is tantamount to suggesting that the intellectual elite should rule, indeed that they would get it ‘right’ but for the ignorance of voters. Representative democracy works on a quite different assumption—although the elite govern, their policies are constrained by the electorate, in the light of the electorate’s assessment of events.

Two national deliberative polls have been conducted in Australia, the first before the November 1999 referendum on the Republic, and the second in February 2001, on Reconciliation with Aborigines. When participants had the opportunity to discuss intensely the referendum on the Republic in a deliberative poll, ‘opinion shifted dramatically’. There was a 20 percent increase in ‘yes’ voters, from 53 to 73 percent, and support for the direct election of the President collapsed, from 50 to 19 percent. Unfortunately for the deliberative pollsters, the referendum failed miserably. One of the reasons it failed miserably was because of a very large sentiment among the public for a directly elected President!

The second poll was again an exercise in impressing the electorate with the intellectual orthodoxy, in this case in Aboriginal reconciliation. The proof of the success of this poll was that ‘opinion shifted dramatically’ as a consequence of the experience. The perception of reconciliation as an important issue facing the nation rose dramatically from 31 percent prior to deliberations to 63 percent following deliberations. With changes in perceptions of the importance of the issue and increases in levels of *political knowledge* (my emphasis), levels of support for a range of national initiatives rose. Support for formal acknowledgment that Australia was occupied without the consent of indigenous Australians rose from 68 percent to 82 percent and support for an apology to the ‘stolen generation’ rose from 46 percent to 70 percent.

Unfortunately for the pollsters, support for the political agenda²⁵ behind the reconciliation initiatives remained relatively unchanged after deliberations. Those who did not support a treaty or set of agreements between indigenous and non-indigenous Australians rose from 46 percent to 50 percent. Those opposed to the allocation of special seats in Parliament for indigenous Australians declined from 57 percent to 55 percent.²⁶ Like the referendum, the deliberative poll was an exercise in elite frustration with the electorate. Civil society leaders showed impatience with the

²⁴ There are many forms of deliberative democracy. For example, ‘Democratization is largely (though not exclusively) a matter of the progressive recognition and inclusion of different *groups* (my emphasis) in the political life of society.’ J. Dryzek, *Deliberative Democracy and Beyond*. Oxford, Oxford University Press, 2000, p. 113. These sentiments assume that the group is more important than the individual in terms of participation.

²⁵ Points put to the assembly in Old Parliament House by the author and two other speakers, Dr Ron Brunton and Dr Keith Windschuttle.

²⁶ Issues Deliberation Australia, *Australia Deliberates: Reconciliation—Where From Here?* Report tabled in the Federal Parliament of Australia, September 25 2001, pp. 59–60.

political leaders and their masters, the voters. Voters changed their sentiment on the parts that did not affect them, they 'learned their lines' but they did not change their views on the parts they thought may affect them.

Case Study 3: Greenpeace and the Sydney Olympics

Environmental NGOs played a key role in the development and delivery of the environmental agenda of the Sydney Olympics. Greenpeace mounted a significant Olympics campaign over seven years leading up to the Bid and the Games, and there was a close working relationship with the Games organisers. Greenpeace International and its office in Sydney, Greenpeace Australia, actively participated in the 1993 bid to host the Games, joining with government and industry in drafting the 'Environmental Guidelines', Sydney's plans for an environmentally-friendly Games.

Greenpeace adopted a 'watch-dog' role which included monitoring the performance of organisers, offering advice and criticism and reporting on the performance of Games organisers. SOCOG dealt with Greenpeace in a number of ways:

SOCOG treated Greenpeace as an organisation with a legitimate interest in the Games and involved them as much as possible. This reflected their role in the Bid, their expertise in the environment, their ability to tap a global network of knowledge and their ability to become involved *whether we wanted them or not* (my emphasis).²⁷

Environmental NGOs helped to establish the standards in all key performance areas, energy conservation, water conservation, waste minimisation, pollution avoidance and the protection of the natural environment. A consortium of environmental groups lead by the ACF were paid \$160 000 for their work by the NSW and Commonwealth governments to keep an eye on the organisers; Greenpeace, true to their view on independence, did not accept government funds. The environmentalists were on the stage at the launch of various environment initiatives with SOCOG; for example, the CEO of Greenpeace launched the waste strategies initiative with the Minister for the Olympics.

Essentially the strategy of SOCOG was to invite the Greens into the tent, to minimise their potential to damage to the Olympic brand. It was part of the 'engagement strategy' now common in the corporate sector. It used the language of 'stakeholder', which implies equal standing among competing interests. Essentially, a stakeholder is 'anyone who can do you damage.' It is the damage that a Green group can do to a company's image that allows it to gain status with the real stakeholders, those who have a contractual relationship with the organisation, whether taxpayers, investors, employees or suppliers and customers.

It was also a 'beyond compliance' strategy, doing more than the law required. The Olympic Games showcased the best of the best, so everything associated with the Games had to be the best of the best. Like any other business, Greenpeace used the

²⁷ Peter Otteson, 'Greenpeace and the Sydney 2000 Games: What Are The Lessons?' Paper delivered at 4th IOC World Conference on Sport and Environment, Nagano, Japan 3-4 November, 2001. Also interview with Peter Otteson, 26 June 2002.

badge of the Olympics to push their product. In this case, however, they paid nothing and they delivered nothing, except the threat of bad publicity. The strategy of engagement delivered power over programs and the judgement of outcomes to those who threatened blackmail. There was a time when such behaviour was considered bad form. Greenpeace stole a moral march on the IOC and the governments—and the IOC, the fans and the taxpayers paid for it.

A proper acquittal of government funds would ensure that public servants and technically competent people were in the decision-making positions, albeit with advice from lobbies. The Sydney Olympics pushed well beyond the proprietaries to indulge in an exercise of damage control and used funds for experiments in environmental management that had insufficient scientific scrutiny.

Case Study 4: Judicialisation of Politics

It may be the ultimate form of individual political involvement to take a matter to court, but the effect of many people litigating many issues, means the transfer of decision-making rights from the legislature to the courts.²⁸ The trend to settle a wider ambit of issues in the courts has multiple origins. It stems from the trend in law, both judge-made and statutory, towards a preference for individualised, discretionary solutions as against the principled application of general laws.²⁹ It stems from the explosion of legislation and the tendency for Parliaments to pass law with general standards rather than specific rules,³⁰ the widening of the law of standing³¹ and the tendency for the judges to confuse compensatory justice for distributive justice, as with the current crisis in tort law.³²

It is now easier for collectives not directly involved in issues to intervene in more legal matters. In *Truth About Motorways Pty Ltd v Macquarie Infrastructure Management Ltd* (2000) the High Court of Australia has widened the capacity of NGOs to take legal action against business. The consensus of the High Court in *TAM v MIM* was that the Parliament had the power to legislate to allow ‘any person’ or ‘a person’, or the like, to have standing under Commonwealth statutes. The Court stated that the Parliament may ‘allow any person to represent the public interest and, thus, institute legal proceedings with respect to a public wrong.’ It further observed that a number of laws had been enacted in recent years, which allowed proceedings to be brought, by any ‘interested person’ (for example, in certain laws relating to the environment, industrial relations and financial markets) or ‘person affected’ (for example, in certain companies and securities, investment and environmental laws).³³

²⁸ See T. Vallinder, ‘The Judicialization of Politics: a World-Wide Phenomenon.’ *International Political Science Review*, vol. 15, no. 2, 1994, pp. 91–99.

²⁹ A.M. Gleeson, ‘Individualised Justice: the Holy Grail.’ *Australian Law Journal*, vol. 69, 1995, pp. 421–433.

³⁰ M. McHugh, ‘The Growth of Legislation and Litigation’, *Australian Law Journal*, vol. 69, no. 1, 1995, pp. 37–48.

³¹ *Truth About Motorways Pty Ltd v Macquarie Infrastructure Management Ltd* (2000) HCA 11 (9 March 2000).

³² P. Atiyah, ‘Personal Injuries in the 21st Century: Thinking the Unthinkable.’ In P. Birks, ed., *Wrongs and Remedies in the 21st Century*. Oxford, Clarendon Press, 1996.

³³ Australian Chamber of Commerce and Industry, ‘High Court Empowers Social Action Groups’, 2000, [http://www.acci.asn.au/index_key.htm].

This widening of the law of standing could prove fertile ground for lawyers and NGOs to press their agendas through the courts in environmental, industrial relations, companies and securities and anti-discrimination, as well as privacy, and finance and investment arenas.

Consider the controversial litigation last year concerning the *Tampa*.³⁴ The proceedings were instituted by a lawyer and a civil liberties group that had no instructions from, or prior contact with, the potential asylum seekers. Both were given standing by the Court on the assumption that they were acting in the 'public interest' to protect a vulnerable group against government excess. History has now conclusively disproved that untested assumption; at least in so far as 131 people given asylum and permanent residence in New Zealand are concerned. Had the *Tampa* plaintiffs won their case, they would have succeeded in having most of those on the boat detained at Woomera, Curtin or Port Hedland for the last 10 months, eventually to see their asylum application rejected, with the result that they must return to a war-ravaged Afghanistan. Those who instead chose to go to New Zealand under the government-sponsored plan have, with a few exceptions, been given asylum and permanent residence in that country. With hindsight, it seems clear that for many on the *Tampa* the government initiatives delivered them a more favourable outcome than the 'public interest' litigation.

Judicial activism is seen by some as an expression of the rule of law in safeguarding individual rights and civil liberties against executive abuse. It is also claimed, though not often explained, 'that judicial activism forms part of a new democratic settlement between the government and the community. If judicial method is as capable or better than legislative or executive method for distilling enduring community values, that needs to be demonstrated.'³⁵

Case Study 5: The Financial Services Reform Act³⁶

The *Financial Services Reform Act* of 2001 is a legislative step into the brave new world of corporate citizenship. It seeks to place open-ended moral restraints on private investment decisions. If they were applied to individuals, there would be an outrage. The Act includes disclosure provisions in the offer of financial products designed to give prospective investors sufficient financial information to decide whether or not to invest.

The provision applies particular disclosure requirements to all superannuation, life insurance and managed investment products. The requirement is that the financial institution concerned discloses for every product the extent to which it has taken into account labour standards and environmental, social and ethical considerations. The requirement is thus imposed on approximately \$650 billion of Australian savings, including the principal form of government-enforced savings—superannuation.

³⁴ See J. McMillan, 'Immigration Law and the Courts.' Address to the Samuel Griffith Society, Sydney, 15 June, 2002.

³⁵ McMillan, *ibid*, p. 7.

³⁶ See J. Hoggett and M. Nahan, *The Financial Services Reform Act—A Costly Exercise in Regulating Corporate Morals*, Melbourne, IPA Monograph, 2002.

Disclosure requires the institution to formulate and express its attitudes and practices to matters that range from difficult to impossible to define. It is open to businesses to state that they do not take these matters into account in their investment decisions. No institution will state that it does not take such matters into account, in part because if they did, NGOs and the media would label them as unethical or anti-social. Silence would be treated as guilt. More importantly, businesses in reality almost always 'take into account' these issues to some degree, so a nil return would in most cases be untruthful. The normal investment selection processes involve winnowing out fraudulent (that is unethical) propositions or those with high-risk exposures arising from their corporate practices. NGOs would exert pressure for highly detailed disclosure statements under each of the headings and would seek to supervise the behaviour of the institutions concerned against those written statements in ways favoured by those groups.

In the end, this is no less than an attempt, by indirect and stealthy means, to impose new and poorly defined community service obligations and prescribed behaviours on business. By means of legislation and mandatory guidelines, the corporate sector is obliged to undertake actions (and report on them) that may adversely affect its profitability³⁷ and that it would not necessarily undertake voluntarily. The Act will encourage significant distortion of investment decisions and management effort to placate hostile groups, which have little financial stake in the institutions or businesses affected.

These provisions dilute the influence of shareholders and the responsibility of corporate management to its shareholders. It could provide an excuse for company boards and management for poor financial performance. In the extreme it might be used as an excuse for business failure on the grounds that the company had focused, perhaps very successfully, on the four non-financial criteria and had thus failed to make a profit. Failure to control labour costs might be equated with high labour standards. Zealous environmental performance might translate into closure of operations huge expenditure to avoid trivial environmental injury and so on.

The expansion of these 'bottom line' concepts is accompanied by the phenomenon of a growing list of interest groups which elect themselves as 'stakeholders'. A stakeholder is traditionally a person who has a stake, that is, someone who has put up something of value to promote the enterprise in question and risks losing it. This delicate trade-off of risk and reward traditionally included shareholders and lenders. It is this trend towards giving everyone a say in everyone else's business that lies beneath much of the pressure for the FSRA provision. It is a perversion of the idea of democracy, a new form of corporatism.

Case Study 6: Reputation Index³⁸

Corporate reputations are a valuable commodity; a poor one can lead to a loss of income for investors and employees. This is precisely why some NGOs seek to

³⁷ See P. Ali and M. Gold, 'An Appraisal of Socially Responsible Investments and Implications for Trustees and other Investment Fiduciaries.' Centre for Corporate Law and Securities Regulation, University of Melbourne, 2002.

³⁸ See Gary Johns, 'Corporate Reputations: Whose Measure?' *IPA Review*, vol. 52, no. 4, 2000, pp. 3-5.

advance their agendas by trying to capture corporate reputations. A prime example is the *Sydney Morning Herald* and *Age* newspapers' list of Australia's 'best' 100 corporations. Each is rated on a number of factors, which are combined to form the 'Good Reputation Index'. The Index purports to measure corporate performance on employee management, environmental performance, social impact, ethics, financial performance, and market position. The judging is undertaken by 'influential' organisations, such as the Ethnic Communities Council, Greenpeace, Amnesty International, the St. James Ethics Centre, the Institute of Chartered Accountants, and the Public Relations Institute of Australia.

An analysis of the data³⁹ shows that, according to the Index and therefore the CSR regulators:

- *Financial performance and social responsibility are inversely related.* Only one of the top ten most socially responsible corporations is ranked among the top 20 firms in terms of financial performance. Conversely, just three of the top ten financial performers were ranked in the top 20 in terms of social responsibility.
- *Government protection and direction is good and market competition is bad.* Five of the top ten most socially responsible corporations are government-controlled. Two, Australia Post (ranked first) and Queensland Rail (ranked fifth), are government-owned monopolies. Telstra is partially government-owned and heavily regulated. Holden and Ford are sustained by taxpayer subsidies. None of the top ten financial corporations are government-owned or subsidised and all face vigorously competitive markets.
- *Funding social activists is a key to social responsibility.* Each of the highly ranked socially responsible corporations donates heavily to corporate social responsibility groups (including many of the organisations who acted as judges for the Index). Westpac (ranked second), Alcoa (ranked sixth) and ING (ranked tenth) are not simply generous financial contributors, but are also strong promoters of the triple bottom line. Westpac has taken the lead in promoting ethical investment in Australia and ING has taken a similar approach around the world. One must at least suspect that their high ranking is a reward for their contribution to the cause.

The Index gathered the opinions of those who have an interest in gaining some leverage over the activities of corporations, but who have no direct interest in their operations. It has precious little to do with actual performance of tasks that corporations need to undertake in order to fulfil their obligations to their customers, shareholders, and their workforce and to society through their legal obligations. The tussle between corporations and NGOs over corporate reputation has reached new heights. It is now a game of cat and mouse, with shareholders having to pay to bribe the civil society regulators.

³⁹ 'The Good Reputation Index 2001', *Sydney Morning Herald*, 22 October 2001.

The Protocol⁴⁰

An essential task for democratic government is to maintain a balance between the organised and the unorganised interests in society and to counteract the tendency for state power to be used to satisfy organised interests. The principle means to achieve this balance are already in place: a conservative constitution devoid of a Bill of Rights and a House of Representatives based on single member constituencies. A further one is to resist the tendency to allow more power to rest in the hands of international institutions where electorates have no direct veto. In addition, in the domestic context, there should be disclosure on the part of all those who have access to the resources of the government. The protocol is the instrument proposed. This is designed to reassert the primacy of the formal democratic institutions, to limit the impact of communitarianism by corralling it through the Parliament, where it is constrained by the electorate.

The Australian Tax Office submission to the Inquiry into Charities noted the lack of information provided by non-profit organisations that enjoy tax concessions. There have been concerns about accountability to donors, possible erosion of confidence in the sector, the lack of data for policy development, and so on:

The Commission is concerned that accountability to donors and the general public is inadequate in terms of the availability of easily understood information and the transparency of operations. This may reduce donor confidence and ultimately public support for the sector.⁴¹

In some overseas jurisdictions, legislation gives public access to various information about concessionally taxed non-profits, including administrator's decisions, constituent documents and financial data. For example, in the USA:

Registered charities must file (annually) form T3010 that requires detailed information on their revenues and expenditures, assets and liabilities, remuneration paid to senior staff, and more general information about their charitable purposes and activities. All of this information is available to the public.⁴²

Consistent with these views, where an NGO wants access to a government, it should be granted on the condition that the NGO is competent in the areas relevant to the particular task required. Each of these competencies requires proof. Specifically, an NGO should provide data about their source of funds, their expertise, their membership and the means of electing their office-holders. Specifically, where a government grants standing to an NGO the following information should be gathered and made available to the public:

⁴⁰ See Gary Johns, 'Protocols with NGOs: the Need to Know.' *IPA Backgrounder*, vol. 13, no. 1, 2001.

⁴¹ Quoted in submission by Australian Taxation Office to *Inquiry into the Definition of Charities and Related Organisations*, January 2001, p. 20.

⁴² *ibid.*

- Legal status: sufficiently detailed to prove the status of the organisation and to identify office holders, along with the structure of responsibilities and appropriate systems to ensure accountability.
- Operating status: proof that the organisation is voluntary, non-profit and non-government.
- Membership: there must be a verifiable list of the membership, one that distinguishes members—people with voting rights—from supporters. The list should not be made public, although there should be evidence that new membership is encouraged.
- Elections: document the election process and processes by which members are able to be involved in the policy-formation, including the ability of members and supporter to access all decisions of the governing body.
- International affiliation: provide information on off-shore affiliates, associated parties; on the degree of non-resident input in terms of board membership and general membership, and extent of offshore funding.
- Financial statement: the financial position should be prepared in accordance with accepted accounting principles and include: significant categories of contributions and other income, expenses of major programs and activities, and all fund-raising and administrative costs.
- Use of funds: money should used in a manner specified by the NGO when it asks donors (and those funds are tax-assisted) for donations. Information should be provided which shows the percentage of total income from all sources applied to programs and activities.
- Fund-raising: solicitations and informational materials must be accurate, truthful, and not misleading. Solicitations shall include a clear description of the programs and activities for which funds are requested.
- Claims to expertise: other than membership interest. The qualifications, whether formal or by way of publications, of those who will speak or act on behalf of the organisation in its representations to the provider, research undertaken, and whether research has been assessed by independent peer review.

Conclusion

NGOs that seek access to government resources should be the subject of scrutiny, and the results of that scrutiny should be made available to the public. The acceptance of an NGO as a body with standing should lead to the publication of the data on a publicly accessible register. This simple procedure would reassert the dominance of

the relationship between governments and their citizens, a dominance that has tended to be displaced by the all-too-ready willingness of providers to accept NGO ‘stakeholders without responsibility’ rhetoric. NGO activity is not going to fade, in many regards it is to be welcomed, but it should be put in perspective. Citizens need to know about the NGOs that seek access to their resources. The simple device of a protocol should help put the citizens back in charge. It may help to modify the tendency evident in civil society to pursue the agendas of the articulate with the resources of the inarticulate, or those too busy to play politics.

Liberal democracy has the virtue of securing a degree of liberty consistent with the views of the majority and the protection of the rights of minorities. It is predicated on a limited politics, where civil society and the economy make their own contributions to society. A civil society that promotes such an outcome shares the same virtues. On the other hand, a communitarian civil society where citizens lay claims on fellow citizens in increasing ways and for an increasing number of reasons could create a less liberal society. Its virtues may not be approved by the majority. The only defence against such insurgency is better information about those who make the claims and organise the voices.

Government in a liberal representative democracy has the legitimacy to arbitrate and conciliate, incorporate and resolve the claims on the commons. Mere assertion of the public interest does not make it so. This is difficult in a liberal society where all voices must be heard, all due weight given to opinion, whoever expresses it. The present difficulty arises because the ability to voice opinion is outstripping the ability to resolve the claims voiced. The strengths of liberal democracy are being used against it. The trick is to retain the strengths and manage the challenges.



Question — You mentioned the liberal democracy that we are living in now—I think liberal democracy is the pits. In that context, you mentioned legislation that recently went through Parliament that is being ineffectively overviewed. When you were in Parliament, federal money was overseen by estimates committees and the views of the Auditor-General. In the area of that legislation, there is no accountability or review by private enterprise of the way they deal with their money, unlike private money. It’s not good enough for this Parliament to opt out.

Gary Johns — The major two lobby groups traditionally have been business and trade unions, both of which are required by law to be registered in some form and to produce evidence about themselves, their activities and the ways in which they perform. There may be inadequacies there, but, by golly, we’ve been at it for about a hundred years now, finding out who these beasts are. My point is that there are some new players on the block and their energy is welcomed, but I think the taxpayer needs to know as much about them as the others.

Question — I was intrigued by your statement about the articulate using the inarticulate to support their claims. The ultimate example of that must be the Republic debate, where civil society—or many of the self-proclaimed champions of civil

society—claimed that the Republic was the only way to go. I am very intrigued by the rebuff to that, by way of the ballot box. How would you see compulsory voting as a bulwark against some of the excess that you see in civil society?

Gary Johns — I have a peculiar view on compulsory voting: I am in favour of it, for a very particular reason. There is a lot of work that suggests that if voting is voluntary there will be bias against the poor, inasmuch as more of the poor won't vote, and it might be in the order of five percent of the vote. I am suggesting that voting requires such a little effort, that it's worth that amount of compulsion to get an *unbiased* vote. If thirty percent of the people don't vote, that's a very large bias. So mine is a sort of statistical rebuttal of those in favour of non-compulsory voting. I think at least every couple of years everyone's views should be heard, no matter how 'ignorant' they are. In a sense, this system only works where the mob constrains those who are brighter and better than us, and it will only ever work in that sort of rough tandem. So I prefer to have everyone in, every once in a while.

Question — I have two questions. Firstly, you are claiming that this process of civil society interacting with the state, and trying to achieve outcomes based on morality, is somehow new. I think this has been around for the last two or three hundred years. The Anti-Slavery Society is still around, and that was started in 1780-something. So there has always been an interaction between the state and various groups who are organised on moral or ethical grounds, and who represent the interests of the minority and not the majority. So why is it new, and why is more of a problem now than it was then?

The second question relates to your comments on the regulation of these things. It is interesting that the regulations you said should apply for those NGOs, both domestic and international, actually do apply. But the examples you used are those which don't take tax-deductible money, such as Greenpeace. At issue is whether organisations which are entirely private, like Greenpeace and the Institute of Public Affairs, should have the same scrutiny as those which take taxpayers money; and if so, then would the IPA be open in exactly the same way?

Gary Johns — First, of course the notion of civil society organising for various purposes not being new is correct. What I've tried to do is to say that they have worked in different modes over those years. The communitarian mode is perhaps more dominant now. The strength of civil society—that is, the amount of money sitting in the pockets of people who have time to think about politics—has increased enormously. So the ability to voice opinion is growing. The old abilities, if you like, to resolve the various claims, are around about the same. So it is that equation that I'm working on.

The Institute of Public Affairs is a Melbourne-based, broadly libertarian, think-tank. When the NGO project started, we couldn't end this question of NGO activity with more regulation. That wouldn't sit kindly. We didn't want to end with more regulation for IPA, so we've ended up with a classical economist view that more information about actors is better. The IPA website tells you about all of the things that I would like to know of NGOs that seek the resources of government. So, yes, we are in the

game too. We are an NGO and we think we should disclose a certain amount. How much the government would wish, is a matter for them.

But, and this is the critical bit, there is no right to know anything about private associations, unless they use someone else's resources. And I want to make that clear. The trigger only arises when you use someone else's resources. So Greenpeace, if it doesn't have tax-deductible status, doesn't have to supply the information. But if it sits on significant committees and says that it has certain expertise and gets involved in things, then I think you are entitled to ask questions, because it is then displacing other people in the electorate. That's a crucial question. The mechanism and the right to know something about private association only arises, not because of their involvement with public debate, but when they cease to substitute for the elector, or the shareholder. A lot of corporations are paying a lot of money in quiet ways to NGOs so that the NGO lays off them. I think shareholders should know a bit more about that.

Question — Regarding the need for more transparent information about NGOs' access to public resources—how could that be put in place by parliamentary democracies? We have, certainly at the state government level and I think also at the Commonwealth government level, a current system that fails to inform taxpayers about large amounts of public resources paid to specific companies, as well as to industries more broadly—although I think most of the lack of information is at the former stage, in specific companies. With your experience, at least in this Parliament, how you would rate the chances of such an arrangement for more transparent information being put into law?

Gary Johns — I think the chances are high. That is not to say there are not other problems and that we don't have full and frank disclosure of taxpayers' use of funds and so on. The non-profit organisations that have some sort of tax-free status, especially those who have tax-deductible gift recipient status, are already listed on the Tax Office records, or they're in specific lists in the Environment or Arts or Education Minister's register. But I don't know who they are, or anything about them. So it is not such a difficult second step, and a lot of the large NGOs say to us: 'This is okay by us because the sort of the material you wish is basically available.' But even if, for instance, you wanted to make a donation to a green group it would be difficult to know, with the thousands of groups around, what they do. I would have thought that if they were getting some sort of taxpayer benefit, then the taxpayer should at least know who they are and what they do. Legislation could have a very useful role, and I don't think it will be very difficult to put that into law.

Question — I first came across your work in a paper tabled into the Joint Standing Committee on Treaties, tabled actually by the CEO of the Australian Food and Grocery Council. The inquiry was into Australia's relationship with the World Trade Organisation. You congratulated our government on resisting the tendency to allow more power to reside in indirectly elected international institutions. A very broad range of institutions exist at the international level from the UN Human Rights Commission down to the World Trade Organisation. I wonder if you differentiate between these, and if you could elaborate on that particular statement.

Gary Johns — Take an institution like the World Trade Organisation. By and large, you need some mechanism whereby if two countries disagree to the extent which they're cheating or holding out others' products and services, there is somewhere to go where you can have a hearing. If nations have signed up to that agreement, and seek to use that means to sort out their difficulties, then I don't have a problem. The problem begins to arise when very broad notions of correct behaviour are written down in international treaties and then applied many years later in all sorts of ways. The United Nations is out there looking for a new constituency. It is paid for by nation states; they are its keeper. They are spending an awful lot of time wooing civil society and business corporations; in other words, they are looking for a constituency of their own. That's okay, but that constituency doesn't pay their wages, and those international organisations, especially of the rule-setting type if you like, are strictly beholden to nation states. They are the building block. I have a real difficulty in that discussion which is swimming around the UN that says: There is a new form of democracy and why don't we get all of the NGOs together in one place—South Africa next week might be a good spot—get them all together and we'll talk about what's good for the world.' My view is that you can talk all you like, as long as you go back to your nation states and put it through *your* parliaments and give *your* people some sort of direct veto about your wonderful ideas.

Question — I was fortunate enough to be at the last WTO meeting, and saw there the tremendous influence of pharmaceutical trans-national companies, who almost influenced the United States government to the extent that they could have endangered the ability of poor people in developing countries to have access to medicines. I'm just wondering why the Institute of Public Affairs concentrate so much on civil society organisations rather than on the tremendous power of corporate organisations that can endanger our lives. For example, the collapse of HIH or Ansett has had severe impact on jobs and the community in Australia. And because you talk about accountability, can you explain where the Institute of Public Affairs gets its funding, and who you see yourselves as accountable to?

Gary Johns — We don't take funding directly for any work that we do, and you'll read this on our website, it's all quite public. We have a range of supporters, individuals as well as corporations, and we have a couple of rules. No more than one corporation can constitute, I think, more than 15 percent of any industry, and no industry can constitute any more than 15 percent of our income. We try to spread as much as possible our backers. I don't want to damn them by naming them, but if Rio Tinto rings me and says: 'Gary, can you write a really hard piece on x and y', I can say no. We are interested in NGOs because if you go to almost any university in the social sciences, they are all writing about NGOs, and most are in love with NGOs. We have a more sceptical view of these things. We put our hand up quickly enough to criticise corporations who seek to do damage to nation states' particular constituencies, but our concern is that in the game that corporations and trade unions play, they have all been subject to scrutiny for a hundred years—but they can never get it right. It is never enduring enough and there is always some mug inside a major corporation who does bad things. And fortunately they are found out, and hopefully jailed. So there's no sense in which the laws should apply here. But I think we have some new characters, some new actors, that ought to be observed, and the end point about research is not to crush them or regulate them, but simply to say: 'Who are you

when you seek to enter and use the resources of government?’ And the reverse is true, governments use them too. We used the Greens mightily back in 1990 or whenever it was. I don’t think it did us much good.

Question — I work for the Australian Council for Overseas Aid and we represent quite a number of NGOs. On the points you made about accountability, we have a Code of Conduct that requires all our members to provide the information that you listed about their money, how they spend it, where they get it from, and things like that. In another issue of accountability, a lot of our members get money from the government, from the Australian Agency for International Development. They have a very strong accreditation system which also requires agencies, if they want to get government money, to go through the same accountability processes, not only on a quantitative measure but on a qualitative measure. They have to provide information, annual reports which document where their money goes and how they got it. So there are two quite strong accountability measures that we have in place for a large section of the NGO community that you didn’t mention, but needs to be known.

Gary Johns — Thanks for raising it. In an earlier paper that I published, that talks about this mechanism of the protocol, I in fact use the example of aid agencies and the Australian aid community as having perhaps best practice in some ways. The requirement that they tell the taxpayer who they are, how they operate, what their internal mechanisms are, your sort of broad ideas of accountability, we have placed as part of the protocol. There are a lot of NGOs who do this; it isn’t always available publicly. But I want the notion to sink in that it should be as of right. If you seek to displace the taxpayer, to represent the taxpayer, then the taxpayer should be informed. In the case of aid agencies, they are spending government money. There is no dispute that we should know all about them. That is a contractual matter. If government was not asking it would be murder, it would be obscene. But we ought to take it a little bit further and run it across a series of NGOs. Yes, I’m aware of your sector and we have no difficulty whatsoever with that. Your notion of accountability is well developed.

The Spirit of Magna Carta Continues to Resonate in Modern Law*

Lord Irvine of Lairg

The Legacy of Magna Carta: a Joint Commitment to the Rule of Law

For near on eight hundred years lawyers and parliamentarians have kept the spirit of Magna Carta alive. For their pains they have been accused of representing an essentially feudal Charter that was motivated by self-interest and the demands of political expediency, as a constitutional document of enduring significance. On this view, it is the glint of the sword, not the spirit of liberty, which best characterises Magna Carta. The principal offender is said to be Sir Edward Coke, himself both Judge and Parliamentarian.¹ In his *Second Institutes*, he wrote that the Charter derived its name from its ‘great importance, and the weightiness of the matter’.² He was wrong in this. It was so named to distinguish it from the separate and shorter Charter of the Forest.³ Coke also considered that the terms of Magna Carta were ‘for the most part declaratory of the principal grounds of the fundamental laws of England, and for the residue it is additional to supply some defects of the common law’⁴ Coke

* This paper is based on the inaugural Magna Carta Lecture, presented in the Great Hall of Parliament House, Canberra, on 14 October 2002.

¹ The most notorious and vociferous condemnation was that of Edward Jenks, ‘The Myth of Magna Carta’ *Independent Review*, no. 4 (1904), p. 260.

² *Institutes—Second Part*, vol. I (1642), *Proeme*.

³ A.B. White, ‘The Name Magna Carta’ *English Historical Review* (EHR) vol. 30, 1915, p. 472; vol. 32, 1917, p. 554. The terms of the Forest Charter were initially part of King John’s Charter of Liberties, but they were separated from it in 1217 when it was reissued by his successor Henry III.

⁴ Coke, *Proeme*, cited at note 2.

certainly went too far, although it can be said that Magna Carta has had effect both as a statute and through the common law. The real issue, however, is whether Coke was closer than his critics to an enduring truth.

Magna Carta was re-issued four times, with various amendments, and is now thought to have been confirmed by Parliament on almost fifty further occasions.⁵ The authoritative text, four chapters of which remain on the statute book in England,⁶ is Edward I's *inseximus* of 1297.⁷ A copy of this version, the only one outside the United Kingdom, is displayed in Australia's new Parliament House. By accompanying words of confirmation, also still on the statute book,⁸ it is said that the Charter of Liberties 'made by common assent of all the realm ... shall be kept in every point without breach';⁹ and that the Charter shall be taken to be the common law.¹⁰ In many respects Magna Carta has transcended the distinction between law and politics and its legacy represents a joint commitment by Monarchs, Parliamentarians and the Courts, to the rule of law.¹¹ This legacy forms a central part of the shared constitutional heritage of Britain and Australia. It is in recognition of this that the monument to Magna Carta, which I visited earlier today, has been established in the Parliamentary Zone of Australia's national capital, incorporating the British Government's contribution towards the celebrations of the Centenary of Australia's Federation last year.¹²

For some, Magna Carta today represents no more than a distant constitutional echo. My proposition, to the contrary, is that the spirit of Magna Carta continues to resonate in modern law. However, let me first reaffirm Magna Carta's constitutional significance and refute suggestions that it was no more than a narrow baronial pact.¹³

⁵ F. Thompson, *Magna Carta—Its Role in the Making of the English Constitution 1300–1629*, Octagon, New York, 1972, chapter 1.

⁶ *Halsbury's Statutes*, vol. 10, Part 1, Butterworths, London 2001, pp. 14–17; the chapters are: 1, 9, 29, 37.

⁷ 25 Edw 1

⁸ *Halsbury's Statutes*, p. 18.

⁹ These words of confirmation refer to Henry III's reissue, which is discussed below. This was the version on which Coke based his *Second Institutes*, since copies of Johns' Charter were unknown to him.

¹⁰ See Coke, *Proeme*, op. cit.

¹¹ It is important to recognise, as Coke himself emphasised, that Magna Carta also provided a measure against which the acts of Parliament were to be judged. Coke stated that it was a 'good caveat to parliaments to leave all causes to be measured by the golden and straight metwand of the law and not the uncertain and crooked cord of discretion' and castigated Parliamentary conduct that failed to observe the promises enshrined in Magna Carta (*Institutes—Fourth Part* (c.1669), 37, 41).

¹² Magna Carta Committee, Australia-Britain Society, *Magna Carta Place in Australia's National Capital: A Report on Its Naming and Development* (March, 2002).

¹³ Modern texts frequently give only passing reference to Magna Carta or even entirely omit mention of it: e.g. S. De Smith and R. Brazier, *Constitutional and Administrative Law*, 8th edition, Penguin, London, 1998; J. Jowell and D. Oliver (eds.), *The Changing Constitution*, 4th edition, OUP, Oxford, 2000; G. Williams, *Human Rights under the Australian Constitution*, OUP, Melbourne, 1999, pp. 2–3; O. Hood Phillips and P. Jackson, *Constitutional and Administrative Law*, 8th edition, Street & Maxwell, London, 2001, 2–007. Alternatively it is said to be a narrow document, the significance of which has been overestimated: e.g. J. Alder, *Constitutional and Administrative Law*, 2nd edition, Macmillan, Basingstoke, 1994, p. 39; D. Feldman, *Civil Liberties and Human Rights in England and Wales*, 2nd edition, OUP, Oxford, 2002, p. 71.

Magna Carta and the Emergence of the Rule of Law

The dramatic events surrounding King John's capitulation remain of central importance to understanding the constitutional significance and enduring message of Magna Carta. Indeed, the Australian monument to Magna Carta fittingly incorporates scenes from the period, which should continue to inspire generations of lawyers, laymen and parliamentarians alike.¹⁴

The story of Magna Carta is a chapter in the continuing history of the struggle between power and freedom. It is a chapter set in a time when ultimate power was concentrated in the hands of a single ruler. However, in a time before the principle of primogeniture had become established, the death of a King was usually followed by a contest for succession in which contestants relied both on might and right in enlisting the support of important magnates, the Church, and those in control of the treasury. It was at this stage that the privilege and power of Kings was most clearly limited. Before coronation by the Church, new Kings were required to make an Oath to observe justice and equity and to uphold the peace. Abuses of the previous reign were stipulated and forbidden for the future. Such were the terms of Henry I's Coronation Oath, sworn in 1100. Henry had rapidly seized the throne after his father died suddenly, if not a little suspiciously, while they were hunting; but his claim was weak and he had shaky baronial support. For these reasons he embodied his Oath in a Charter of Liberties, which was the crude precursor of Magna Carta.¹⁵ Nonetheless, once crowned, a Coronation Oath, even in the form of a Charter, was no restraint against a powerful King. Few expected such promises to be taken particularly seriously, and Henry broke every one of them.¹⁶

However, Magna Carta was not, as is often said, simply a reaction against the tyrannies and excesses of King John. Sir James Holt, the pre-eminent modern authority on Magna Carta, has argued that the predominant cause of the Charter was the manner in which the Angevin Kings exploited England in an attempt to expand and defend their continental empire.¹⁷ This process can be traced to the accession of Henry II in 1154 who, as Count of Anjou and Duke of Normandy, had dominions covering three-fifths of France. To sustain this empire Henry gave the administrative centres of England, the Curia Regis and the Exchequer, a new lease of life. He extended the jurisdiction of the King's Courts, and exploited the feudal obligations owed by his barons.¹⁸ The momentum was increased by Henry's successor, Richard I, and his Chief Justiciar, Hubert Walter, since it was necessary to pay for Richard's prolonged and expensive crusades.¹⁹ The Angevin Kings also eagerly seized new

¹⁴ Magna Carta Committee, 2002, op. cit., pp. 13–21, 33–34.

¹⁵ W. Stubbs, *The Constitutional History of England—In its Origin and Development*, vol. I, 4th edition, Clarendon, Oxford, 1883, pp. 328–330.

¹⁶ W.S. McKechnie, *Magna Carta—A Commentary on the Great Charter of King John*, Glasgow UP, Glasgow, 1905, p.118.

¹⁷ J.C. Holt, *Magna Carta*, 2nd edition, Cambridge UP, Cambridge, 1992, p. 24.

¹⁸ *ibid*, pp. 29–33.

¹⁹ Historians have recently revised views of Richard I's reign and administration, which were traditionally thought to have been retrogressive. See generally, J. Gillingham, *Richard Coeur De Lion—Kingship, Chivalry and War in the Twelfth Century*, Hambledon Press, London, 1994, pp. 95–118; M.T. Clanchy, *England and Its Rulers 1066-1272*, 2nd edition, Blackwell, Oxford, 1998, pp. 94-98.

opportunities to raise revenue that were not open to other feudal lords, notably the taxation of trade and the control of weights and measures. Faced with this centralised and ruthlessly efficient governmental apparatus, the King's subjects required assurances that good practices would be observed and their liberties preserved.

Even so, it was no accident that the revolt occurred in the reign of King John. He was a capricious and inconstant ruler. Moreover, he inflamed his barons by demanding enormous scutages and aids to finance his unsuccessful military expeditions. He lost Normandy to the French King and his nickname, "John Softsword", set him in unfavourable contrast with his lionhearted brother, Richard. A battle with Rome ended in his astute but ignominious offer of homage to the Pope.

When John determined on setting out across the Channel to stamp his authority on his lands in Poitou and Anjou and perhaps even re-take Normandy itself, he found many of his barons refusing to follow, in open defiance of their fealty. Instead John, with his mercenaries, set off northward to bring the most intransigent northern magnates to heel. Civil war was averted only by the bold intervention of Stephen Langton, the Archbishop of Canterbury, who persuaded John not to distrain his barons without lawful judgment of his court. Enraged, John had to settle for a fortnight's marching about his northern fiefdoms stamping his feet in frustration.²⁰ The following year in 1214 John renewed his assault on his enemies in France, but was this time deserted by his Poitevin barons. On his return to England his discontented English magnates seized their opportunity and John was confronted by open revolt. As John's biographer has put it: 'it may well have seemed to men already inflamed to the point of conspiracy, that John had been obliged to come to terms with the Church and with the French king and that the next item on the agenda, as it were, was that he should come to terms with them.'²¹

It was likely to have been Stephen Langton who produced Henry I's Charter as a way of focusing and legitimating the baronial grievances.²² While many of the barons, it is true, were principally activated by selfish desires for revenge and recompense, the Charter also appealed to moderates. It provided a point of compromise and a sure foundation for Magna Carta.²³ The terms of Magna Carta itself were hammered out during protracted negotiations in the meadow in Runnymede in 1215.²⁴ King John was undoubtedly trying to buy time and the country was still destined to descend into civil war. However, when the storm eventually subsided Magna Carta emerged as the rock upon which the constitution would gradually be built and the fulcrum upon which the constitutional balance would be struck.

²⁰ See W.L. Warren, *King John*, Yale UP, New Haven, 1997, p. 214.

²¹ *ibid*, p. 225.

²² Langton's role is celebrated by the Australian Magna Carta monument. Modern historians, however, disagree over precisely what role he had. Certainly Warren regards him as the only person who deserves to be singled out from among Magna Carta's framers (*ibid*, p. 213, cf. pp. 217, 232, 245). He also believes that Langton produced Henry I's charter, probably at the famous St Paul's meeting in 1213: *ibid*, pp. 226–228 also Clanchy, above note 19, p. 138. Holt, however, is more circumspect and argues that the meeting never took place: above note 17, pp. 219–220, 224–225, 269–270, 279–287.

²³ Warren, 1997, above note 20, p. 231; Holt, above note 17, p. 222.

²⁴ See Holt, above note 17, chapter 7.

The terms of John's Charter amplified and expanded Henry I's.²⁵ It was dominated by issues of contemporary importance as diverse as reliefs, widows, wardships and fishweirs. Scutages and aids were only to be levied by the Common Council of the Kingdom.²⁶ The City of London, which had played host to the rebel barons, was to have all its ancient liberties and free customs.²⁷ There were several concessions to merchants, and weights and measures were regularised. The most famous chapters,²⁸ which later became the venerated chapter 29, stated that no free man was to be arrested, imprisoned, disseised, outlawed or exiled or in any way destroyed, except by the lawful judgment of his peers or by the law of the land. To no one in his realm, the King swore, would he sell, refuse, or delay right or justice. It is stretching imagination to find here a protection of jury trial, but Magna Carta manifestly asserted the superiority of the ordinary law and of regular over arbitrary justice.²⁹

There is no reason to think, as is often suggested, that Stephen Langton was also solely responsible for the inclusion of 'free men' as addressees of the Charter. It was becoming clear to reflective Lords and Bishops that the Charter required a broader base than would be supplied by a simple baronial pact.³⁰ Coke later took the inclusion of "free men" to encompass the entire citizenry, but, while it was certainly used broadly, it excluded the villein who was protected only by local custom in his lord's court.³¹ Nonetheless, Sir James Holt has argued that the Charter was unique in accepting an exceptional degree of legal parity among free men, and also in its comprehensive application to a relatively cohesive community.³²

By chapter 61, if the King transgressed, he was at the mercy of the 'community of the whole realm'.³³ Moreover, some provisions applied universally, such as the promise not to sell, refuse or deny justice. The provision which might have had the greatest popular significance was chapter 20.³⁴ By this chapter no man was to be fined except

²⁵ Stubbs, above note 15, p. 572.

²⁶ Chapters 12 and 14, these provisions were altered in the 1217 charter (see McKechnie, above note 16, pp. 172–175) and were altogether excluded from later re-issues. Furthermore, this provision in no way limited the King's right to tallage London and other towns. It thus contained only the germ of the later principle that taxation was only to be levied by the consent of property owners, as represented in Parliament.

²⁷ Chapter 13, which later became chapter 9.

²⁸ Chapters 39 and 40.

²⁹ Other chapters likewise protected the citizenry's access to justice. Chapter 17 (which became chapter 11) stated that common pleas shall not follow the King's court but shall be heard in some fixed place; a provision that led to the separation of the Common Pleas and the King's Bench. Chapter 38 (which became chapter 28) provided that no man was to be put to wager his law except by the provision of an honest witness.

³⁰ Chapter 1; Holt, above note 17, pp. 269–270.

³¹ See J.H. Baker, *An Introduction to English Legal History*, 3rd edition, Butterworths, London, 1990, pp. 347–349, 531–540; McKechnie, above note 16, pp. 341–344, 448–449.

³² Holt, above note 17, pp. 276–280; cf. P. Vinogradoff, 'Magna Carta' *Law Quarterly Review*, vol. 21, 1905, pp. 250, 253.

³³ It was the King's inability to satisfy the barons in respect of the contentious issues relating to the retrospective correction of previous transgressions that essentially led to the civil war which followed the events in Runnymede: Holt, above note 17, chapter 10.

³⁴ Which became chapter 14.

in proportion to the degree of the offence; and his livelihood was to be at all times preserved. Merchants were not to be deprived of their goods nor villein tenants deprived of their ploughs. These protections against destitution were not, as such, binding against all the world, only against the King; but further protection against the abuses of feudal lords was embodied in chapter 60, according to which they were to observe the same good practices in respect of their men as promised by the King in respect of his.³⁵ This not only bestowed another dimension on chapter 20, but also extended the protections on such matters as wardships and marriage. The breadth of these protections is illustrated by the fact that in later times Magna Carta was most commonly relied upon in suits between private individuals.³⁶ This was, then, no mere private bargain between King and barons.

The great nineteenth century constitutional historian, Bishop Stubbs, went as far as to declare Magna Carta the first great act of a united nation.³⁷ It is apparent that there was much insight in this assessment. Magna Carta was certainly the product of a shift in the structure of society. The Angevin Kings, with their powerful central administration, had been forced to concede that governmental power should be exercised according to principle, custom and law.³⁸ Although the crisis in 1215 was immediately and in great part a tussle between King and barons, under this surface the first great step was taken towards a new political theory of the state. Executive power could no longer be employed simply in pursuit of the King's own private projects, nor was it only limited by the rights of a narrow baronial class. Henceforth, government not only had to be just, but also had to consider the good of the community.³⁹ Significantly, the terms of the settlement were distributed in sealed charters throughout the realm and sheriffs, foresters, and other bailiffs, were ordered to read them in public.⁴⁰ In a time when most law was orally proclaimed, Magna Carta not only became 'the great precedent for putting legislation into writing',⁴¹ but also an awesome record of the terms on which power was to be exercised; intended, as its terms read, to be observed 'in perpetuity'.⁴²

King John's death in 1216 brought the child King Henry III to the throne. During his minority the Charter was re-issued three times. This was at the behest of the King's advisors and supporters, out of recognition that the continued legitimacy of

³⁵ See Holt, above note 17, pp. 276–277, who points out that this was 'not simply laid down as an airy principle' but was backed-up by chapters 15 (no one shall levy an aid from his free men) and 16 (no one can be forced to perform more service for any tenement than is due therefrom). He concludes: 'When the framers of the Charter set out to protect the interests of under-tenants, they meant business.'

³⁶ Thompson, above note 5, chapter 2.

³⁷ Stubbs, above note 15, pp. 571 and 583.

³⁸ 'Magna Carta has thus been truly said to enunciate and inaugurate "the reign of law" or "the rule of law"' (McKechnie, above note 16, p. 148); '... the permanent regulations which the Charter was intended to establish were, taken as a whole, a remarkable statement of the rights of the governed and of the principle that the king should be ruled by law' (Holt, above note 16, p. 338).

³⁹ See in particular the analyses of Clanchy, above note 19, pp. 97–98, and Warren, above note 20, p. 240.

⁴⁰ M.T. Clanchy, *From Memory to Written Record—England 1066–1307*, Edward Arnold, London, 1979, pp. 211–212.

⁴¹ *ibid.*

⁴² Chapter 1.

government depended on the observance of certain principles of good administration, respect for the liberties of the subject, and adherence to the law. When Henry confirmed the Charter voluntarily and in full majority in 1237 its constitutional importance was secured. By 1300 copies of the Charter were being read and displayed in cathedrals and other public places across the land.⁴³

We can conclude from this examination of the terms and historical context of Magna Carta that in celebrating its role in our shared constitutional heritage we need not fear that we are viewing history through rose-tinted spectacles. Magna Carta is a defining document in the emergence of the rule of law and, however it came to acquire its name, certainly it is Great.

Magna Carta and the Conception of Modern Human Rights Documents

If we shift our gaze from the thirteenth century to modern law, we find the modern-day equivalents of Magna Carta in agreements to respect human rights. Unlike Magna Carta, the abuses which inspired these documents became the concern of the whole world and they were conceived on the international plane. After the Second World War, the international community resolved to spell out in writing the inalienable rights of individuals to ensure the future protection of, as the Preamble to the Universal Declaration of Human Rights puts it, “freedom, justice and peace in the world”. These principles increasingly flesh out the rule of law in modern democracies. However, the ancestral connection between Magna Carta and the modern human rights era, whilst there, must not be over-stated. Magna Carta was framed in a time when tests of legal right might still be by battle or ordeal⁴⁴ and even the most beneficent of childhood folk heroes, Robin Hood, was said to have paraded the mutilated head of Guy of Gisborne on the end of his bow.⁴⁵ This is a far cry from the respect for human dignity and the fundamental worth of human life which underpins modern human rights documents. Also, despite its universality, Magna Carta still rested upon a system of inequality and feudal hierarchy.⁴⁶

However, to reject Magna Carta’s relevance and contribution to the modern human rights era would be to adopt a far too simplistic analysis. We should recall that the United States Constitution was held for many years to licence racial segregation; that, like Magna Carta, the American Declaration of Independence of 1776 consisted largely of a list of alleged wrongs committed by the Crown,⁴⁷ and that it was proclaimed against a background of legalised slavery. The primary importance of Magna Carta is that it is a beacon of the rule of law. It proclaimed the fundamental nature of individual liberties, notwithstanding that many of the liberties it protected would not find direct counterparts in modern democratic states. That said, I shall

⁴³ Clanchy, above note 40, p. 213.

⁴⁴ Although ordeal was dying out, and from 1215 the clergy were forbidden from participating: Baker, above note 31, pp. 5–6.

⁴⁵ J.C. Holt, *Robin Hood*, revised edition, Thames and Hudson, London, 1989, pp. 10–11, 32–33.

⁴⁶ Reflecting what were regarded as the good Christian ethics of the time, chapters 10 and 11 of Magna Carta also explicitly discriminated against Jewish money lenders (one of the primary sources of credit at the time).

⁴⁷ ‘The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world. ...’ [they are then listed]

discuss later its provisions protecting access to justice and illustrate their continued vitality in modern law.

Magna Carta influenced human rights documents in several, connected, ways. The first was through its role in the development of theories of natural rights.⁴⁸ Second, these documents owe a large debt to the various constitutions of the American States and the United States Constitution itself. In their turn these owe much to the legacy of Magna Carta, and in particular the writings of Blackstone and Coke.⁴⁹ American constitutional documents effectively married this constitutional inheritance with the ideology of natural and inalienable rights, best represented by the writings of John Locke and Tom Paine. I do not intend to pursue these avenues;⁵⁰ but I will nevertheless show that the spirit of Magna Carta played an important role in the conception of modern human rights documents and continues to resonate through them.

On January 1st, 1942, the Allied powers included in their War aims the preservation of human rights and justice, in their own lands as well as in those lands in which human rights had been denied. From this point the Second World War can be seen as, in part, a crusade for what Winston Churchill termed, in an address to the World Jewish Congress that year, ‘the enthronement of human rights’.⁵¹ The United Nations Charter, signed after the conclusion of the War, included central commitments to human rights.⁵² In 1948 the United Nations General Assembly adopted the Universal Declaration of Human Rights.⁵³

Surprisingly perhaps, the most prominent voice demanding that the War be fought for human rights was that of the author, H.G. Wells, who had visited Canberra in the

⁴⁸ It must be admitted that this was not always a positive contribution. Tom Paine was less than effusive about Magna Carta in *Rights of Man* where he distinguished it from the French Declaration, arguing that it was not a founding constitutional instrument: B. Kuklick (ed.), *Thomas Paine Political Writings*, Cambridge Texts in the History of Political Thought, Cambridge UP, Cambridge, 1997, p. 191. However, in *Common Sense* he had earlier called for an American Continental Charter of the United Colonies ‘answering to what is called the Magna Charter of England’ (ibid, at pp. 28–29). The Levellers generally admired Magna Carta and it was prominent in their thought and demands. A few, however, particularly William Walwyn, dismissed it. For example, Overton and Walwyn described Magna Carta as ‘a beggarly thing containing many marks of intolerable bondage ...’ (‘A Remonstrance of many thousand citizens ...’, 1646, in A. Sharp (ed.), *The English Levellers*, Cambridge UP, Cambridge, 1998, 33 at pp. 46–47). See generally on Magna Carta and Leveller thought, A. Pallister, *Magna Carta—The Heritage of Liberty*, Clarendon, Oxford, 1971, pp. 13–22.

⁴⁹ A.E.D. Howard, *The Road from Runnymede—Magna Carta and Constitutionalism in America*, Virginia UP, Charlottesville, 1968. For a short account see D.V. Stivison, ‘Magna Carta in American Law’, in *Magna Carta in America*, Gateway Press, Baltimore, 1993.

⁵⁰ An account of the United Kingdom’s contribution to human rights was given by Professor Palley as the 42nd Hamlyn Lecture Series, *The United Kingdom and Human Rights*, Street & Maxwell, London, 1991.

⁵¹ *The Times*, 29 October 1942, 30 October 1942 (cited in H. Lauterpacht, *An International Bill of the Rights of Man*, Columbia UP, New York, 1945, p. 86).

⁵² Preamble and Articles 55 and 56. See Lord Irvine of Lairg, ‘The Development of Human Rights in Britain’, *Public Law*, Summer 1998, pp. 221–224.

⁵³ General Assembly Resolution 217 (III), 10 December 1948.

1930s.⁵⁴ Wells sparked public debate in two letters to *The Times* in 1939. In the second he included a ‘trial statement of the Rights of Man brought up to date’.⁵⁵ He introduced his declaration with the proposition that at various moments of crisis in history, beginning with Magna Carta and going through various bills of rights, it has been our custom to produce a specific declaration of the broad principles on which our public and social life is based (perhaps better, on which our public and social life *should* be based).⁵⁶ The debate was conducted in the pages of the *Daily Herald*, and a drafting committee was established to refine the proposed declaration. It was nominally under the chairmanship of the former Lord Chancellor, Lord Sankey, whose name the declaration eventually bore. Wells produced a mass of material in this cause, and much was translated and published across the world. Some was even dropped by aircraft over the European Continent. His book, *The Rights of Man—Or What are We Fighting For?* is steeped in references to Magna Carta. He admits to having deliberately woven its terms into the provisions of the declaration itself, so that, he wrote, ‘not only the spirit but some of the very words of that precursor live in this, its latest offspring’.⁵⁷

The extent to which the enterprise of Wells and his colleagues influenced Anglo-American policy, or the framers of the United Nations Charter and the Universal Declaration of Human Rights, has not been conclusively established.⁵⁸ President F.D. Roosevelt, who was on good terms with Wells, commented upon his draft declaration in 1939.⁵⁹ In 1940 Wells conducted a lecture tour in the United States. Introducing the Universal Declaration to the General Assembly, the Lebanese delegate mentioned the contribution of six individuals. H.G. Wells was one, a second was Professor Hersch

⁵⁴ For accounts of Wells’ role see D.C. Smith, *H. G. Wells—Desperately Mortal—a Biography*, Yale UP, New Haven, 1986, chapter 17; J.H. Burgers, ‘The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century’, *Human Rights Quarterly*, vol. 14, no. 4, 1992, pp. 447, 464–468. (1992); and A.W.B. Simpson, *Human Rights and the End of Empire—Britain and the Genesis of the European Convention*, OUP, Oxford, 2001, pp. 161–167, 204.

⁵⁵ 23 October 1939.

⁵⁶ In *The Rights of Man—Or what are we fighting for?* Penguin, Harmondsworth, Eng, 1940, Wells wrote: ‘the first ... [necessity] is to do again what it has been the practice of the Parliamentary peoples to do whenever they come to a revolutionary turning-point of their histories, which is to make a declaration of the fundamental principles upon which the new phase is to be organised. This was done to check the encroachments of the Crown in Magna Carta. The Petition of Right made in 1628 repeated this expedient. It was done again in the Declaration of Right and the Bill of Rights which ended the “Leviathan” and the Divine Right of Kings. Magna Carta and the Bill of Rights are an integral part of American law. The American Declaration of Independence was another such statement of a people’s will, and the French Declaration of the Rights of Man derived its inspiration directly from that document.’ (pp. 28–29).

⁵⁷ *ibid*, p. 75.

⁵⁸ Wells’ biographer, D.C. Smith, (op. cit.) argues that Wells and the debate influenced the Atlantic Charter drawn up by Churchill and Roosevelt on 14 August 1941 (which was the sapling that later blossomed into the UN Charter) and Roosevelt’s Four Freedoms. He also states that Wells’ views were introduced by Eleanor Roosevelt to the UN and even that ‘final form’ of the *Rights of Man* was the UDHR itself (*The Correspondence of H. G. Wells*, D.C. Smith (ed.), vol. 1880–1903, xli–xlii.). For criticism of these latter assertions see Simpson, above note 54, p. 166. However, Simpson notes that some of Wells’ views were directly introduced to the San Francisco conference in another form (p. 204).

⁵⁹ Burgers, above note 54, p. 465.

Lauterpacht, to whom we will return, and a third was President Roosevelt.⁶⁰ It is rightly considered to be Roosevelt's famous 'Four Freedoms' address on the State of Union delivered in January 1941⁶¹ that is the most direct ancestor of the United Nations Charter and the Universal Declaration of Human Rights, as well as the International Covenants that followed.⁶² But if the spirit of Magna Carta was alive in the popular imagination in this period, so it was in political rhetoric. President Roosevelt himself appealed to Magna Carta and the heritage of freedom in his addresses to the American nation.⁶³ Similarly, in a broadcast to the United States after the conclusion of the war, Winston Churchill spoke of the 'great principles of freedom and the rights of man which are the joint inheritance of the English-speaking world and which through Magna Carta, the Bill of Rights, the Habeas Corpus, trial by jury, and the English common law find their most famous expression in the American Declaration of Independence'.⁶⁴

Popular oratory of this sort would, of course, have had no direct effect on the jurisprudential developments of the time. Nonetheless, the spirit of Magna Carta was alive and well. It was in the minds of those who made the great political moves of the time and in the ears of those who had to put those moves into practice. After the Lincoln Cathedral copy of Magna Carta was transported to the United States Library of Congress for safekeeping in 1939,⁶⁵ an astonishing fourteen million people queued to see it for themselves.⁶⁶ At a ceremony returning the Charter in 1946 the Minister representing the United Kingdom traced a lineage that he said was 'without equal in

⁶⁰ *Official Records of the Third Session of the General Assembly, Part 1, Plenary Meetings of the General Assembly, 21 September–12 December 1948*, 180th, 857–858 (Mr. Charles Malik).

⁶¹ S.I. Rosenman (ed.), *The Public Papers and Addresses of Franklin D. Roosevelt, 1940 Volume—War and Aid to Democracies*, Macmillan & Co., London, 1941, p. 663. See also his State of the Union Address of 11 January 1944, in S.I. Rosenman (ed.), *The Public Papers and Addresses of Franklin D. Roosevelt, 1944–5 Volume—Victory and the Threshold of Peace*, Harper & Bros. Publishing, New York, 1950, p. 32.

⁶² The direct influence can be seen from the preamble to those documents. The inspiration derived from Roosevelt's speech was repeatedly stressed in the General Assembly, see above note 60. For an excellent brief history see L.B. Sohn, 'Human Rights Movement: From Roosevelt's Four Freedoms to the Interdependence of Peace, Development and Human Rights', Harvard Law School, 1995.

⁶³ See 'The Third Inaugural Address', 20 January 1941, S.I. Rosenman (ed.), *The Public Papers and Addresses of Franklin D. Roosevelt, 1941 Volume—The Call to Battle Stations*, Harper & Bros. Publishing, New York, 1950, 3 at 5; and 'A Radio Address Announcing the Proclamation of an Unlimited National Emergency', 27 May 1941, 181 at 193.

⁶⁴ M. Gilbert, *Winston S. Churchill 1874–1965, volume VIII 1945–1965—Never Despair*, Heinemann, London, 1988, p. 200. Further eloquent testimony to Churchill's veneration for Magna Carta can be found in his *A History of the English-Speaking Peoples, Volume I—The Birth of Britain*, Cassell, London, 2002, chapter VII ('Magna Carta').

⁶⁵ The Charter's evacuation was approved by Neville Chamberlain. It is an interesting aside to note that Churchill would not have allowed its removal and instructed that all national treasures, rather than be displaced from their homeland, be buried or hidden in caves: M. Gilbert, *Winston S. Churchill 1874–1965, volume VI 1939–1941—Finest Hour*, Heinemann, London, 1987, p. 449.

⁶⁶ Sir Thomas Bingham MR (as he then was), discussing the long queue of pilgrims to the US Constitution that accumulates each day outside the National Archives in Washington, considered that '[t]he nearest we come, perhaps, is the Great Charter of 1215, an instrument of which the significance is, interestingly, much more generally appreciated in the United States than here' ('The Courts and the Constitution', *King's College Law Journal*, vol. 7, no. 12 (1996–1997) p. 12.

human history’ and considered that the preamble to the United Nations Charter was the most recent of Magna Carta’s ‘authentic offspring’.⁶⁷

In academic, but not physical, terms a far more weighty contribution than that of H.G. Wells to the development of modern human rights was Professor Lauterpacht’s work, *An International Bill of the Rights of Man*, published in 1945.⁶⁸ Like Wells, Lauterpacht sought to emphasise the continuum between Magna Carta and his own enterprise, and to affirm its continued relevance to the modern world. He extolled the significance of the Charter in initiating the English constitutional practice of safeguarding the rights of subjects by way of general statutory enactment,⁶⁹ and even went as far as to declare that, ‘in the history of fundamental rights no event ranks higher than that charter of the concessions which the nobles wrested from King John.’⁷⁰

The United Nations itself has suggested that the roots of the human rights movement can be traced to John’s Charter of 1215.⁷¹ And Eleanor Roosevelt, who chaired the Human Rights Commission responsible for drawing up the Universal Declaration,⁷² proclaimed that it was a declaration of the basic principles to serve as a common standard for all nations and thus it ‘might well become a Magna Carta of all mankind’.⁷³ If there was much in Stubbs’ comment that Magna Carta was the first great act of a united nation, then there is also much to be said for the Universal Declaration of Human Rights as the first great act of a united world. Dr H.V. Evatt, the Australian President of the General Assembly, saw the Declaration as ‘a step forward in a great evolutionary process ... the first occasion on which the organised community of nations had made a declaration of human rights and fundamental freedoms.’⁷⁴

The Universal Declaration, whilst not as ‘universal’ as we might today wish, triumphed in uniting the common values and traditions of many seemingly disparate nations. The Commission contained representatives from eighteen nations and republics. The Anglo-American legal tradition was a major element in its conception,⁷⁵ although the Chinese, French, Lebanese and Soviet Union

⁶⁷ John Balfour, *New York Times*, 11 January 1946 (cited in Thompson, above note 5, p. v).

⁶⁸ Above note 51. The book was reprinted as part of H. Lauterpacht, *International Law and Human Rights*, Stevens & Sons Ltd., London, 1950.

⁶⁹ Above note 51, p. 55 and generally chapter V.

⁷⁰ Above note 51, p. 56.

⁷¹ *The United Nations and Human Rights*, Office of Public Information, New York, 1978, p. 1.

⁷² For the influence of Eleanor Roosevelt on the UDHR see M.G. Johnson, ‘The Contributions of Eleanor and Franklin Roosevelt to the Development of International Protection for Human Rights’ *Human Rights Quarterly*, vol. 9, 1987, pp. 19, 27–48.

⁷³ Above note 60, p. 862. However, Lauterpacht, criticising the Universal Declaration, rejected parallels with Magna Carta and other later declarations because, at least initially, it was primarily aspirational: see ‘The Universal Declaration of Human Rights’ *British Yearbook of International Law*, vol. 25, 1948, pp. 354, 371–372.

⁷⁴ Above note 60, 183rd, p. 934.

⁷⁵ For an unrivalled account of the English role, and the origins of modern Human Rights documents generally, see Simpson, above note 54.

representatives exerted influence.⁷⁶ Nonetheless, although the precise terms of Magna Carta found no place in the final document, we can see in the guarantee that ‘no one shall be subjected to arbitrary arrest, detention or exile’⁷⁷ clear similarities with Chapter 29 of Magna Carta.

The fact that the spirit of Magna Carta continues to resonate through modern human rights documents is reason enough for sparing it from that dusty cupboard of constitutional relics that have outlived their significance. There is, however, a further dimension to the relationship between Magna Carta and modern protections of human rights. This relates to the translation of international human rights guarantees into domestic law.

Reinvigorating the Rule of Law: Guaranteeing Human Rights in Domestic Law

The Universal Declaration is not directly binding on States, although it has largely become part of customary international law⁷⁸ and can be considered by domestic courts.⁷⁹ However, two years ago this month, the United Kingdom brought into effect the Human Rights Act, 1998, which enables individuals to raise allegations of violations of the European Convention on Human Rights before domestic courts. The present Government’s White Paper preceding the Bill stated an intention to ‘bring rights home’⁸⁰ and records comments made by Sir Edward Gardner MP during an earlier attempt to incorporate the European Convention. He noted that the Convention’s language ‘echoes down the corridors of history. It goes deep into our history and as far back as Magna Carta.’⁸¹ Individual rights and freedoms are believed, rightly, to be held of birthright in our countries. The Government recognised in the UK context that the common law alone could not meet the demands of the modern age, and in particular the demands of our international obligations in Europe. The UK was persistently found wanting by the European Court of Human Rights and our own courts had no powers to make comparable findings. Since it is the joint responsibility of Parliament and the courts to protect the birthright of our citizens it was entirely fitting, and in accord with our constitutional heritage from Magna Carta through to the Petition of Right 1672, the *Habeas Corpus Act 1679* and the Bill of Rights, for Parliament to set out new terms on which power is to be exercised; and so reinvigorate the rule of law in the UK.

Recently, in the Boyer Lectures, Chief Justice Murray Gleeson stated that ‘human rights discourse is entering a new phase’ in Australia and described how the question

⁷⁶ M.G. Johnson and J. Symonides, *The Universal Declaration of Human Rights: a History of its Creation and Implementation, 1948–1998*, UNESCO, 1998.

⁷⁷ UDHR Article 9.

⁷⁸ Johnson and Symonides, above note 76, pp. 67–68

⁷⁹ See e.g. *Hunter v. Canary Wharf Ltd.* [1997] AC 655, 714 (Lord Cooke).

⁸⁰ The White Paper, *Rights Brought Home: the Human Rights Bill*, Cm 3782.

⁸¹ *ibid.*, 1.5 (*Hansard H.C.*, 6 February 1987, col.1224).

whether to enact a bill of rights is ‘a controversial issue in current political debate’.⁸² It is an issue which is obviously for Australians to decide. Since 1991 Australia has extended to individuals the protection of the International Covenant on Civil and Political Rights by allowing those claiming to be the victims of violations of protected rights to submit a communication to the Human Rights Committee. However, Australia has so far kept this protection beyond the jurisdiction of its own courts. We must not, however, underestimate the extent to which the Australian Constitution and the Australian Courts already protect individual rights. Nonetheless, if the number of adverse opinions of the Human Rights Committee increases then Australians may find, as was our experience in the UK, that pressure continues to grow for a new settlement of individual rights.⁸³ Moreover, it occurs to me, as we celebrate today the bond between our two nations, that, but for the generally amicable manner in which Australia became an independent nation, it might, like other successor nations to dependent territories, already have a bill of rights.⁸⁴

The Continuing Relevance of Magna Carta in Australian and United Kingdom Law

The process of Federation meant that Magna Carta was given concrete legal effect in Australian jurisdictions in a complex way. Jurisdictions with Imperial Acts (the Australian Capital Territory, New South Wales, Queensland and Victoria) all chose to enact chapter 29. This was not, primarily, for its potentially salutary legal effects, but rather to recognise Magna Carta’s pivotal role in the constitutional legacy that these jurisdictions had inherited.⁸⁵ By contrast, in the Northern Territory, South Australia, Tasmania and Western Australia, Magna Carta was received by Imperial law reception statutes.⁸⁶ These jurisdictions find themselves in the surprising position of having almost all the provisions of Magna Carta theoretically still in force. I say surprising because, as I mentioned at the start of this lecture, only four chapters still remain on the statute book in the UK, but Magna Carta was largely received in these jurisdictions before this process of repeal began.⁸⁷ The position is also theoretical because the chapters of Magna Carta would have to be suitable to modern conditions there, and many clearly would no longer be.

⁸² *The Rule of Law and the Constitution*, ABC Books, Sydney, 2000. A study published by the University of Wollongong has described this as a ‘Millennium Dilemma’ for Australia: J. Innes, *Millennium Dilemma, Constitutional Change in Australia*, Wollongong University, 1998. The literature on this dilemma is voluminous, but for one comprehensive study which pays particular attention to the British heritage (considering Magna Carta a ‘landmark document’) see the Queensland Electoral and Administrative Review Commission, Issue Paper No. 20, *Review of the Preservation and Enhancement of Individual Rights and Freedoms*, Brisbane, June 1992, especially pp. 43–46.

⁸³ Cf. Joint Committee on Foreign Affairs, Defence and Trade, *A Review of Australia’s Efforts to Promote and Protect Human Rights*, Australian Government Publishing Service, Canberra, December 1992, which concluded that there are gaps in Australia’s protection of human rights.

⁸⁴ For a brief account of the process of separation see G. Sawyer, ‘Government and Law’ in J.D.B. Miller (ed.), *Australians & British—Social and Political Connections*, Methuen, North Ryde NSW, 1987.

⁸⁵ David Clark, ‘The Icon of Liberty: the Status and Role of *Magna Carta* in Australian and New Zealand Law’ *Melbourne University Law Review*, vol. 24, 2000, pp. 866–891; A.C. Castles, ‘Australian Meditations on Magna Carta’, *Australian Law Journal*, vol. 63, 1989, pp. 122, 124.

⁸⁶ Clark, *ibid.*, pp. 870–872.

⁸⁷ For an account of the process of repeal see Pallister, above note 48, chapter 7.

The legacy of Magna Carta has also been inherited by Australia through the common law. Today, it can be seen to resonate most clearly through the fundamental common law doctrine of legality and the right of access to justice. We shall see, however, that the High Court of Australia in *Jago v. District Court*⁸⁸ limited the extent of Magna Carta's contribution to the right of access to justice, at least in Australian law. Nonetheless, Isaacs J, speaking in the High Court of Australia in 1925, was speaking truly when he proclaimed Magna Carta to be 'the groundwork of all our Constitutions'.⁸⁹

I will return to the common law doctrine of legality shortly, but first let me address the right of access to justice. English courts attach considerable importance to the individual's right of access to justice; and now speak of it as a constitutional right.⁹⁰ The wellspring of the modern case law is the case of *Chester v. Bateson*.⁹¹ Regulations enacted during the First World War for the defence of the realm prevented certain landowners from recovering possession of their property from munition workers without the consent of the Minister of Munitions. This provision was held to deprive the subject "of his ordinary right to seek justice in the Courts of law",⁹² and was consequently declared to be invalid. As a matter of 'constitutional law' Avory J was prepared to hold that the regulations were in direct contravention of chapter 29 of Magna Carta.⁹³ Darling J, however, recognised that, had the regulations been made within the authority of the parent statute, Magna Carta would have been of no assistance, since it cannot stand in the face of the doctrine of Parliamentary sovereignty. However, he declared that the blanket sweep of the regulations, coupled with their draconian penalties, was unnecessary and represented an unjustified interference with individual rights.⁹⁴ The case foreshadowed the development of a common law method of constitutional interpretation, now routinely adopted by the English courts,⁹⁵ which demands that public officials justify their actions by reference to the principles of necessity and proportionality when they interfere with individual rights. Darling J's judgment, in particular, also illustrates the way that Magna Carta has effect not only as a statute, but also resonates through the common law principles

⁸⁸ (1989) 168 CLR 23.

⁸⁹ *Ex parte Walsh and Johnson* (1925) 37 CLR 36, 79; he continued: '[Chap. 29] recognizes three basic principles, namely, (1) primarily every free man has an inherent individual right to his life, liberty, property and citizenship; (2) his individual rights must always yield to the necessities of the general welfare at the will of the State; (3) the law of the land is the only mode by which the State can so declare its will.'

⁹⁰ *Raymond v. Honey* [1983] 1 AC 1; *R v. Secretary of State for the Home Department, ex parte Leech (No 2)* [1994] QB 198; *R v. Lord Chancellor, ex parte Witham* [1998] QB 575; *R v. Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115. See my 'Activism and Restraint: Human Rights and the Interpretive Process', *European Human Rights Law Review*, 1999, pp. 350, 369-70.

⁹¹ [1920] 1 KB 829.

⁹² *ibid.*, p. 834 (Darling J).

⁹³ *ibid.*, p. 836.

⁹⁴ *ibid.*, pp. 832-833.

⁹⁵ See *R (Daly) v. Secretary of State for the Home Department* [2001] 2 AC 532; *Ex parte Simms* [2000] 2 AC 115.

of interpretation developed to safeguard the liberties of the individual from the exercise of governmental power.⁹⁶

Lord Scarman, a champion of human rights and an early and strong advocate of a Bill of Rights for the UK,⁹⁷ suggested judicially in 1975 that Magna Carta had been “reinforced” by the European Convention.⁹⁸ Certainly it is now Article 6 of the Convention, which concerns the right to a fair trial, and its developing jurisprudence that will provide most assistance to UK courts in interpreting the right of access to justice. However, it is interesting to reflect on the fact that Article 6 itself makes no mention of any right of access to a court. This right has been read into its terms by the European Court. The Court argued that the ‘principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally ‘recognised’ fundamental principles of law.’⁹⁹ In its turn, this fundamental principle found one of its first and most important expressions in Magna Carta.¹⁰⁰

In Australia there has been some judicial disagreement about whether Magna Carta’s promise not to delay or defer¹⁰¹ right or justice supports a right to a speedy trial, or at least a right not to have one’s trial unreasonably delayed.¹⁰² In *Jago v. District Court* the High Court was faced with a claim for a permanent stay of criminal proceedings that were scheduled to be held over five and a half years after the accused had been charged. Refusing the stay, it held that no such right existed separate from either the

⁹⁶ In *Ex parte Walsh and Johnson* (1925) 37 CLR 36, 79-80 Isaacs J stated: ‘... the Courts have evolved two great working corollaries in harmony with the main principles [of chapter 29], and without which these would soon pass into merely pious aspirations. *The first corollary* is that there is always an initial presumption in favour of liberty, so that whoever claims to imprison or deport another has cast upon him the obligation of justifying his claim by reference to the law. *The second corollary* is that the Courts themselves see that this obligation is strictly and completely fulfilled before they hold that liberty is lawfully restrained. The second is often in actual practice and concrete result the more important of the two to keep steadily in view ... it will be seen that the principles themselves and the corollaries are far more than mere academic interest. They materially help to solve disputed points ...’.

⁹⁷ 26th Hamlyn Lecture Series, *English Law—The New Dimension*, Stevens & Sons, London, 1974; 7th Lord Fletcher Lecture, 1985, ‘Human Rights in the UK—Time for Change’.

⁹⁸ *R v. Secretary of State for the Home Department, ex parte Phansopkar* [1976] QB 606, 626.

⁹⁹ *Golder v. United Kingdom* (1975) 1 EHRR 524, para 35.

¹⁰⁰ Lord Donaldson MR, speaking before important developments in the jurisprudence on Article 6, declared the common law, Magna Carta and Article 6 to be consistent: *R v. Home Secretary, ex parte Wynne* [1992] 1 QB 407, 418. See also *AB v. John Wyeth & Bros. Ltd.* (1992) 12 BMLR 50. For a survey of the developments of the law on Article 6 since *Golder’s case* see *Matthews v Ministry of Defence* [2002] EWCA Civ 773.

¹⁰¹ This is the term adopted in the 1297 version.

¹⁰² Relying on Magna Carta, McHugh JA (as he then was) powerfully argued that the common law recognised such a right: *Herron v. McGregor* (1986) 6 NSWLR 246, 252; *Aboud v. Attorney-General for New South Wales* (1987) 10 NSWLR 671, 691-692; *Jago v. District Court of New South Wales* (1988) 12 NSWLR 558, 583-585; *Brisbane South Regional Health Authority v. Taylor* (1996) 186 CLR 541, 552. In this latter case McHugh J expressed apparently slightly modified views in stating that chapter 29 of Magna Carta was protected by the power ‘to stay proceedings as abuses of process if they are satisfied that, by reason of delay or other matter, the commencement or continuation of the proceedings would involve injustice or unfairness to one of the parties.’ I will not discuss here Magna Carta’s rather indirect contribution to the notion of ‘due process of law’, which has also been considered by Australian courts (see *Alder v. District Court of New South Wales* (1990) 19 NSWLR 317) as well as by the Privy Council (*Thomas v. Baptiste* [2000] 2 AC 1).

court's duty to prevent injustice or from the accused's right to fair trial.¹⁰³ This view was subsequently adopted by the English Court of Appeal.¹⁰⁴ I agree that Magna Carta should not be read to require a stay of proceedings, or the quashing of a conviction, unless there has been an abuse of process or an unfair trial. However, it seems to me inescapable that there is, enshrined in Magna Carta, a right not to have justice delayed.¹⁰⁵ Deane J in *Jago*, differing slightly from the rest of the court, accepted that such a right exists. He pointed out that it was ordinarily vindicated through the ability of the accused to apply to the court for an appropriate order, and that it would only result in a permanent stay or quashing of a conviction in the circumstances envisaged by the whole court.¹⁰⁶ Michael Kirby in *Jago*, as President of the New South Wales Supreme Court, considered that Magna Carta was sufficiently secured in Australian law,¹⁰⁷ but, in comments that have recently been reiterated by the High Court,¹⁰⁸ said that a more relevant source of guidance in interpreting the law was modern statements of human rights.¹⁰⁹ In the UK context the European Convention and the Human Rights Act have, indeed, fortified and reinvigorated the right, enshrined in Magna Carta, not to have justice delayed. Article 6 of the Convention confers a right to a hearing

¹⁰³ (1989) 168 CLR 23; subsequently followed and affirmed in respect of new arguments in *Alder v. District Court of New South Wales* (1990) 19 NSWLR 317. The case led K.C. Gould to remark that 'the Charter's place in the sun, if anywhere, rests largely on the towel of sentimentality' ('Australian Meditations on Magna Carta—A Postscript', *Australian Law Journal*, vol. 64, 1990, p. 376.)

¹⁰⁴ *Attorney-General's Reference (No 1 of 1990)* [1992] 1 QB 630.

¹⁰⁵ For a discussion of the delay or denial of justice in the context of civil proceedings see *Allen v. Sir Alfred McAlpine & Sons Ltd.* [1968] 2 QB 229, 245 (Lord Denning MR).

¹⁰⁶ (1989) 168 CLR 23, 59.

¹⁰⁷ However, he did not recognise a separate right to a speedy trial. Nonetheless, by contrast, none of the other justices in either the High Court or the New South Wales Supreme Court (other than McHugh JA, on whose views see above note 102) acknowledged that Magna Carta made any normative contribution to modern law. Brennan J considered that Coke's views on access to justice were merely aspirational (*ibid.*, p. 42), and agreed with Toohey J. Toohey J, *ibid.*, pp. 66–67, himself following Samuels JA in the court below ((1988) 12 NSWLR 558, 473–575), criticised Coke's interpretation of the Charter and argued that chapter 29 was primarily intended to correct the worst abuses of royal justice while at the same time securing its pre-eminence. However, these provisions of Magna Carta can be regarded as reflecting an emerging view that justice was a community right and not simply a baronial privilege. It should also be recalled that by virtue of Chapter 60 of Magna Carta lords at each rung of the feudal ladder were expected to abide by the good principles of the Charter. Cf. Holt, above note 17, pp. 279, 285–286, 327.

¹⁰⁸ *Azzopardi v. The Queen* (2001) 205 CLR 50, 65 (Gaudron, Gummow, Kirby and Hayne JJ). Cf. M. Kirby, 'The Australian Use of International Human rights Norms: From Bangalore to Balliol—A View from the Antipodes', *University of New South Wales Law Journal*, vol. 16, no. 2, 1993, p. 363. For a discussion of the protection of human rights in Australian domestic law: J. Doyle and B. Wells, 'How Far Can The Common Law Go Towards Protecting Human Rights?' in P. Alston, *Promoting Human Rights Through Bills of Rights: Comparative Perspectives*, Oxford UP, Oxford, 1999.

¹⁰⁹ (1988) 12 NSWLR 558, 569.

‘within a reasonable time’.¹¹⁰ The Court of Appeal has recently held that a stay of proceedings or the quashing of a conviction will, as before, only be appropriate where there is an abuse of process or an unfair trial. However, in the event of an unreasonable delay the court can now mark a contravention of Article 6 and this can be taken into account when sentencing. Also, where appropriate, for example where there is a subsequent acquittal, UK courts can now make an enforceable award of damages to remedy such a violation.¹¹¹ This seems to me to be an example of a specific instance of the continuum between Magna Carta and the modern protection of human rights.

Finally, I promised that I would return to the doctrine of legality. The doctrine of legality mandates that government action cannot proceed arbitrarily and without lawful authority. It represents the kernel of the rule of law. A recent case has vividly illustrated how Magna Carta continues to underpin this doctrine in important respects.

Bancoult was an Illois, an indigenous inhabitant of the Chagos archipelago in the middle of the Indian Ocean. The Islands were divided from the British colony of Mauritius in 1965, creating the British Indian Ocean Territory. Today these Islands house a United States defence facility; but its establishment was at the expense of the Islands’ indigenous population, thought to have numbered around four hundred people. This population was, in all relevant respects, exiled by an Immigration Ordinance in 1971. Aware that if the inhabitants of the Chagos Islands were recognised as indigenous their actions would be in violation of the UN Charter, successive British governments maintained that the inhabitants were only contract workers. Belatedly, almost thirty years later, the Divisional Court ruled that the actions of the British government in 1971 had been unlawful.¹¹²

Relying on Magna Carta, it was argued that Bancoult had a statutory right not to be exiled unless it was by the law of the land. However, Laws LJ held that direct reliance on Magna Carta could not assist Bancoult’s case for two reasons. First, to find that the terms of Magna Carta had been breached the court would have to be satisfied that the Ordinance had been made without lawful authority. If there was no such authority the government’s actions would be *ultra vires* in any event, although admittedly they would violate Magna Carta into the bargain.¹¹³ Second, and more fundamentally,

¹¹⁰ Kirby P in the Supreme Court of New South Wales in *Jago* ((1988) 12 NSWLR 558, 570) addressed Article 14.3 ICCPR, which states: ‘In the determination of any criminal charge against him, every one shall be entitled to the following minimum guarantees (c) to be tried without undue delay.’ He concluded that this did not protect an independent right to a speedy trial and, like chapter 29 of Magna Carta, the provision was ‘sufficiently secured’ by the principles relating to unfair trials and abuse of process. Samuels JA adopted a wider interpretation of the ICCPR, suggesting it did protect an independent right to a speedy trial, but took a narrower view about the value of international legal instruments regarding ‘the normative traditions of the common law as a surer foundation for development’ (pp. 580 and 582).

¹¹¹ *Attorney-General’s Reference (No 2 of 2001)* [2001] 1 WLR 1869; *R v. Massey* [2001] EWCA Crim 2850. Damages may be awardable by virtue of section 8 HRA, which confers a broad remedial discretion on courts when a violation of the Convention has been found.

¹¹² [2001] QB 1067.

¹¹³ Magna Carta often emerges behind the doctrine of legality in this manner: e.g. *Holden v. Chief Constable of Lancashire* [1987] 1 QB 380; *Re B (Child Abduction: Wardship: Power to Detain)* [1994] Fam 607; *In re S-C (Mental Patient: Habeas Corpus)* [1996] QB 599; *R v. Commissioners of Customs and Excise, ex parte a Company*, 15 October 1996.

Magna Carta, as a statute, was held not to apply to the British Indian Ocean Territory (BIOT) because it was a ceded colony to which the benefit of UK statutes had to be expressly extended.¹¹⁴ But this was not the end of the matter. Laws LJ stated that the ‘enduring significance’ of Magna Carta was that it was a ‘proclamation of the rule of law’ and in this guise it followed the English flag even to the Chagos archipelago.¹¹⁵ Although Magna Carta did not provide the answer to this case, what did was that the ‘wholesale removal of a people from the land where they belong’ could not reasonably be said to conduce to the territory’s peace, order and good government. The Ordinance of 1971, therefore, violated the fundamental doctrine of legality and flouted the rule of law.¹¹⁶

The Continuing Relevance of Magna Carta in Modern Law

Let me sum up this discussion briefly. The constitutions of the UK and Australia are distinct, but they share the same roots and Magna Carta and its legacy represent the sturdiest and the oldest. The fact that the provisions of Magna Carta rarely break the surface or provide explicit contributions to the outcome of modern cases should not obscure its contemporary importance.¹¹⁷ I hope I have shown that in celebrating the legacy of Magna Carta in the UK and Australia we are not clinging to a constitutional relic, vastly overestimated by generations and without modern significance. The opposite is in fact true. Magna Carta can be truly appreciated as the foundation stone of the rule of law. Its terms continue to underpin key constitutional doctrines; its flame continues to burn in the torches of modern human rights instruments; and its spirit continues to resonate throughout the law.

¹¹⁴ For a discussion of Magna Carta’s extension to the Commonwealth see Sir I. Jennings ‘Magna Carta and Constitutionalism in the Commonwealth’ in S.E. Thorne, W.H. Dunham Jr, P.B. Kurland and I. Jennings, *The Great Charter—Four Essays on Magna Carta and the History of Our Liberty*, Pantheon, New York, 1965.

¹¹⁵ [2001] QB 1067, para 36. This phrase was coined by the Canadian Supreme Court, which stated in *Calder v. Attorney-General of British Columbia* (1973) 34 DLR (3d.) 145, 203 that ‘Magna Carta has always been considered to be the law throughout the Empire. It was a law which followed the flag as England assumed jurisdiction over newly-discovered or acquired lands or territories.’

¹¹⁶ *ibid*, para 57 and para 71 (Gibbs J). Despite the fact that the actions of the British Government infringed fundamental rights, Laws LJ felt that comments made in the Privy Council case *Liyana v. The Queen* [1967] 1 AC 259 precluded him from adopting a more rigorous constitutional standard of scrutiny of the legality of the ordinance (although he was not strictly bound by the decision). He made no mention of whether he would have felt so compelled if Magna Carta had extended to the BIOT. Gibbs LJ, however, felt that if Magna Carta had applied to the BIOT ‘I might have found assistance in the provisions of Chapter 29 in interpreting the legality of the Ordinance, at least in the resolution of any doubts on the point’ (para 68). Laws LJ has since suggested that Magna Carta might be one of a small number of fundamental statutes that the common law insulates from all but expressly stated repeal: *Thorburn v. Sunderland City Council* [2002] 3 WLR 247, para 62. However, the High Court of Australia has stated that Magna Carta does not ‘legally bind the legislatures of this country or, for that matter, the United Kingdom. Nor ... [does it] limit the powers of the legislatures of Australia or the United Kingdom’ (*Essenberg v. The Queen*, 22 June 2000) and it is treated like any other statute.

¹¹⁷ Concluding a comprehensive study of the continuing role of Magna Carta in Australian and New Zealand law, Dr David Clark states, ‘...the myth of *Magna Carta* has proved legally, and above all, constitutionally, useful to subsequent generations. While, as we have seen, it is of little practical use in actual cases, it remains an animating idea and one important basis upon which judges continue to found the legitimacy of the rule of law and constitutionalism generally (above note 85, p. 891).

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- 2 Anne Lynch, *Legislation by Proclamation—Parliamentary Nightmare, Bureaucratic Dream*

John Vander Wyk, *The Discharge of Senators from Attendance on the Senate upon a Dissolution of the House of Representatives*, July 1988
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- The Rt Hon. Sir Zelman Cowen, “‘Is it not time?’ The National Australasian Convention of 1891—a milestone on the road to federation’
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